

**IN THE HIGH COURT OF TANZANIA  
(DAR ES SALAAM DISTRICT REGISTRY)  
AT DAR ES SALAAM  
PC CIVIL APPEAL NO. 100 OF 2021**

*(Arising from the Ruling of Kinondoni District Court in Civil Revision No. 27 of 2020, before Hon. H.M. Hudi-RM, dated 28<sup>th</sup> May, 2021, Originating from Probate and Administration of Estate Cause No. 103 of 2011 of Kinondoni Primary Court)*

**SHUKURU ALLY SALUM as administrator of the  
Late Peter Mwakalukwa).....APPELLANT**

**VERSUS**

**JOYCE PETER MWAKALUKA.....1<sup>ST</sup> RESPONDENT**

**MAS & ASSOCITES COMPANY LIMITED.....2<sup>ND</sup> RESPONDENT**

**THE REGISTERED TRUSTEES OF DIOCESE OF**

**DAR ES SALAAM (PARISH OF LUHANGA TANDALE).....3<sup>RD</sup> RESPONDENT**

**JUDGMENT**

*28<sup>th</sup> March, 2021 & 22<sup>nd</sup> April, 2022*

**E.E. KAKOLAKI, J.**

This is an appeal from the ruling of Kinondoni District at Kinondoni in Civil Revision No. 27 of 2020, dated 25/05/2021 dismissing the appellant's application for revision. To exhibit his dissatisfaction to the said decision, the appellant herein has advanced five grounds of appeal in which before I embark on considering them, I find it worthy to narrate albeit briefly its genesis. The whole dispute between the parties hinges on division of the

estate of the late Peter Mwakalukwa who met his demise on 14/12/2010 at his residence Tandale, within Kinondoni District, Dar es salaam Region. Following his demise the first Respondent (the deceased's daughter) successfully petitioned for letters of administration before the Primary Court of Kinondoni in Probated and Administration of Estates Cause No. 103 of 2011, where she was appointed as administratrix of the estate. Later on and in the course of holding her office other heirs who were dissatisfied with her management of the estate appeared before the trial court and sought to displace her from the office through revocation of letters, but in return on 08/11/2018 the appellant was appointed as co –administrator to the 1<sup>st</sup> respondent and both ordered to jointly administer the said estate for the interest of all beneficiaries. In the course of discharging her duties as administratrix of the estate and before appointment of the appellant as co-administrator, 1<sup>st</sup> respondent successful prayed for and secured an order from the trial Court to sell two houses located at Tandale and Mbezi, belonging to the estate for the proceeds to be divided to the beneficiaries, but the order could not be effected till appointment of the appellant as co-administrator. It is alleged on 14/06/2019 the 1<sup>st</sup> respondent with the help of 2<sup>nd</sup> respondent, (the court broker) sold/auctioned the house of Tandale to

the 3<sup>rd</sup> Respondent for Tshs. 40,000,000/- out of the valued amount of Tshs. 94,000,000/- and the sale report duly made to the trial court by the 2<sup>nd</sup> respondent on 19/06/2019 and later on 31/03/2020. Dissatisfied with the whole sale exercise and the purchase price obtained, the appellant as co-administrator filed complaints before trial Court where the Court ruled out that, the sale was properly conducted and that he was informed of the said sale. Discontented with such decision the appellant applied for revision before Kinondoni District Court, vide Civil Revision No. 27 of 2020, praying the District Court to examine the lower court record and satisfy itself as to their correctness, legality and propriety of the order made by the trial court in Probate and Administration of Estate Cause No. 103 of 2011. Upon hearing both parties the District Court found out that, there was nothing to revise for want of illegality and impropriety in the complained of Primary Court decision. Consequently, the application was dismissed.

Unpleased with the decision of Kinondoni District Court, Appellant has preferred this appeal, clothed with five (5) grievances as hinted earlier on namely:

1. That the Honorable Learned Trial Resident Magistrate grossly erred in law and fact for having properly found that the trial court had no any

jurisdiction to try dispute over land matters but erroneously declared the sale of the said suit house to the 3<sup>rd</sup> Respondent to be proper

2. That the Honorable Learned Trial Resident Magistrate grossly erred in law and fact in failure to hold that the suit house was sold to the 3<sup>rd</sup> Respondent at a very throw away price of Tsh. 40,000,000/= which was below the valuation report price of Tsh. 94,000,000.
3. That the Honorable Learned Trial Resident Magistrate grossly erred in law and fact in failure to hold that the auction of the suit house was unprocedural and procured by irregularity.
4. That the Honorable Learned Trial Resident Magistrate grossly erred in law and fact in holding that a price in action is determined by circumstances of the auction, in disregard of the valuation report from the registered chief government valuer.
5. That the Honorable Learned Trial Resident Magistrate grossly erred in law and fact in failure to hold that the 1<sup>st</sup> Respondent alone had no any power to initiate sale of the deceased suit house without seeking and obtaining consent from the appellant who is co-administrator of the estate of the late Peter Mwakalukwa.

On the strength of the above grounds, the appellant prayed this Court to allow the appeal, set aside both decisions and subsequent orders of the lower courts, and further award him costs of the appeal.

At the hearing the Appellant appeared represented by Mr. Adolf W. Mahay, learned advocate while the 1<sup>st</sup>, 2<sup>nd</sup> and 3<sup>rd</sup> respondents enjoyed the services of Mr. Casmiri Nkuba learned counsel. Parties unanimously prayed leave of the court which was granted for them to dispose of this appeal by way of written submission in which all the submissions were filed timely. In his submission in chief the appellant chose to argue all grounds of appeal in seriatim. In respect of the first ground of appeal Mr. Mahay submitted that, the purported sale of the suit house was tainted with illegalities due to the reasons that, the trial court had no jurisdiction to deal with land matters. He referred the court to section 4(1) of Land Disputes Courts Act Cap 216 of 2019 and page 6 of the impugned ruling where the Court held that, Primary Court has no jurisdiction to determine land matters, but erroneously proceeded to declare the sale of the suit house to the 3<sup>rd</sup> Respondent was proper, the decision which is unjustified and against the law under the circumstance of this case. To back up his proposition he cited to the court a

number of cases which I do appreciate and take note of but not intending to reproduce them.

On the second ground, Mr. Mahay is faulting the decision of the District Court for failure to hold that, the suit house was sold at a throw away price of Tsh. 40,000,000 which was below the valuation report price of Tsh. 94,000,000/= obtained after trial court's order. While referring at page 8 of the impugned ruling where the District Magistrate held that the auction price is determined by circumstances prevailing during the auction, he argued that, the suit house was sold at 40,000,000/- only despite of the existing estimated value of Tshs. 94,000,000/- as per the valuation report. In view thereof, it was Mr. Mahay's submission that the District Court's reasoning that the auction price is determined by the market price and highest bidder and not the valuation report holds no water. The Court was invited to be persuaded with the decision in the case of **Peter Zacharia Sanio Vs. EFC Tanzania MFC Ltd and Another**, Land Case No 08 of 2015, HCT Land Division at Dar es salaam where this Court held that, during auction the auctioneer should strive to secure best price reasonably obtainable at the time of sale. In his view 2<sup>nd</sup> respondent failed to discharge the said duty imposed by the law in obtaining

the best price of the property in dispute hence prayer for this Court to nullify the sale.

On the third ground of appeal, Mr. Mahay lamented that, the auctioning procedures of the suit house were not followed as the process contravened Regulation 6 of the Land (Conduct of Auctions and Tenders), of the Regulations of 2001 which require the auction to be published in one Swahili and English daily circulating newspapers in the District and on Public notice Board, of the date of the auction which shall not be less than twenty one (21)days prior to the auctioning date, as well as the conditions for the auction, but the same was not adhered to in the present case. He argued that, since the procedures were faulted, the auction of the disputed suit house proceeded without prior knowledge of appellant as lawful appointed administrator as well as heirs.

Submitting on the fourth ground of appeal the appellant reiterated his submissions made in support of the second ground that, the auction price is not determined by circumstances prevailing during the auction but rather by valuation report. And on the fifth and final ground of appeal, the appellant is faulting the decision of District Court for failure to hold that, 1<sup>st</sup> respondent alone had no any power to initiate sale of the deceased's suit house without

consent from the appellant who was the co-administrator of the estate of the late Peter Mwakalukwa. He contended that even beneficiaries were not involved on such sale and that the 2<sup>nd</sup> respondent used the said money in her own personal use without distributing it to the heirs as required by law. In his view, since he was not involved in the sale of the suit house, and since that thrown away price paid by 3<sup>rd</sup> respondent is still in possession of 1<sup>st</sup> Respondent, it is in the interest of justice that, 1<sup>st</sup> respondent be condemned to reimburse said money to the 3<sup>rd</sup> Respondent the purported sum of Tsh. 40,000,000.

In response to Mr. Mahay's submission on the first ground of appeal Mr. Nkuba for the respondents while admitting the fact that the Primary Court does not have jurisdiction on land matters he argued, as rightly stated by the District Court the dispute before the trial court was not a land matter but rather on sale of part of the estate in the Probate and Administration Cause in which the Primary Court had jurisdiction to deal with. He cited to this Court the case of **Malietha Gabo Vs. Adam Mtengu**, Misc. Land Appeal No 21 of 2020 (HC-unreported) to support his stance where the court held that:

*"...the law is settled that when a dispute on ownership or disposition of land arises from inheritance or purchase for value of the landed property forming part of the deceased*



*persons estate while the probate and administration Court is still seized with the matter, it is the Probate and Administration Court which has jurisdiction to deal with and decide on the dispute.”*

With regard to the second ground of appeal on whether the price fetched on the suit house of Tshs. 40,000,000/- which was less than the valued price of Tshs. 94,000,000/- was reasonable and fair one, Mr. Nkuba submitted that, the valuation report relied upon by the appellant was 4 years old as of the date of public auction contrary to the period not exceeding one year (twelve months) provided under section 52(2) of the Valuation and Valuers Registration Act, 2016 for validity of the valuation report prepared for other purposes than compensation. He said since the appellant claimed no any foul play or fraud or collusion of the respondents during sale, then the obtained highest price is the market price hence the property was properly sold. He relied on the case of **Godebertha Rukanga Vs. CRDB Bank Limited and Others**, Civil Appeal No. 25 of 2017 (CAT-unreported) to back up his stance. It was therefore his submission that the outdated valuation could not change the settled position of the law on market value of the properties sold through public auction hence Courts should not interfere with the rights of bonafide purchaser of a property sold at a public auction, unless

the objector/ appellant proves that the transaction was tainted with fraud or misrepresentation or conspiracy between purchaser and the Auctioneer, in which none of these factors is proved.

Regarding the 3<sup>rd</sup> ground of appeal that, the trial court failed to hold the auction of suit house was unprocedural and procured by irregularities, Mr. Nkuba argued that, this is a new issue as it was not raised and determined by the District Court, therefore cannot be raised at this appellate stage. That notwithstanding he referred to page 9 of impugned ruling and stated that, the issue of procedure was adequately submitted on by the 2<sup>nd</sup> respondent at the trial level and the trial Court in reaching its decision was satisfied that, the procedure used was in compliance with the law as the public auction notice of 14 days was issued and the advertisement made in the gazette, leave alone the notice to the local authority. According to Mr. Nkuba, the appellant never disclosed how he was prejudiced by the sale of the said suit house. He further elaborated that; the applicant is the co-administrator serving conflicting interest with that of the 1<sup>st</sup> respondent, that is why trial Court intervened by making order for sale of the suit house by public auction. He added that, the 3<sup>rd</sup> respondent participated in the said public auction and emerged the winner, the purchase price was paid in terms of the conditions

of sale, which money was subsequently applied by 1<sup>st</sup> respondent in accordance with the procedure of administration of estate, hence the 3<sup>rd</sup> respondent's rights are well protected. In his view if the appellant felt prejudiced by the auction, he could have sought remedy by filing a civil suit for damages as provided for by the case of **Godbertha Rukanga** (supra).

Concerning the allegation that the auction was done without his knowledge, Mr. Nkuba submitted that, the appellant was aware of all processes including advertisement of sale. It was his further view that, as a tenant in the said house, appellant was also aware of the notice of the auction as they were affixed at the walls of the said house. And added that, this point was well addressed by the District Court hence a prayer to dismiss the ground.

Concerning the fourth ground of appeal, Respondents reiterated their submission in the second ground of appeal.

As regard to the last ground of appeal, it was his submission that, the order to sell the suit house came from the trial court, after the conflicting interests of the administrators, so the allegations that the same was initiated by 1<sup>st</sup> respondent alone is baseless. He said, the law is settled that, administrator of the estate is accountable before the court, he has to file inventory and accounts, and in case he misappropriates the probate proceeds he will be

accountable. According to the respondent the money was applied in accordance with the instruction of 1<sup>st</sup> respondent as administrator. So, the allegations that the money were misappropriated lacks basis. In totality and on the basis of the above submissions Mr. Nkuba implore this court to find the appeal is without merit and proceed to dismiss it.

In his rejoinder, Mr. Mahay by large reiterated his submission in chief, and maintained that, neither appellant nor beneficiaries know on the whereabouts of the proceeds of sale of the suit house as both appellant and beneficiaries were not involved in the whole process. On the respondent's allegations that the issue of legality is a new matter he contended the same lacks basis since at page 9 of the impugned ruling the trial magistrate addressed the said issue at length. He therefore reiterated his prayers and moved the court to allow the appeal.

Having considered the rival arguments of both parties and thoroughly visited the available records, I wish to start by responding to the third ground of appeal where the appellant is faulting the learned trial magistrate for not holding that the auction of suit house was unprocedural and was procured with irregularities while Mr. Nkuba is of the contrary view asserting that, the ground is a new matter not raised and determined by the trial court hence

cannot be entertained at this appeal level. I am not in agreement with Mr. Nkuba that, this is a newly raised matter at this stage thus not a submission from the bar as alleged. As rightly submitted on by Mr. Mahay in his rejoinder submission, the District court in its ruling at page 9 while deciding on the issue whether the sale contravened the law of the land or not discussed the procedure obtained by the 2<sup>nd</sup> respondent before concluding that the court was persuaded that, the law was followed at the trial court level. I find it worth to let the District court speak for itself as I hereby quote the excerpt from page 9 of the impugned ruling which reads:

***"2<sup>nd</sup> respondent at the trial through Makame Segulo said they followed the law, gave 14 days' notice, they notified the street chairman office, they also advertised in the gazette hence persuaded the trial court that the law was followed. As the trial magistrate was in a position of hearing the parties of both sides, he was in a position of assessing well and in absence of any law which complained to be violated, I cannot in a position to say that real the law was not followed hence finds this ground also lacks merits."***

What is discerned from the above excerpt of the District Court's ruling is a clear picture that the Court was satisfied after re-evaluating the evidence of one Makame Sengule at the trial court that the sale procedure was followed

by the 2<sup>nd</sup> respondent hence dismissed the appellant's complaint that, the sale was against the law. It is from that background therefore, I dismiss the submission by Mr. Nkuba that, the 3<sup>rd</sup> ground of appeal is newly raised at this stage hence cannot be entertained by the appeal court. It is common law that this being the first appellate court is entitled to re-evaluate the evidence and come up with its findings particularly where it is proved that, there is misdirection and non-direction on the evidence or the lower court has misapprehended the substance, nature and quality of the evidence or where there is no evidence to support a particular conclusion of the lower court, or if it is shown that the trial magistrate/judge has failed to appreciate the weight or bearing of circumstances admitted or proved, or has plainly gone wrong in arriving at the decision reached. See the cases of **Peters V. Sunday Post Ltd.** (1958) E.A. 424 and **Demaay Daat Vs. Republic**, Criminal Appeal No. 80 of 1994 (CAT-unreported).

In the matter at hand this court had ample time to revisit the evidence of the said Makame Sengulo adduced before the Primary Court of Kinondoni on 31/03/2020, the testimony that gave birth to its ruling of 27/09/2020 in which the District Court was called upon by the appellant to examine and

revise in Civil Revision No. 27 of 2020 hence the impugned decision. In his testimony Makame said and I quote:

*"Makame Sengulo, Dalali wa Mahakama, Mahakama yako tukufu ilimpa amri ya kuuza nyumba za mirathi mbili za marehemu Peter Makalukwa kwa kipindi hicho msimamizi akiwa Joyce Makalukwa, tulifany kama taratibu zilivyotaka za kutoa notice ya siku 14 na kutoa pia taarifa ya serikali ya mtaa kujua kama kana migogoro yeyote au laa, tulizifuata taratibu zote na baada ya hapo tulipeleka taarifa hapa Mahakamani na baada ya hapo tukapata rasmi ruhusa ya kuuza nyumba hiyo, nilitangaza kwenye gazeti kwa tarehe ya kuuza 16/01/2019 nilifika kwenye nyumba ya mnada kikakuta imechorwa kuwa nyumba ile haiuzwi, navurugu zilitokea na zoezi kushindikana na tarehe 18/01/2019 nilileta taarifa mahakamani...ndipo msimamizi aliniambia anakwenda kuongea na ndugu zake ...mnada uliendelea tarehe 14/06/2019 baada ya msimamizi huyu kunihakikishia ulinzi...nilipata mteja wa 40,000,000/- japo thamani ni 94,000,000 nilimtaarifu Mhe. Kuwa sijachukuwa hela hivyo nimesema wasimamizi wa mrathi wakae na kukubaliana na familia...Mh. taratibu zilifanyika zote na wanunuzi wa nyumba hiyo walipatikana kwenye mnada na nilileta ripoti na mimi kupewa gharama zangu..."*

From Makame's testimony apart from the copy of letter in the file dated 12/06/2019 written by Makame S. Sengulo for the 2<sup>nd</sup> Respondent, to the

Tandale street Executive Officer informing him of the expected public auction which was to be conducted on 14/06/2019, there is no any other documentation or evidence to prove that 14 days' notice of the said public auction was issued by the 2<sup>nd</sup> respondent on public notice and the advertisement made to that effect in the Swahili and English newspapers circulated in the district as provided by the law, before executing the alleged sale. The said law in regulation 6 of the Land (Conduct of Auctions and Tenders), Regulations of 2001 provides that:

*"The agent shall **publish in one Swahili and one English daily circulating newspaper in the District and on public notice boards the date of the auction** which shall not less than twenty one (21) days before the auction as well as condition of the auction."* (Emphasis supplied)

Since the provision of the law cited above relating to the public auction procedures were no doubt infringed by the 2<sup>nd</sup> respondent, this court is satisfied and therefore of full agreement with Mr. Mahay's submission that, the auction of the disputed suit house proceeded without prior knowledge of appellant as lawfully appointed co-administrator, hence the sale was a nullity for being marred with irregularities. Had the learned Resident Magistrate of the District Court of Kinondoni addressed himself properly on the evidence



of Makame Sengulo and the fact that, no evidence was ever tendered by him to exhibit that, the notice allegedly issued to the public and advertisements made in the gazettes were in fact in existence, I am convinced would not have arrived to the conclusion he reached that, sale of suit house was lawfully conducted. I so hold as those exhibits would have served as a proof to this court that, the appellant was aware of the date of the said public auction, place and time as well as the terms and conditions which evidence is missing, hence was prejudiced as he was not involved in the whole process of sale of the suit house being the co-administrator the estate of the late Peter Mwakalukwa.

In view of the above discussion it is the finding of this court that the third ground of appeal has merit and the appeal is allowed. This ground I find sufficient to dispose of the appeal hence I am proposing not to further deal with the remained grounds of appeal.

Since the alleged sale is already found to be a nullity, I invoke the revisional powers bestowed to this court under section 44(1)(b) of MCA and proceed to nullify the alleged sale of the house of Tandale made by the 2<sup>nd</sup> respondent on the 14/06/2019 and set aside the rulings of the District Court of Kinondoni in Civil Revision No. 27 of 2020 and the Primary Court of

Kinondoni in Mirathi No. 103 of 2011 dated 25/05/2021 and 29/07/2020 respectively and orders thereto. I order that, the same be re-conducted in accordance with the law and with full participation of the appellant but under different appointed competent court broker.

I order each party to bear its own costs.

It is so ordered

DATED at Dar es salaam this 22<sup>nd</sup> day of April, 2022.

E. E. KAKOLAKI

**JUDGE**

22/04/2022.

The Judgment has been delivered at Dar es Salaam today on 22<sup>nd</sup> day of April, 2022 in the presence of the Appellant in person, Ms. Shiza Ahmed advocate for Respondents and Ms. Asha Livanga, Court clerk.

Right of Appeal explained.

E. E. KAKOLAKI

**JUDGE**

22/04/2022

