

IN THE HIGH COURT OF UNITED REPUBLIC OF TANZANIA

DAR ES SALAAM DISTRICT REGISTRY

AT DAR ES SALAAM

MISC. CIVIL APPEAL NO. 185 OF 2022

ELIAS SHAYO..... APPLICANT

VERSUS

MARRY P. KIWANGO.....RESPONDENT

Last order: 21/09/2022

Ruling date: 30/09/2022

RULING

MANGO, J

The Applicant, Elias Shayo filed this application praying the following orders;

1. That, this Hon. Court be pleased to summon parties to appear before your honourable Court so as to enable the Court to nullify the auction and set aside the sale then orders the same to start afresh after completing the valuation process to determine the actual values of the Plot No. 177 Block F, Tegeta are within Dar es salam.
2. That's, costs of the Application be provided for that, the Hon. Court be pleased to grant any other order it deems fit.

The application is supported by an affidavit sworn by Godfrey John Ambet, the Applicants counsel. The second Respondent YONO

AUCTION MART and Co. Ltd did not contest the Application. The 1st Respondent contested the Application.

On 2nd August 2022 when the application was called for hearing the Applicant was represented by Godfrey Ambrace learned advocate, the 1st Respondent was represented by Makubi Kunju, learned advocate and the 2nd Respondent as represented by Goodluck Charles Lwiza learned advocate.

In his submission in support of the Application, advocate Ambrace adopted the contents of the affidavit filed in support of the Application. He submitted further that, the Applicant is dissatisfied with the manner the properties located at Plot No. 63 Block A Babati Street, Temeke District DSM and Plot No. 177 Block F, Tegeta Dar es salaam was auctioned. He argued that the two properties were auctioned without conducting proper valuation of the properties to a certain its market value and forced sale value. He argued further that, the auctioning of the disputed properties without valuation is contrary to the provisions of the Court Brokers and Process Servers (Appointment, Remuneration and disciplinary Rules) 2017, the law that guides Court Brokers in performing their duties. He specifically referred the Court to Rule 24 (1) of the cited law as the provisions that establishes the requirement to have the property valued.

He submitted further that failure to conduct valuation prior to auction sale amounts to a misconduct under Rule 24 (3) of Court Brokers Rules which is punishable under Rule 18 of the same Rules.

He prayed for Courts intervention to rectify irregularities in the Execution process by nullifying the auction sale and order a fresh auction after the properties has been valuated. He referred the Court to letters written by the Applicant, and the 2nd Respondent requesting for courts intervention and prayed the Court to consider them as evidence of the alleged irregularities in the auction sale.

In his reply submission, advocate Kunju for the 1st Respondent adopted the contents of the counter affidavit filed by the 1st Respondent to form part of his submission. He submitted that, the application at hand is unmeritorious as per reasons contained in the 1st Respondents counter affidavit.

The learned counsel challenged non-inclusion of purchasers of the suit properties since the contents of the Applicants affidavit and the counter affidavit and affidavit filed by the 2nd Respondent, establish that, the properties have already been sold. He is of the view that, non – inclusion of the purchases of the suit properties of the suit properties will result to infringement of their right to be heard incase the Court will issue orders that will affect their rights over the properties they have purchased.

With regard to this application, he submitted that there is no provision of law that provides for nullification of sale due to absence of valuation report. He argued that, to the Respondent's understanding, the properties have been sold as reported by the second Respondent via his letter to the Deputy Registrar dated 6th October 2021.

He is of the view that, this application is an afterthought calculated at delaying the first Respondents enjoyment of the fruits of a decree issued by the Court. He argued further that, admission of irregularities by the 2nd Respondent amount to admission of incompetence of the second Respondent. He expounded his argument that, the 2nd Respondent being a competent and professional Court Broker ought to have followed the rules of his profession and not words allegedly from a party to a case. He then prayed to have the application dismissed and the 1st Respondent be given her portion of matrimonial assets as ordered by the Court.

According to him, the rules cited by the Applicant's counsel do not require valuation of the property before auction. It requires the value of the property to be indicated in the report which to his understanding, the value was indicated by the second Respondent as per the legal requirements.

He submitted further that, the arguments would have been valid if there would have been proof that the properties were underpriced

during auction. Citing Order XXI Rule 88 (I) of the Civil Procedure Code, [Cap 33R.E 2019], he argued that, the Applicant has not proved injury of any kind that allegedly was caused by the irregularity of the auction sale.

He is of the view that a proper forum for the Applicant's complaints is the committee as provided under the Court Broker Rules and not the Court since what transpired is merely a professional misconduct on the part of the 2nd Respondent.

Advocate Lwiza for the 2nd Respondent did not object the Application. He admitted the 2nd Respondent's responsibility for the irregularities in the auction sale. He blamed the 1st Respondent to be the cause of the irregularities because she was pressurizing the 2nd Respondent to dispose the properties. He submitted further that, since the 2nd Respondent is responsible with the irregularities, he is also duty bound to rectify the same. Thus, they do not object the application.

In his rejoinder, learned counsel for the Applicant, reiterated his submission in chief.

On the issue of non-joinder of the purchasers of the properties, he submitted that, the Applicant does not know the purchasers because the Respondents have never disclosed their names.

I have considered submissions by both parties and Court record. Court record establishes that, this Court via Matrimonial Cause No. 2 of 2011 declared the marriage between the Applicant and the 1st Respondent to have broken down irreparably and granted a prayer for divorce. It also granted the 1st Respondent 40% as the matrimonial properties which are not located in the clan land. In order for the 1st Respondent to have his 40% of the properties, the Court ordered sale and division of the proceeds of sale to the decreed percentage.

It also issued other orders in respect of other properties and issues of the broken marriage. In execution of the Court order, the 1st Respondent filed Execution No. 16 of 2019 praying for sale of Matrimonial properties as decreed by the Court.

The Application at hand concerns disposition of some of the decreed properties. Court record indicates that, the properties were sold and information regarding sale, purchasers of the properties and the purchase price of the two properties was communicates to the Court, the Applicant and the 1st Respondent via a letter dated 6/10/2021 authored by the 2nd Respondent addressed to the Deputy Registrar. The said letter was also copied to the Applicant and 1st Respondent. Existence of such letter in the Court file establishes that the Applicant did not join the purchasers of the Suitland for reasons best known to himself. I would have orders joinder of the purchasers, but I find the same to be not necessary because I find the application unmeritorious.

As correctly submitted by the 1st Respondent counsel before setting aside sale under Order XX1 Rule 88 (I) of Civil Procedure Code, the Applicant should establish that he has suffered injury by reason of irregularity. The law qualifies the irregularity that may cause the court to set aside sale to be **material irregularity**.

In the application at hand, I do not find the auction sale of the disputed properties to be tainted with material irregularity. I hold so because, the only mentioned irregularity is lack of valuation report. Valuation report is necessary in auctions that are commercially motivated. Disposition of properties for purposes of distribution of matrimonial properties cannot be equated to disposition of properties in order to satisfy a monetary decree or recovery of outstanding loan. Disposition of assets for the sake of dividing the properties may be done by parties agreeing on the value of their properties to be disposed.

The Applicant and 1st Respondent agreed on the auction prices as reflected in the letter written by the 2nd Respondent dated 6/10/2022. It is not clear what transpired in the mind of the Applicant and moved him to file this application. Moreover, the Applicant did not mention even the estimated value of the properties in order to establish that lack of valuation report made the properties to be underpriced.

The provision to Rule 88 (1) restricts setting aside sale on the ground of irregularity or fraud unless the Applicant proves to have suffered

substantial injury by reason of such irregularity or fraud. The provision reads: -

*" Provided that, no sale shall be set aside on the ground of irregularity or fraud unless upon the facts proved the court is satisfied that the Applicant has sustained **substantial injury** by reason of such irregularity or fraud (emphasis added).*

The Applicant in this Application has only raised lack of valuation report as an irregularity in the auction sale conducted by the 2nd Respondent. He has not availed the Court with facts as to how he has been injured by the irregularity. In such circumstance, he cannot be considered to have been substantially injured by the conduct of auction sale without the valuation report.

For those reasons, I hereby dismiss the Application and order the 2nd Respondent to fulfil his other duties as ordered by the Executing court. Given the nature of the Application, I do not award costs.

Dated at Dar es salaam this 30st day of September 2022.


Z. MANGO
JUDGE