

**IN THE HIGH COURT OF TANZANIA
MWANZA DISTRICT REGISTRY
AT MWANZA**

PC. CIVIL APPEAL No. 29 OF 2020

(Arising from District Court of Nyamagana in Civil Appeal No.39 of 2019, Originating from Civil Case Na.397 of 2017 of Urban Primary of Nyamagana District)

PAULINA SAMBA..... APPELLANT

VERSUS

RODA JACKOBO GWANKO AND ANOTHER.....RESPONDENT

JUDGMENT

25th November, 2020 & 14th 24th February, 2021

TIGANGA, J

Paulina Samba, the appellant, was a member of WAMHILA FYUCHA GROUP which group was established for the main purpose of contributing money daily and the amount be handed over to one of the member on rotation bases support and boost its members economically. After receiving the member would continue to contribute for others to get what they also deserve on the conditions set in the group constitution. The said daily contribution was Tshs. 10,000/= by each member which was collected by the treasurer for six days in a week, except Sunday.



From the evidence, her husband who happened to be one of the founding members of the group, died before receiving his entitlement from the group. Following his death, the group leader collected what he was supposed to be receiving and handed it over to the appellant as a wife obviously as part of the estate of the deceased.

Thereafter the appellant continued her husband's membership and hers. From the evidence, soon or later thereafter things did not go well, some people either stopped contributing, or what they contributed which was received by the treasurer did not benefit members of the group, as those who were supposed to receive the money did not receive as required. Being one of those who were deprived of their right, the appellant sued the chairperson and the treasurer of the group, who were **Hassan Kassim Mussa** and **Joseph Simon Bwana** for the recovery Tshs. 17,400,000/=.

After hearing of the parties, the trial primary court found the claim to be proved at the required standard and ordered the respondent to pay the appellant and his fellow members Tshs. 17,400,000/.

The then defendant before the trial court in the original case did not appeal against the decision of the trial court; it was during the execution of that decision when the objection was raised by the first defendant. That objection was overruled by the executing court for lack of merits.

Thereafter two persons who are the current respondents filed objection proceedings against execution on the ground that the properties which were attached were the family properties and did not secure the claimed amount. The objection was also overruled on the ground that, the objection of that sort was once filed and decided by the court and it was not appealed against.

Dissatisfied by the decision of the of the trial court on the objection, the respondents appealed to the District Court of Nyamagana by filing five grounds of appeal as follows:-

1. That the appellants are respective wives of Hassan Kassim Mussa and Joseph Simon Bwana.
2. That the trial court erred when it failed to consider that the appellants were not parties to the case for which their matrimonial dwelling houses were attached and sold away.

3. That the trial court erred in dismissing the appellant's objection against sale of her matrimonial dwelling houses,
4. That the trial court erred when it failed to consider that the appellants had not given spousal consent for a loan or loss which was caused by their husbands,
5. That the appellant did not mortgage their matrimonial dwelling houses to WAMHILA FUTURE GROUP for their husbands to take loan or cause any loss to the said group.

After hearing both parties in appeal, the appellate District Court, dismissed the appeal on the ground that the objection was overtaken by events as the same was preferred on 25/07/2019 after the auction had already been conducted on 16/07/2019 and that the objection proceedings are not appealable.

However, having refused the appeal, the district court went ahead and invoked its powers of revision under section 22(1) of the Magistrate's Courts Act [Cap 11 R.E 2002] on the grounds that, section 48(1)(e) of the Civil Procedure Code [Cap 33 R.E 2002] provides that the residential house is not subject to attachment. That the respondent having proved that they were the wives of **Hassan Kassim** and **Joseph Simon Bwana**, they

were supposed to have consented to whatever their husbands were doing with their houses.

Dissatisfied by the decision of the District Court, the appellant filed two grounds of appeal as follows;

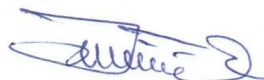
- (a) That the District Court erred in law when it moved from the appeal to revision and enter *suo motu*, the decision through revision without hearing the parties in that point of revision,
- (b) That the District Court erred both in law and facts to make an order that the properties (houses) be returned to the respondents while they were sold to *bonafide* purchasers by the Court Broker in execution of the court's decree who were not parties to the Appeal No. 39 of 2019.

Hearing of the appeal was conducted orally. The appellant was represented by Mr. Innocent Bernard, learned counsel, who argued one ground of appeal after the other. Arguing the first ground of appeal indicated herein before, he submitted that it was not proper in law for a District Court to move from the appeal to revision and enter *suo motu*, the

decision through revision without hearing the parties on that point upon which the revision orders based.

He submitted that by failing to address them on the new issue parties were condemned un heard and it is against the rule of natural justice. He relied on the case of **Jayant Kumar Chandurabhai Patel@ Jeetu Patel and 3 Others vs Attorney General & 2 Others**, Civil Application No. 160 of 2016 CAT- Dar Es Salaam in which it was held that, once a new issue has been raised in the course of preparing the judgment the court should and is required to open the hearing on the new issue raised. Failure to do so is depriving the parties their right to be heard and renders the decision to be a nullity. To strengthen his argument he cited the case of **Wegesa Joseph M. Nyamaisa vs Chacha Muhogo**, Civil Appeal No. 161 of 2016 –CAT Mwanza, and **Mbeya Rukwa Autoparts Transport Ltd vs Jestina George Mwakyoma**, [2003] T.L.R251 CA. He asked the Court to find that the non calling of the parties denied the parties the right to be heard.

Regarding the second ground of appeal which raises the complaint that it was not proper in law for the District Court to order that the houses, subject matter of this dispute be returned to the respondents while they



were sold to the *bonafide* purchaser, who was not a party to the appeal No. 39 of 2019 by the Court Broker in execution of the court decree. To buttress his arguments he relied on the case of **Mathias S. Kwezaho vs Furuza Kahuzu**, Misc. Land Appeal No. 18 of 2018 HC - Mwanza, Siyani, J held that he failed to order the house to be returned because the same had already been sold to another person who was not a party to the case.

It was submitted further that, the interest of *bonafide* purchaser must be protected, and on that argument he relied on the decision of the Court of Appeal in the case of **Nala Textile and Others vs Tax Recovery Officer and another**, Civil Appeal No.6536 of 2003 that the stranger who becomes a *bonafide* purchaser must have his interest protected. He submitted that the court was not justified to order the house to be returned.

The respondents were not represented, they fended themselves in person. The first respondent submitted that their appeal was properly allowed because the houses were not mortgaged neither did he give consent. She submitted that it was her belief that the District Court correctly decided in their favour.

The second respondent submitted that she was not aware of the case, she saw the court broker coming to her for execution, she complained to the chairman and later to the primary court where she filed the objection, and then appealed when the same was overruled, but the District Court upheld the appeal as the houses were not properly sold as they were so sold without the consent of the spouse.

In the rejoinder, the counsel for the appellant submitted that the houses were not sold because of loan, the case was a normal civil case, he submitted that the respondents agree that there was partial interests of their husbands in the sold houses which facts makes them to be properly filed. He in the end asks the appeal to be allowed.

As rightly complained by the appellant and submitted by her counsel, the matter went to the High Court as an appeal, however, when it reached there the Honourable appellate magistrate found the appeal to be devoid of merits and dismissed it, on the ground that the objection proceedings from which the appeal lied was filed after the sale had been effected and that the appeal is unmaintainable on the ground that it originated from the objection proceedings. However, he proceeded to revise the findings of the trial court on the ground that, the houses which were sold were

matrimonial residential houses which are not subject of attachment under section 48 of the Civil Procedure Act.

He did so without calling upon the parties to address him on the issue he raised *suo motu*, before he decided to revise the proceedings. Now the issue is whether the act of revising the proceedings and orders on the issue raised by him *suo motu* without first calling upon parties to address him was proper in law?

The law as properly articulated in a number of cases including those cited by the counsel for the appellant, which are **Jayant Kumar Chandurabhai Patel@ Jeetu Patel and 3 Others vs Attorney General & 2 Others, (supra), Wegesa Joseph M. Nyamaisa vs Chacha Muhogo, (supra) and Mbeya Rukwa Autoparts Transport Ltd vs Jestina George Mwakyoma, (supra)** and many others which held to the effect that, once a new issue which was not raised and argued by the parties, has been raised by the court *suo motu* in the course of preparing the judgment, the court should and is required to open the hearing by re-summoning the parties to address the court on the new issue raised. Failure to do so is tantamount to depriving the parties their right to be heard and renders the decision to be a nullity even if the decision

reached would have been the same, even after parties had addressed the court on the new issues raised.

In this case the District Court conducted revision after raising *suo motu* the ground that the houses in disputes were matrimonial and residential which are not attachable in terms of section 48 of the Civil Procedure Code (*supra*) this was a new raised issue, it is new because it was not one of the grounds of appeal before District Court, its discussion and decision was to be given after calling the parties to address the court on the issue.

Further to that, and by way of passing, the law upon which the order was based is in applicable in the matter, the district court relied on the provision section 48 of the Civil Procedure Code, with all due respect to the honourable magistrate, Civil Procedure Code [Cap 33 R.E 2019] does not apply to proceedings originating from Primary Courts, the law applicable are either The Magistrates Courts Act, [Cap 11 R.E 2019] or the Civil Procedure (Appeals in Proceedings Originating in Primary Courts) Rules G.N. No. 312 of 1964. It is worthy to find that even the law relied on is not relevant in the circumstances. That said, I find the first ground of appeal to be meritorious, and thus up held.

Regarding the second ground of appeal which raises the complaint that it was not proper in law for the District Court order that the houses, subject matter of this dispute be returned to the respondents while they were sold to the *bonafide* purchaser, who was not a party to the Appeal No. 39 of 2019 by the Court Broker in execution of the court decree.

It is trite law that, where the interests of the *bonafide* purchaser are involved in any matter then that interest must be protected. Now who is a *bonafide* purchaser?

In **Suzana S. Waryoba versus Shija Ndalawa**, Civil Appeal No. 44 of 2017, CAT – Mwanza the court adopted the dictionary definition of the term *bonafide* purchaser to mean;

"A bonafide purchaser is someone who purchases something in good faith, believing that he/she has clear rights of ownership after the purchase and having no reason to think otherwise. In situations where a seller behaves fraudulently, the bona-fide purchaser is not responsible. Someone with conflicting claim to the property under discussion would need to take it up with the seller,

not the purchaser, and the purchaser would be allowed to retain the property."

Further to that, in the case of **Nala Textile and Others vrs Tax Recovery Officer and another**, Civil Appeal No.6536 of 2003 it was also held that, the stranger who becomes a **bonafide** purchaser must have his interest be protected.

These authority read together with the findings of by Brother Hon. Siyani, J in the case of **Mathias S. Kwezaho vrs Furuza Kahuzu**, (supra) it goes without saying that in the circumstances like this one, where the houses had already been sold to another person who was not a party to the case, courts are duty bound to protect the interest of the *bonafide* purchaser.

Now in this case, the houses in question were sold on 16/07/2019 through an open auction in execution of the order of the court which has never been challenged in appeal. In the circumstances where the purchaser having heard about an auction to be conducted, probably conducted search and found no appeal against the decision to be executed, and that up to the time when the auction was to be conducted there was

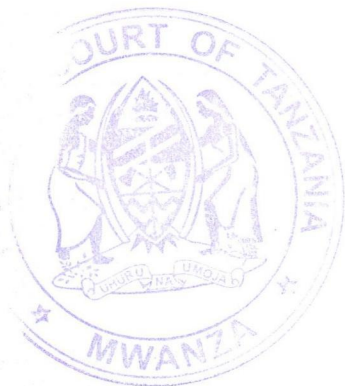
no objection proceedings filed. In that circumstances the purchaser who went ahead and purchased the said disputed properties was *bonafide* and he *bonafidely* believed the houses to have no any encumbrances and purchased the said houses in that *bonafide* belief. He is therefore a *bonafide* purchaser and his interest need to be protected as directed by the authorities above.

It is important to note that, at the time when the respondent were filing the objection proceedings, they were aware of the names and identity of the purchaser. Had the respondents been mindful of the right and interest of the *bonafide* purchaser and really wanted an order against him, they would have joined the purchaser in their objection proceedings, this is because, when they were filing the proceedings the properties had already been sold and the purchaser was known to them. It was therefore not proper for the District Court to order the return of the houses from the *bonafide* purchaser, who was not a party to the case.

That said, I also find the second ground of appeal to be meritorious and upheld. In the upshot, the entire appeal is meritorious and therefore allowed with costs for the reasons given.

It is so ordered.

DATED at MWANZA, this 23th day of February, 2021



J. C. Tiganga

Judge

23/02/2021

ORIGINAL