

IN THE HIGH COURT OF THE UNITED REPUBLIC OF TANZANIA
(DAR ES SALAAM DISTRICT REGISTRY)
AT DAR ES SALAAM

MISCELLANEOUS CIVIL REVISION NO.18 OF 2018

(Originating from Matrimonial Cause No. 69 of 2008 and Misc. Civ.
Appl. No. 116 and 117 of 2017)

1. SALUM MNEMBUKA

2. FARIDA EXAVERY

----- **APPLICANTS**

VERSUS

HEKE WINGA KIDIKU-----**RESPONDENT**

RULING

Date of Last order: 05.02.2020

Date of Ruling: 25.03.2020

EBRAHIM, J.:

The applicants have presented the instant application praying for the court to call and examine the records or proceedings of the District Court of Temeke in respect of **Miscellaneous Civil Application No. 116 of 2017** and satisfy itself as to its correctness.

The application is supported by the joint sworn affidavit of Salum Mnembuka and Farida Exavery, the applicants.

The genesis of this application is traced from Matrimonial Case No. 69 of 2008 which issued a decree of divorce to the applicants. The trial court further issued an order for equal division of matrimonial properties including a house/plot bearing Residential Licence No. **TMK/MBGK/KJC/18/22** situated at Mtoni Kijichi area, Mbagala Kuu, Temeke District, Dar Es Salaam. Following the decision of the trial court, the second applicant initiated the execution process against the said house in order to collect her share of the house. The auction was conducted on 30.06.2013 where the Respondent herein purchased the disputed house for Tshs. 20,000,000/-. Aggrieved by the process of sale, the 1st Applicant filed **Miscellaneous Civil Application No. 23 of 2013** where Hon. Khamsini RM nullified the sale on 29th April 2014 for being conducted illegally and un-procedurally. The Respondent herein then filed **Civil Revision No. 17 of 2015** which was dismissed by this court on 05.09.2016 for being time barred. The Respondent then filed **Miscellaneous Civil Application No. 116 of 2017** objecting the eviction order. The RM of Temeke District on 22.03.2018 referred the matter to the High Court for directives on the issue of execution against a person who was not a party to the case. It

is from the ruling of the lower court that the applicants initiated the instant application.

When the matter was called for hearing, the applicants were represented by advocate Amina Mohamed Mkungu; and the respondent was represented by advocate Grace Mataba. The court ordered the application to be disposed of by way of written submission and set a schedule thereto. Both parties adhered to the set schedule.

Counsels for both parties have extensively defended their positions. I have dispassionately gone through the submissions of which I shall refer in the course of addressing substantive issue in this application.

I have given the sequel of events that led to the present stage. As it can be gleaned from the records and as explained earlier after the sale of the disputed house to the respondent, there has been a litany of legal wrangling where the 1st applicant alleging illegal sale, surprisingly the 2nd applicant who initiated the sale of the house at first place is also claiming unfair play; and the respondent challenging the eviction and defending ownership of the same.

Thus, the main issue here for the court to address is the position/status of the respondent vis á vis the disputed house and the claim by the applicants.

Counsel for the Applicants in his submission while stating that his main ground of the application was challenging the stay of execution of the order given to nullify the sale, his submission based on challenging the sale of the house and the ownership of the house by the respondent.

On the other hand Counsel for the respondent after giving the concise facts of the case from when the Respondent emerged as the highest bidder and bought the house; concluded that the Respondent is the owner of the disputed house following his purchase and being issued with a certificate of sale. He argued that the Respondent herein was not a party to the proceedings in Miscellaneous Civil Application No. 23 of 2013 hence cannot be affected by any order derived from the ruling of 24th April 2014. The Respondent Counsel referred to the cases of **A.D. Mashoto Vs A.H. Kanga** (1986) TLR 67(HC); **Kangaulu Mussa Vs Mpunghati Mchodo** (1984) TLR 348(HC); and **Katibu Mkuu Amani Fresh Sports Club Vs.**

Dodo Umbwa Mamboya and Another (2004) TLR 326 (CA) on the principle that any person not a party to the suit and has interest in the property may institute an objection proceedings.

Indisputably is the fact that after the sale of the disputed house the 1st applicant instituted **Miscellaneous Civil Application No. 23 of 2013** which is also the basis of **Miscellaneous Civil Application No. 116 of 2017** and it led to the present application. Upon going through the records I observed that Miscellaneous Civil Application No. 23 of 2013 was made under Order **XXXVIII Rule 1(a) and 2(1) of the Civil Procedure Code, Cap 33 RE 2002**. The preferred provision of the law deals with appointment of receivers which has no bearing with the genesis of the matter. It can thus be argued that the application was preferred under the wrong provision of the law. However the prayers in the chamber summons vividly suggests that the applicant was applying for injunction in terms of **Order XXXVII Rule 1(a) and 2(1) of the Civil Procedure Code, Cap 33 RE 2002**. The 1st Applicant (Applicant in Application No. 23 of 2013) prayed for *ex parte* and *inter parte* order of *interim injunction against the 2nd Applicant and Sombo Auction Mart* from evicting him from the disputed house pending the

hearing and final determination of the suit before the court. He also prayed for the auction and sell of the applicant's house be declared null and void as it was made in the absence of the knowledge of the applicant.

In essence the 1st applicant was challenging the procedural irregularity in selling the disputed house. The magistrate in his ruling also addressed how the execution process was un-procedurally conducted and he set aside the sale for being irregular.

There are two issues for determination here. Firstly as to whether the magistrate was properly moved to set aside the sale hence had jurisdiction to do so; and secondly whether the route taken by the respondent to file objection proceedings is correct.

Evidently I need not say much that the provision of the law applied to move the court is an interlocutory order which could not be applied by the Magistrate to set aside the sale. An order to set aside sale is a final order which automatically permanently determines the rights of parties unless otherwise challenged and reversed by a higher tribunal. Thus at the very beginning, there was a fatal misapplication of the law

in entertaining the matter that the magistrate was wrongly moved and consequently exercised jurisdiction he did not have.

Coming to the aspect of objection proceedings as I understand it; I find it apt to reproduce the relevant provision i.e. **Order 21 Rule 57(1) of the Civil Procedure Code CAP 33 RE 2002** which reads:

*"57.-(1) Where any claim is preferred to, or any objection **is made to the attachment of, any property attached in execution of a decree on the ground that such property is not liable to such attachment,** the court shall proceed to investigate the claim or objection with the like power as regards the examination of the claimant or objector and in all other respects, as if he was a party to the suit:"* (Emphasis is mine)

From the above provision of the law, it is clear that objection proceedings do not relate to execution **procedure** but rather **liability** and **propriety of the attachment**. Objection proceedings go to investigate and ascertain as to whether the property subject to attachment is of the judgement debtor or not or whether it is protected by any law. It follows that a party cannot file objection proceedings in a bid to challenge the irregularity of the execution process.

Again, in any event where a sale of an immovable property has already been issued in the course of execution of a decree, there is

only one procedure where the executing court may intervene as outlined in **Order 21 Rule 87 -92 of the Civil Procedure Code** but not as the magistrate did in Miscellaneous Civil Application No. 23/2015 by being moved by an interlocutory provision of the law. All in all need I not repeat myself that the Miscellaneous Civil Application No. 23 of 2015 was wrongly moved, entertained and adjudicated in all fours and it is the basis of all the consequential and litany of applications that followed thereafter.

Before I give out my final order, I would wish to address the issue raised by the Counsel for the respondent that the final order in **Miscellaneous Application No. 23 of 2015** has no any consequence to the right of his client as he was not a party to the proceedings. I am totally of the different views and find the argument to be self-defeating. I am saying so because whether the order of the court was right or wrong, it went on nullifying the sale of the house purchased by the respondent. The result of which directly affects the respondent's ownership of the disputed house. Thereafter as to whether the respondent could have come to court by way of objection proceedings or could have come by way of revision being that his

rights were conclusively determined without being afforded right to be heard; I would not embark into that journey now since I have already found out that the order of the executing court was erroneous.

It is from the above background, this court in the exercise of its revisional powers under **section 44(1)(b) of the Magistrate's Court Act, CAP 11 RE 2002** nullifies all the proceedings, resultant orders and ruling in **Miscellaneous Civil Application No. 23 of 2015** as the court was wrongly moved and consequently exercised jurisdiction in does not have. Parties wishing to challenge the sale in either procedural aspect or Propriety of the same should conform to the requirement of the provisions of the relevant laws. Following the nature of the matter, I give no order as to costs. Each party to bear its own.

Accordingly ordered.

A handwritten signature in black ink, appearing to read 'R.A. Ebrahim', is written over a circular stamp or seal.

R.A. Ebrahim
Judge

Dar Es Salaam
25.03.2020