

IN THE HIGH COURT OF THE UNITED REPUBLIC OF TANZANIA

[IN THE DISTRICT REGISTRY OF ARUSHA]

AT ARUSHA

LAND CASE NO. 17 OF 2016

PENDAEL JOEL MOLLEL PLAINTIFF

VERSUS

GOODLUCK YONA AKYOO 1ST RESPONDENT

JOSEPHAT MRISHO AKYOO2ND DEFENDANT

MEM. AUCTIONERS AND COURT BROCKERS LTD –3RD DEFENDANT

JUDGMENT

MWENEMPAZI, J.

The Plaintiff is claiming against the defendant a piece of Land comprised in a certificate of Title No. 378930 owned and registered in the name of the plaintiff. According to the plaint the said piece of Land was acquired by the plaintiff through a public auction conducted in execution of the judgment of the Primary Court in Civil Case No. 79 of 2009 between the 2nd Deffendant and one Katibu Lenga Losingo who is a decree holder in the referred proceedings. The above referred certificate of Title was processed by the Plaintiff in his name and in the process he requested the assistance of Nguruma Village to confirm the boundaries. That was followed by construction of the concrete brick wall enclosing the whole Land. on 23rd

March, 2016 the plaintiff was informed that the land has been invaded and the entrance gate was broken.

The plaintiff upon inquiry was told that the invasion to the dispute land was due to execution of an order of the District Land and Housing Tribunal in an Application for Execution No. 31 Of 2015. His position is that he is a lawful owner of the disputed land since 2010. He prays for this Honourable court:

- (a) An order that the Judgement and orders of the District Land and Housing Tribunal are ineffective so far as the plaintiff herein was not a party.
- (b) Declaration that Orders of the Tribunal are null and void.
- (c) Permanent injunction, restraining the Defendants, his agents, workmen, or any one claiming under them from trespassing to the said land.
- (d) Declaration that the Plaintiff is the lawful owner of the disputed land.
- (e) Damages for the invasion and destruction caused by the defendants.
- (f) Costs of the suit
- (g) Any relief this Honourable court deems fit and equitable to grant.

The 1st defendant disputed the claims by the plaintiff and it is her case that the title deed attached by virtue of paragraph 5 of the plaint was obtained on 1st July, 2012 when the first defendant had already instituted Land case No. 141 of 2010 at Arusha District Land and Housing Tribunal in which the 2nd defendant and Katibu Lenge Losingo were parties. And at the

time, there was a temporary injunction order. In the Judgment of Maji ya Chai Primary court, Civil Case No. 79 of 2009 between 2nd Defendant and Katibu Lenga Losingo. There was no. order for sale of the dispute Land.

At the hearing the plaintiff was being represented by Lobulu T. Osujaki, Advocate and the defendants were being represented by Fr. Priscus Massawe, Learned Advocate.

The issues which were framed and agreed at first were, two, namely;

1. Whether the sale of the suit Land to the plaintiff by the 3rd defendant as an agent of the Court was Legal.
2. To what reliefs are the parties entitled to.

However, upon hearing, the counsel for the plaintiff, after discussion with the Counsel for the defendants, prayed for an order to file amended issues under order XIV Rule of 5 (1) and (2) of the Civil Procedure Code, Cap. 33 RE 2002. Leave was granted and the following issues were filed as amended proposed issues for consideration by the Court. The same are;

1. Whether the conduct of auction sale of Land by Akheni Ward Execution officer was lawful and Justified.
2. Whether proceedings and Judgment at Arusha District Land and Housing Tribunal, In Land Application No. 141 of 2010 and its execution No. 31 of 2015 were lawful in absence of the purchaser of the disputed Land.
3. Whether 1st Defendant has any interest over the disputed Land Capable of being protected on basis of lawful spouse wife.

The plaintiff in his case allege that he legally purchased the dispute land at the public auction which was conducted on the 6/10/2010 after there

was compliance to the Legal requirement necessary to execute an order of the court and also to conduct the auction. In the evidence tendered the plaintiff has as his case that at the said public auction he emerged a highest bidder and paid the purchase price at two installments. One, was paid by cash to the Ward Executive Officer, John Lawrence Laizer (PW2), Tanzania shillings three million only (Tshs. 3,000,000/=); and two, by depositing Tanzania shillings seven Million only (Tshs. 7,000,000/=) in the Account No. 01J2099339500, CRDB Bank held by Josephat Mrisho Akyoo 2nd defendant in this suit, that followed by filling in Exhibit. P2 (Makabidhiano ya fedha). The same is signed by the plaintiff, Pendaël Joel Molled and the Ward Executive Officer.

According to the evidence adduced by the said John Lawrence Laizer, PW2. The auction was a result of an order from the Maji ya Chai Primary Court in Madai 79/2009 between Katibu Lenga Losingo and Josephat Mrisho Akyoo. It is said that the defendant Josephat Mrisho Akyoo had a debt owing to the plaintiff, Katibu Lenga Losingo to the tune of Tanzania shillings nine hundred Thousand only (Tshs. 900,000/=) which he had failed to pay. The said order was received in Court as Exhibit P5. It is dated 26/5/2010. The witness tendered also form for execution J/RCF. 49 of an order by selling the Judgment debtor's property described as:

"Kiwanja kilicho Manyire Kijiji cha Nguruma chenye ukubwa wa pagala lenye matofari ya kuchoma – Mipaka. Kusini – Majengo ya mahakama ya Haki za Binadamu Africa – Kaskazini – John Japhet na Robert – Mashariki – Dominic C. Shirima (BONDO)."

The said J/PCF. 49 was admitted as Exhibit P4.

The Ward Executive Officer testified that after receiving the order of the court and directives to conduct an auction, he notified the 2nd Defendant who is the owner. In turn, the 2nd Defendant promised to settle the debt within 14 days. However, he did not honor the promise. The Ward Executive Officer prepared an advert on 20/9/2010 which was posted on public boards including at the village Executive Chairman's office. That is where, on 23/9/2010, the plaintiff according to his testimony, he came know of the intended auction. On the date of auction, the auction was conducted at around 11:00 am. The plaintiff emerged the highest bidder.

As to whether the conduct of auction sale of land by Akheri Ward Executive Officer was lawful and justified, we need to have the other side of the story before embarking on answering the question. The relevant person to tell the story is the 1st Defendant Goodluck Yona Akyoo and the 2nd Defendant, Josephat Mrisho Akyoo. The 1st defendant testified as DW1. In her testimony she stated that immediately she knew about the order to sell her property owned together with her husband she started working to stop the auction. She was able to secure a Restraint Order from the District Land and Housing Tribunal of Arusha at Arusha. She collected the said order at the District Land and Housing Tribunal of Arusha on the 6/10/2010 in the morning and went straight to the Ward Executive Officer to serve the same. The Ward Executive Officer was supervising the public auction.

The order was issued in the **application No. 141 of 2010. And the parties were Goodluck Yona Akyoo versus Josephat Mrisho Akyoo**

(1st Respondent), Katibu Lenge Losingo (2nd Respondet) and Akeri Ward Executive Officer (3rd Respondent). It is dated the 6th October, 2010.

In her testimony, DW1 procured the order at 8:00 am and worked hard to serve the Akheri Ward Executive Officer sometime before 10:00 am. On the 6/10/2010. This is also confirmed by DW2, Josephat Mrisho Akyoo who testified that he was taken by the police to attend the auction which was conducted between 10:00 am and 11:00 Am on the said date.

Gawanyiko Kimishua (DW3) testified that he was a police officer before retiring. On the date he was coming from his work station. He was on night duty the previous night. He passed through the Ward Executive Officer. There he found DW1 Crying. Upon asking her, she said she has a restraint order from the District Land and Housing Tribunal which she wanted to serve the Ward Executive. He has refused to receive the same. He intervened and advised the Ward Executive Officer that it was genuine order he should receive and work on it. A reply from the Ward Executive Officer was that the work (public auction) has already been done, they are just concluding, by filling up various papers. During cross examination DW3 testified that:

"It is true that I was a police officer, Staff Sergeant. I was in uniform and the woman was crying. I thought may be W.E.O has not understood her. That is why I took her into the office of the W.E.O. My duty as a police officer is to protect Citizens and their properties. In civil cases what I did was enough"

Under the circumstances narrated whether, it was proper for the auction to proceed despite the restraint order; and in wholesome whether the first issue can be resolved in affirmative.

The counsel for the plaintiff has submitted that it is in the process of execution of the order of the court, Maji ya Chai Primary Court in Civil Case No. 79 of 2009. The judgement debtor had failed to comply with the order and therefore it was necessary to sell his property which was sold in a public auction; the plaintiff emerged the highest bidder and fulfilled all conditions of Public auction. The disputed property came into ownership of the plaintiff herein.

In the whole process the 2nd defendant appeared as the owner of the now disputed land and the 1st defendant has never shown up and was stranger to the local authorities.

According to the Ward Executive Officer PW2, he was directed by the officer of the District Commissioner's office to attach the property of the Judgment debtor and give back the report to Court; and he acted upon such directives. He also waited for an order for sale of property which he also acted upon after expiration of notice of period initially issued.

The warrant of attachment and notice for sale of the property would have prompted the 1st and 2nd defendants to act, if any of them wished to stop the Public auction. Rule 69 of the ***Magistrate and Court (Civil Procedure in Primary Court) Rules*** gives an opportunity for the Judgment debtor to apply to court for the court so rescind warrant of attachment on ground that the property does not belong to him. Under rule

70 (1) of the same rules a third party is given a room to object an attachment of a property she claims to have interests. With these avenues provided by law, nobody objected to an attachment of property and sale of the same before the primary court.

The Counsel opines that under the circumstances the attachment and the order for sale of the property were lawful and justified. Therefore, the plaintiff herein acquired a good title upon purchase of the disputed land.

I find it difficult to agree with the opinion of the counsel for the plaintiff. **One**, the 1st defendant did not seat idle to await the result of an auction; in her testimony she testified that once she had knowledge that there is an auction advertised to sale their property, she filed application No. 141 of 2010 in Arusha District Land and Housing Tribunal and on 6/10/2010 she procured an order for injunction. **Two**, that order was served to the W.E.O before 10:00 Am, this is according to the testimony of DW1 and DW3. Further to that the said DW3 when he passed by his office and found DW1 crying because the W.E.O had refused to receive the Restraint order, tried to rectify the situation by explaining to the W.E.O. and advised him that it was a genuine order which he is obliged to work on it.

In my opinion, in Consideration to the testimony of DW1, DW2 and DW3 the auction was conducted in defiance of lawful order of the District Land and Housing Tribunal. I understand that the two, Maji ya Chai Primary Court and the District Land and Housing Tribunal are two different courts on the different line of working. Both of them are statutory creatures which has

to be respected. In the case of **Tanzania Bundu Safaris Ltd vs. Director of Wildlife & Another [1996] T.L.R. 246 (HC)**

"Disregard of orders of court is certainly a matter of gravity, whatever the order may be and irrespective of whether it has been irregularly or erroneously made. The punitive jurisdiction of the court to punish for breach is based upon the fundamental principle that it is for the good of the public and the parties that such orders should not be despised or slighted. And I think it is neither incongruous nor extravagant to add that a party, however highly placed or well-circumstanced he may happen to be, ought to know that he is obliged to obey the orders given by courts, and indeed, that is perfectly consistent with the much talked about rule of law concept."

In ***Scott v. Scott (2), [1913] A.C. 417***, Lord Atkinson at p. 462 quoted as a correct statement of the law the following passage:

" An order of the court in a civil action or suit creates an obligation upon the parties to whom it applies, the breach of which can be and in general will be punished by the court, and in proper cases such punishment may include imprisonment."

Once we have that position, the whole auction in my view was marred with irregularity in that, though there was an order of the Primary Court and directives to conduct the same, there was no need to proceed with an auction. In fact, it would seem at the time alleged the auction conducted, only formalities were taken given the statements said by PW2 to the 1st

Defendant when she was serving the summons, the said DW1 testified as follows, I quote: -

"I took that stop order to the Ward Executive Officer at around 10:00Am. The Ward Executive Officer said that whether the order has been issued or not the auction is scheduled to be conducted at 11:00AM. The W.E.O said the auction was for the purpose of filling in forms but there is no auction. He has already concluded the business. The auction was conducted. I heard it was conducted. I did not attend because the W.E.O threatened to beat me. After the auction I continued with my case."

Also, the statement of the W.E.O to DW3 when he tried to help clarify about the restraint order from the District Land and Housing Tribunal. The same have not been controverted save for the clarification of the counsel in the final submission. The counsel has submitted in his final submission that:

"If the temporary order of injunction was issued to the 1st Defendant earlier before the auction took place and the 1st Defendant bothered to make it known to the public or at least those who attended the auction, no bidder would have dared to buy the property. Knowledge of the order would have scared away any prospective bidder. The only plausible explanation about this is that though the order of injunction was issued on the same day, and it was issued at the time when the auction had already been conducted. The 1st defendant's explanation on denial of the Ward Executive Officer to act on the order and threats against her are outright lies unsupported by concrete evidence. Even

the Ward Executive Officer rejected to work on order, she had all other means to make it known but most probably the order was not there timely."

In the case of **Sultan bin Ali Hilal F/Esri Vs. Mohamed Hilal and two others**, Misc. Commercial Case No. 64 of 2014, High Court of Tanzania (Commercial Division) at Dar Es Salaam, Hon. **Mwambegele J.** (as he then was) observed that.

"Counsel's submission is not evidence and equally does not form party of the litigant's pleadings. Accordingly, the same cannot be relied on to establish a matter of fact. At most, they are an exposition of an advocate's stance regarding a matter of fact or law in respect of the case which is always backed up by authorities such as case laws, legal texts etc."

Having explained the position of the law vis a vis the facts in this case, I find that the first issue as to whether the conduct of auction sale land by Akheri Ward Executive Officer was lawful and justified is answered in the negative. The auction was conducted in defiance to the lawful injunction order of the District Land and Housing Tribunal for Arusha at Arusha.

The second issue for consideration is whether proceedings and Judgement in Arusha District Land and Housing Tribunal, Land Application No. 141 of 2010 and its execution No. 31 of 2015 were lawful in absence of the Purchaser of the disputed land. The application in the District Land and Housing Tribunal has just been explained by way of touching. After

explanation in regard the fact that the plaintiff was not a party to the proceedings in the District Land and Housing Tribunal, and citing the case of

JUMA B. KADALA v LAURENT MNKANDE [1983] T.L.R 103 (HC)

where it was held that:

“in a suit for the recovery of land sold to a third party, the buyer should be joined with the seller as a necessary party defendant; non-joinder will be fatal to the proceedings;”

The counsel for the plaintiff has prayed that this court nullifies the proceedings of the Tribunal which condemned the plaintiff herein unheard. In as much as I agree to the position of the law, this being a suit justifying the purchase in the public auction and not an appeal or challenge of the application sought to be, the prayer is not entertainable. In the testimony of DW1 she testified that she did not sue the plaintiff because, she filed the case in the District Land and Housing Tribunal, I believe Application No. 141 of 2010, before the Public Auction was conducted with the eventual alleged sale of the dispute land to the plaintiff.

In the testimony of DW1, she told this court that during the pendency of the application No. 141 of 2010 in the District Land and Housing Tribunal she was taken to police. There, she was told and or advised to let go the dispute land so that she lives. It will be worthy if I quote the words, which I proceed as follows: -

"The plaintiff knew about the case in the District Land and Housing Tribunal; when I was being taken to police, police officers were telling me to let go a plot and the house so that I

may live. Police officers were telling me it is Joel Mollel. I never saw him. I knew his name there. I was being arrested at least once every week. Until I went to RPC. I was told by women police. The RPC told them they should not arrest me unless there are reasons for that. He told me I shouldn't be intimidated by the police. They don't dispense justice. I should go to court. there were people who were touched. They were escorting me."

All the testimony above was not anyhow challenged during cross examination. In my view, there were a lot of opportunities to make good whatever went wrong from the time a public auction had taken place. It was not done, but the 1st defendant was taken to police almost every week until the RPC intervened. Since the plaintiff felt to have already acquired interest, it was his duty to spend that precious time wisely by consulting a lawyer, if he did not know what to do as he did when he filed this case. For the reasons and under the circumstances, the proceedings in the District Land and Housing tribunal were lawful proceedings and so is the decision out of the said proceedings.

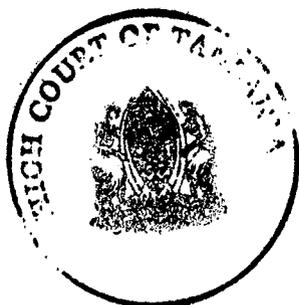
As to the third issue as to whether the 1st Defendant has any interest over the disputed land capable of being protected on the basis of lawful spouse/ wife; I think she has. A judgment of the District Land and Housing Tribunal in Application No. 141 of 2010 was admitted in evidence as Exh. D2. According to the decision the property in dispute was declared to be a matrimonial property belonging to the family of Josephat Mrisho Akyoo and Goodluck Yona Akyoo and the same be handed over to her family. Since that

decision has not been shown to have been challenged anywhere, my hands are tied to declare otherwise.

In the conclusion, the plaintiff testified he has made some improvement by construction of the brick wall around the plot. However, the testimony of DW1 and DW2 shows they had, as a family, they had constructed a wood house and eight (8) rooms house with concrete bricks which was at the stage of lintel. That house was demolished hurriedly by the plaintiff after the public auction. DW2 testified an estimate of Tshs. 35,000,000/-. I think to be fair and in the interest of justice, the two may set-off to each other, as it is difficult to assess the value of the landed property destroyed by the plaintiff. The plaintiff should surrender the title deed he processed to the Registrar of Titles so as it is registered in the name of 1st and 2nd defendant.

For the reasons stated, the suit by the plaintiff is dismissed with cost.

Dated and delivered at Arusha this.....13th.....day of November, 2020.




T. M. MWENEMPAZI

JUDGE