

IN THE HIGH COURT OF TANZANIA

IN THE DISTRICT REGISTRY

AT MWANZA

PC CIVIL APPEAL No 85 OF 2020

(Arising from Civil Review No. 01 of 2020, District Court of Ilemela, and DC Civil Application No. 16 of 2018 both arising from Probate Cause No. 20 of 2009 from Ilemela Primary Court)

MSAFIRI JUMANNE MASHAKA.....APPELLANT

VERSUS

**SOLOLO JUMANNE YAMLINGA Administrator of
the estate of the late JUMANNE YAMLINGA.....1ST RESPONDENT
ALFRED JUMANNE YAMLINGA.....2ND RESPONDENT
BULUGU JUMANNE YAMLINGA.....3RD RESPONDENT
MARIA JUMANNE YAMLINGA.....4TH RESPONDENT
PRISCA JUMANNE YAMLINGA.....5TH RESPONDENT**

JUDGMENT

21/04/2021 & 04/06/2021

TIGANGA, J.

In this appeal, the appellant is challenging the decision of the District Court of Ilemela, Hon. Sivonike, RM, in Civil Review No. 01 of 2020 which was taken *suo motu* after the appellant herein had made complaints before that court that, the house which was auctioned and sold to him on 12/05/2018, was ordered to be re-auctioned by the



Ilemela Primary Court and also that though he purchased the said house, the title deed has never been handed over to him.

After receiving such complaints, the Honourable Magistrate realised that there was once an application for revision conducted in respect of the same matter in DC Civil Application No. 16 of 2018, by the same Court in which the 1st Respondent, **Sololo Jumanne Yamlinga**, the Administrator of the estate of the late **Jumanne Yamlinga**, moved the said court to revise the decision of the Primary Court in Mirathi No. 20 of 2009. Following that state of affairs she regarded herself as *functus officio*, consequent of which she sought directive from the Hon. Judge in charge who directed her to review the decision in DC Civil Application No. 16 of 2018. In pursuing that cause, she summoned and heard all the parties concerned and came up with the impugned ruling which;

1. Quashed the trial court ruling dated 15/01/2020 and all the orders arising therefrom,
2. Ordered a resale of the house No. 162 Block "U" located at Mitimirefu Mwanza through a public auction in which all interested parties are allowed to bid and that whoever succeeds shall have the house,



3. In case the purported present buyer fails to bid the highest, then he shall be refunded from the sale price paid by the successful bidder,
4. The court broker has to proceed with resale of the house in question by way of public auction.

The complainant was unsatisfied with the ruling together with its orders, hence this appeal in which he advanced only one ground of appeal namely;

1. THAT, the Honourable Court erred in law to order for a new sell of the house erected at Plot No. 162 Block "U" Mitimirefu Mwanza without first taking into account the presence of a valid auction which was conducted on 31st July, 2019.

The appellant's prayer before this court is to allow the appeal by quashing the ruling and orders of the Ilemela District Court.

This appeal was argued by way of written submissions, the appellant was represented by Mr. Stephen Makwega, learned Advocate whereas the respondents were unrepresented but their submission was drawn by Mr. Fabian Mayenga who was engaged for drawing only.

In his submission in support of the appeal, the counsel for the appellant argued that, the appellant herein purchased the house in question for Tshs. 190,000,000/= on 12/05/2018 at a public auction ordered by the Ilemela Primary Court. After the auction, the heirs were unhappy as they believed that the house was worth Tshs. 300,000,000/= so they filed an application asking the Ilemela Primary Court to nullify the auction on the ground that the house was sold way below the market value.

The court in turn, after hearing them did not set aside the auction, but gave them a period of three months within which they were to search for a buyer who would be willing to buy the house at that price. That ruling also did not satisfy them, so they applied for revision before the District Court in DC Civil Application No. 16 of 2018 against it, in which the impugned ruling was upheld, but the District Court went further and ordered that, first, the value of the property be ascertained by the government valuer.


Following the order of the District Court, valuation was conducted, the value of the house was ascertained to be Tshs. 316,000,000/= with a forced market value of Tshs. 221,000,000/=. After such ascertainment, the Primary Court ordered that, there be conducted



another public auction. The same was conducted on 31st July, 2019 in which the appellant was again the highest bidder and purchased the house at the price of Tshs. 190,000,000/=.

Following that second auction, the respondents never complained of any foul play in the latter auction. The Counsel cited the case of **Juma Jaffer Juma vs Manager of the Peoples' Bank of Zanzibar Ltd and Two Others** (2004) TLR at page 333. He also referred this court to section 132(2) of the Land Act [Cap 113 R.E 2002] which prohibits the sale of a landed property below 25% of its value and stated that the price paid by the appellant was way above 25% of 221,000,000/=. He also cited the case of **Bank of Africa Tanzania Ltd vs Naif Salum Balhabou and Two Others**, Commercial Case No. 140 of 2016 (unreported) which held to that effect.

He was of the view that, the Honourable Magistrate lacked legal justification to disregard the auction that was conducted on 31st July, 2019 and order of resale of the house in question. He contended further that the nullification of the auction simply because the appellant could not reach the forced market value was a result of a wrong interpretation of the law and facts.



Lastly, he contended that, the act by the Magistrate to depart from the decision of Hon. Kalegeya, RM, was wrong as the decision was given by the same court and on the same case. He prayed that the appeal be allowed with costs by quashing the decision and orders in Civil Review No. 01/2020.

Replying to the submission by the appellant, the respondents stated that, in the impugned decision the Honourable Magistrate did not deal with the public auction that took place on 31st July, 2019 but that of 12th May, 2018 because it was done without first ascertaining the value of the house.

On the issue that the respondents never complained of any foul play plus the cited case of **Juma Jaffer Juma vs Manager of the Peoples' Bank of Zanzibar Ltd and Two Others** (supra), the respondents replied that the case is distinguishable as the same dealt with mortgaged property while the house in question does not fall within that category.

Regarding the cited section 132(2) of the Land Act, (supra), the reply by the respondents was that, the said section does not provide for the prohibition of sale below 25% rather provides for the mortgagee's powers of sale of the mortgaged property, therefore it is irrelevant to



the context as well, and so is the cited case of **Bank of Africa Tanzania Ltd vs Naif Salum Balhabou and Two Others** (supra)

Regarding the argument that the court was wrong to depart from its earlier decision, it was argued by the respondents that, what the court did was to review its own decision so as to cure the mischief and not to depart as alleged by the appellant.

It was their contention that the District Court was right to nullify the public auctions that were conducted before and after valuation because there was no order or directives by the District Court to the Primary Court to do so. They prayed that the appeal be dismissed for being meritless.

The appellant's rejoinder was to the effect that, their main concern is that, the District Court disregarded the auction which was conducted on 31st July, 2019 without giving any reasons to that effect while there was no any complaints of foul play in the said auction and the same was conducted after conclusion and receipt of a valuation report. He insisted that this appeal be allowed and the impugned decision be quashed.

That marked the end of the submissions by the parties for and against the appeal. Now having gone through the arguments advanced in the submissions,

Before going to the merit of the appeal, it is important to point out that the ruling which is the subject of this appeal was a result of the review conducted by the District Court regarding its decision earlier on conducted from the proceedings originating from the Primary Court. The order of the District court in Review No. 01 of 2020 did not depart or overrule the decision of the same court in DC Civil Application No.16 of 2018, it reviewed the order in question having realised that, it left some important matter unattended.

The only question which arises at this stage is whether the District Court had powers to review its own order earlier on given. In resolving this issue, I hasten to say that, it is incumbently clear that every power of the Court should be statutorily conferred. In law, the procedure regulating the proceedings which originates from the Primary Courts is provided either by the Magistrates Courts Act or the rules and regulations made under it. I have passed through the Magistrates Courts Act, I found no provision providing for the power of review to the District Court in the proceedings origination or emanating from the Primary Court. The only powers I find in respect to the proceedings before the District Court which originated from the Primary Court are appellate and revisional.


Further to that, looking at the proceedings and ruling which is the subject of this appeal, we find that, even the magistrate herself did not state under which law she conducted that review. However, the definition of review denotes the power of the court to look once again in its decision for purposes of reconsidering its judgment or decision.

The aim of review is to rectify errors inherent in the decision after discovery of new and important matter or evidence which after the exercise of due diligence was not within the knowledge or could not be brought to the attention of the court at the time of the decision. That may also be done on account of some mistakes or apparent on the face of the record or for any other sufficient reason.

From the definition the powers of every court or tribunal to review its own decision is inherent for the purposes of curing the mistake or errors it committed in its decision.

Therefore, although the Magistrate Courts Act (supra) does not provide for powers for review, then, it is important to take inspiration from section 78 and Order XLII Rule (1) (a)(b) of the Civil Procedure Code [Cap 33 R.E 2019] which provides for the powers of the court to review its decision made in original jurisdiction.

Section 78 provides as follows;



"Subject to any condition and limitation prescribed under section 77 any person considering himself aggrieved:-

- a) by the decree or order from which an appeal is allowed by this code but from which no appeal has been preferred or*
- b) by a decree or order from which no appeal is allowed by this code.*

may apply for a review of judgment to the court which passed the decree or made the order, and the court may make such order thereon as it think fit"

Order XLII Rule 1 (1) (a) and (b) also provides that;

"Any person considering himself aggrieved.

- a) by a decree or order from which an appeal is allowed but from which no appeal has been preferred, or*
- b) by a decree or order from which no appeal is allowed and who, from the discovery of new and important matter or evidence which, after the exercising due diligence, was not within his knowledge or could not be produced by him at the time when the decree was passed or order was made, or on account of some mistake or error apparent on the face of the record, or for any other sufficient reason, desires to obtain review of the decree passed or order made against him may apply for a review of judgment to the court which passed the decree or made the order"*

From these provisions and on the importance of taking inspiration from the procedure in the CPC providing for review, I find that, the District Court was justified in reviewing its own decision as it did.

In the case before the District Court the base of the review is the complaint made by the counsel for the appellant to the District Court via his letter dated 17/01/2020, which was complaining that on 12/05/2018 his client purchased House "162" Block "U" at Mitimirefu in Mwanza City through a public auction ordered by the Primary Court of Ilemela, after he merged the highest bidder, but had never handed over the said house and there was another order for resale.

As earlier on pointed out that the review conducted by the District Court based on fact that, the revisional order in DC Application No. 16 of 2018 which upheld the decision of the Primary court and ordered valuation to be conducted, did not invalidate or nullify the auction which was conducted on 12/05/2018 without valuation.

I entirely agree that the fact that the court ordered valuation to be conducted, by necessary implication means that, the auction conducted without valuation was so made blindly in the ignorance of the actual or forced value of the said house therefore the same was irregular and tainted. Although the order did not expressly nullify the auction and sale, it impliedly did so for there was no point of ordering the valuation



in the same was not going to affect the said auction which was conducted without valuation. That said I thus find that, the order by Hon Kalegeya - RM in Revision No. 16 of 2018 also meant and nullified the auction conducted on 12/05/2018. Now having so found, the issue is what is the status of the acts that followed thereafter? It is on record that, the valuation came up with the value market values of Tshs. 316,000,000/= and the forced market value that is Tshs. 221,000,000/=

Which means the highest bidder did not reach at the market value or the forced market value something which justified their complaint. That resulted into the second auction which was ordered by the Primary Court which was conducted on 31st July 2019 after it was advertised in Mtanzania News paper of 23rd March 2019 informing the general public of the auction to be conducted on 31st July 2019.

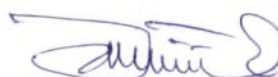
It should be noted that the respondent were by the order of the Primary Court of 31/05/2018 directed to participate in finding the person who was able to give the best offer. However it is worthy to note that even the second auction which was conducted on 31st July 2019 after valuation yet, the respondent did not take there their alleged prospective buyer who would give the best offer, and yet even in that

at auction the appellant emerged the highest bidder by Tshs. 190,000,000/=

Taking into account the fact that, the auction was not in execution of the decree of the court but was at the request of administrator who asked the assistance of the court to appoint the auctioneer to auction the house, which is the estate of the deceased, so that the realised amount could be distributed to the lawful heirs of the deceased.

In law it is the duty of the Administrator to collect and distribute the estate of the deceased in terms of rule 5 and 10 of the 5th Schedule to the Magistrates Courts Act [Cap. 11 R.E 2019].

Since the sale was as requested by the administrator, the involvement of the court and the court broker was probably aiming at bolstering the transparency and trust on the part of administrator. Unlike in a normal execution of court decree, the procedure in this case was supposed to be a bit relaxed. It was supposed to be mostly involving the administrator and the heirs in getting the best price as the broker was more of the assistance to them than of executing the decree of the court, in other words, from the nature of the matter, the administrator and the heirs were not supposed to be complaining that the price realised from the highest bid was well below the market value without



them finding the best offer of either 316,000,000/= which is the market value, or the forced market value that is Tshs. 221,000,000/= especially after they were given the opportunity by the trial Primary Court to find the best buyer, they were not prevented to come with their own bidder who would be ready to give a best offer.

It should be noted that, the duty of the auctioneer in any auction is to conduct an auction not to solicit the people to pay the better price, his duty is to pick the highest bidder of the estate and declare him the buyer.

In auction where the market value of the property to be auctioned is fixed, it is the expectation of the owner of the property and interested parties to get the best offer either at the market value so estimated and valued by the competent valuer. However, such fixation of the price or value does not imply that, the auction must be at that price. The same can be sold at the auction value which is the price of an item appreciated at the auction being the amount given by the highest bidder at that particular auction. That may be the amount higher or less than the market value depending on a number of factors which the auctioneer has no capacity to influence.

The auction price or value depends on a number of factors one of them being the demand and supply of the said item which is subject to the auction at that material time and in the particular circumstances when the auction is carried out. But is important if the highest bidder reaches the market value which is the amount for which something can be sold on a given market.

Having so observed, I will state right away that I agree with the argument by the counsel for the appellant that the public auction that was conducted on 12th May, 2018 was automatically nullified by the order of the District Court in Revision (DC Civil Application No.16 of 2018), thus paving the way for another auction to be conducted after the valuation, as conducted on 31st July, 2019 which was conducted without any complaint from the respondent and which they were opportune to bring in their best buyer who would have given the best offer than that of the applicant.

The District Court was not therefore justified in its review to nullify the auction conducted on 31st July, 2019.

I would say that the respondents were not supposed to end up informing the auctioneer that they had a buyer who was ready to buy the said house at a price of Tshs. 250,000,000/=, they had a duty to go

with that buyer to the auction so that he or she could participate in the auction, this has taken into account the fact that, the advertisement of the second auction was made in Mtanzania News paper of 23rd March 2019 informing the general public of the auction to be conducted on 31st July 2019, there was therefore an ample time for both side to prepare and even that said buyer who was said to be on safari to have returned and be present at the date set for auction.

The findings have also based on the complaint raised by the Administrator of the estate, as quoted in the proceedings which resulted into the ruling dated 31/05/2018 in Mirathi No. 20 of 2009 in which the administrator, at page 2 and 3 of the ruling, is quoted to have said in his evidence that;

"Imeelezwa pia kuwa sio warithi wote wanaopinga nyumba kuuzwa kwa mnada bali wanaopinga ni warithi ambao wamenufaika kwa muda mrefu kutokana na mapato ya nyumba tangu mwaka 1996. Mleta maombi Na. 1 na 3 ndio ambao hawakubaliani na uuzwaji wa nyumba tajwa ili waendeleo kupokea kodi na kuishi katika nyumba hiyo bure wakati wapo warithi wengine ambao hawanufaiki na nyumba hiyo"

From this complaint, I am afraid that these complaints are calculated to delay the auction for purposes of perpetrating the above



complained of evil motive which the court should not allow especially in a situation like this where the money from the bonafide purchaser is held for years without its fate known.

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 protected.

These authority read together with the findings of by Brother Hon. Siyani, J in the case of **Mathias S. Kwezaho vrs Furuza Kahuzu**, Misc. Land Appeal No. 18 of 2018 HC - Mwanza, (supra) it goes without saying that in the circumstances like this one, courts are duty bound to protect the interest of the *bonafide* purchaser.

In cases like this where the second auction has not been contested, or any foul played in the auction complained off, the interest of the bonafide purchaser needs to be protected. In the fine, I find the appeal to have merits, and consequently allowed. I find the District Court to be not justified to nullify the auction made on 31st July 2019, I thus reverse the decision to the extent explained above, the order which nullified the auction conducted on 31st July 2019 is set aside, same remains intact, and the trial Primary Court is by this decision directed to proceed with the next step of declaring the sale absolute, and go ahead to hand over the house to the *bonafide* purchaser.

It is accordingly ordered.



DATED at MWANZA, this 08th day of June, 2021.

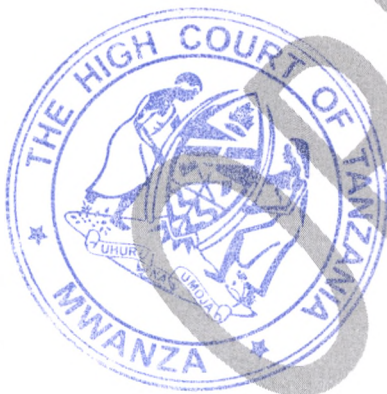


J.C. Tiganga

Judge

08/06/2021

Judgment delivered in open chambers in the presence of Mr. Stephen Makwega, counsel for the appellant, and Mr. Sololo Jumanne Yamlinaga the 1st respondent Administrator of the Estate of the late Jumanne Yamlinga, on line via audio teleconference. Right of Appeal explained and guaranteed.



J.C. TIGANGA

JUDGE

08/06/2021