

**IN THE HIGH COURT OF TANZANIA
DAR ES SALAAM DISTRICT REGISTRY
AT DAR ES SALAAM
CIVIL APPEAL No. 67 OF 2016**

(Appeal From Judgment of the District Court of Temeke delivered by Hon.
Mfanga, RM dated the 20th of May 2016 in Civil case No. 27 of 2015)

SALUM MNEMBUKA.....1st APPELLANT
FARIDA XAVERY.....2nd APELLANT

Versus

FLAMINGO AUCTION MART.....1st RESPONDENT
HEKE WINGA KIDIKU.....2nd RESPONDENT

JUDGMENT

26//07 / - 30/09/2019

J. A. DE-MELLO, J;

This is a first Appeal emanating from **Temeke District Court** whereby the Appellants/Plaintiffs unsuccessfully sued these same Respondents/Defendants, successfully for compensation as a result of unlawful demolition of their matrimonial home to the tune of **TShs. 41,600,000/=** against the **1st Respondent**, and **TShs. 16,105,000/=** for confiscation of furniture, household items and personal belongings against the **2nd Defendant**. **TShs. 100,000,000/=** was claimed as **General Damage**. It is on Court's record that, the two Plaintiffs once husband and wife ended up in divorce following annulment of the marriage by the same **Temeke District Court** in **Matrimonial Case No. 69 of 2008**. As part of division of Assets, the Matrimonial Home was Auctioned

69 of 2008. As part of division of Assets, the Matrimonial Home was Auctioned and sold to one **Heke Winga Kidiku**. The **1st Appellant** seemed dissatisfied with the proceeds of **TShs. 8,850,000/=** that was procured in which **Sambo Auction Mart** was the auctioneer. Reluctant to vacate with a view of handing over the suit premise, **Flamingo Auction Mart** was engaged and, in due course household items were vandalized. The Court in its wisdom found no merit in the suit and dismissed it based on the three framed issues as follows;

- 1. Whether there is lawful order auctioning the Plaintiffs matrimonial house?**
- 2. Whether the 2nd Defendant bought the disputed house due to lawful order of the Court?**
- 3. Any other Relief(s) which the Court thinks fit to grant.**

Dissatisfied, they jointly join forces to lodge this Appeal with the three following grounds;

- 1. That, the learned Magistrate erred in law and fact in failing to evaluate properly the evidence of the Appellants.**

2. That, the learned Magistrate erred in law and fact by including and allowing the FLAMINGO AUCTION MART to attend in the case instead of SAMBO AUCTION MART.

3. That, the learned Magistrate erred in law and fact by allow FLAMINGO to conduct the Auctioneer instead of SAMBO AUCTION MART.

Written submissions were ordered and, on record both sides are in compliance except the **1st Respondent** who even after service by publication, proved futile. Un-represented are the Plaintiff's whereas the **2nd Respondent** is enjoying the services of **Frank Kilian from Kariwa & Company Advocates**. It is the Plaintiffs submissions in addressing the first ground of Appeal that, would the Trial Magistrate consider the order in **Misc. Application No. 23 of 2013** restraining the Respondent to evict, notwithstanding the declaration that, the sale was irregular, he would have not decided in favour of the Respondents. Further that, the Matrimonial Case itself had attracted the attention of the **High Court in Civil Appeal No. 97 of 2011** upheld the Trial Court decision but ordered for valuation to ascertain the value of the suit premise. In so doing, the value fetched **TShs. 72,900,000/=** ~~as~~ opposed to **TShs. 20,000,000/=** which it

fetches upon execution. Even the second issue on lawfulness of the purchase by the second defendant was a nullity considering the order in **Misc. Application No. 23 of 2013** which had not been challenged any way. Their prayers are for allowing the Appeal, thereby quashing and setting aside the Trial Court decision.

On their part, while observing missing signatures of the two Appellants which Counsel is of a view to have contravened **section 44(1) & 44(2)** of the **Advocates Act Cap. 341**, restricting Courts to accept or recognize instruments not signed by one who prepares them. Evidently so, the remedy is to expunge the submission from record. In addressing the **1st ground of Appeal**, Counsel submits that so long as the **Sambo Auction Mart** was not part of the proceedings and decision from the Trial Court to be condemned as they did. Unless heard, **section 13(6)** of the **Constitution** of the **URT 1977** for '**Haki ya Kusikilizwa**'. The judgment, was based on evidence that, parties had adduced, exhibits tendered which ultimately appointed **Flamingo Auction Mart** for execution and that of **SALE** alone. The 1st accused and as rightly observed appealed to High Court and with only one ground challenging equal division of the house in **Mtoni Kijichi** which he claimed to be personally

board, let me highlight the path on which these two spouses went through in quest for justice;

- 1. Matrimonial Case No. 69 of 2008 Farida Exavery Mwalaka vs. Salum Rashid Mnembuka – For Divorce, Division & Custody.**
- 2. Civil Appeal No. 97 of 2011 Salum Mnembuka vs. Farida Exavery Mwalaka – Upholding the District Court findings in Matrimonial Case No. 69 of 2008 but ordered for valuation.**
- 3. Misc. Application 23 of 2013 Salum Mnembuka vs. Farida Exavery & Nsombo Auction Mart - Challenging Auction & Sale. Court set aside the Sale. Restraining order was similarly granted. This was on 29/04/2014**
- 4. Civil Case No. 27 of 2015 Salum Mnembuka & Farida Exavery vs. Flamingo Auction Mart & Heke Winga Kidiku – Claim against the Defendants**

However as this was the pattern and trend I find a missing link from the High Court Appeal which upheld the Trial Court in **Matrimonial Case 69 of 2008** serve for valuation. Injunction was granted **28th August 2013** with a Ruling setting aside the Auction. The time the **2nd Appellant** went on to apply for execution on the ...record has it that she even lodged an


eviction order against the **1st Respondent** on the **30/09/2013**. On the **17/10/2013** eviction was reportedly effected by one **Deogratius Luziga** a **Broker from Flamingo Auctioneers**. I see **Sambo Auctioneers** to be in charge of the Auction attaching the Proclamation of Sale Dated the **5th of June 2013, Certificate of Sale** issued to **Heke Winga Kidiku** on the **3/07/2013** for payment of full purchase price of **TShs. 20,000,000/=, Tangazo la Mnada", Malipo ya Mgawano wa Pesa kutokana na shauri Na. 69/2008 to the 1st Appellant Farida, on the 23/07/2013 and Kukabidhi Pesa Mahakamani ya Mdaiwa Salum Rashidi Mnembuka on the 30/10/2013. It is even on record the Valuation Report of the Unsurveyed Parcel of Land No. TMK/MBGK/KJC18/22, MTONI KIJICHI AREA, MBAGALA KUU WARD TEMEKE MUNICIPALITY, DAR ES SALAAM CITY FOR MATRIMONIAL PURPOSES;** inspected on **21/01/2013** and Report dated the **23/01/2013**. You will observe that, the valuation and in place since **January 2013** had not subject of any proceedings since when ordered and conducted by both the High Court as well as **Government Valuer**. The logical translation of all that transpired for Auction, Sale and Eviction in absence of Valuation raises eye brows. From **TShs.**

72,900,000/= to **TShs. 20,000,000/=** is unrealistic and unfair. The reason why the two Appellants are now in Court for this yet another Appeal. It seems from the High Court the **1st Appellant** never took any further legal recourse to register valuation as ordered until **2015** when the two lodged the **Civil Suit No. 27 of 2015** almost two years after all had been accomplished. I read from both proceedings and judgment the capturing of the High Court decision and specifically valuation which the **1st Appellant** registered at the Trial Court but nothing to avail. **Un paged 4 para 2, 3 & 5** has the testimonies of the two Appellants on sale below the value of the house. Based on the **three 3 issues that were framed** and rightly so, with nothing as to lower price against the valuation, it is so too on the three grounds of Appeal. The evaluation of evidence was based on the issues framed and not otherwise. Parties to suit from Trial in the Matrimonial Cause were the two Appellants, **Farida vs. Salum, The Appellants against the Flamingo and Heke Wingu Kidiku** alone. **Sambo Auctioneers** has not featured until execution and how they took over from Flamingo also raises eyebrows. I even saw one **Nsombo Auctioneers!** Possibly and, out of their limited knowledge of law then, the Appellants sat on their rights.

The Appeal appears misplaced rather misconceived and is dismissed.

I waive costs considering the long path the Appellants have traversed and, lay litigants presumably.

It is so ordered.


J. A. DE-MELLO
JUDGE
30/09/2019