

**IN THE HIGH COURT OF TANZANIA
(DAR ES SALAAM DISTRICT REGISTRY)
AT DAR ES SALAAM
MISCL. CIVIL APPLICATION NO. 8 OF 2022**

**1. HAROLD SEKIETE LEVIRA..... APPLICANT
2. FLORESCENCE KOKUJAMA MUKYANUZI APPLICANT**

VERSUS

1. AFRICAN BANKING COOPERATION

TANZANIA LTD (Banc ABC) RESPONDENT

2. NUTMEG AUCTIONEERS & PROPERTY

MANAGERS COMPANY LIMITED..... ..RESPONDENT

RULING

24th & 28th February 2023

MKWIZU, J.

The application traces its origin from loan facilities secured by the applicants from the 1st Respondent. To secure the said loan, the applicants executed a legal mortgage over their property with a certificate of Title NO. 102116 Plot No. 1230 Block "G" Tegeta within Kinondoni Municipality registered in the applicant's name. It is apparent that the applicants defaulted in servicing the loan upon which the first respondent in exercising its rights under the Mortgage Deed instructed the second respondent, **NUTMEG AUCTIONEERS & PROPERTY MANAGERS COMPANY LIMITED**, to auction the suit property.

Seemingly unhappy, the applicants instituted a suit in this court No 236 of 2016 praying *inter alia*, for ascertainment of the amount due and

order the same to be paid by installment with an order restraining the respondents from selling the suit property. The applicant's goals have not attained the dismissal of their case for want of merit prompting an appeal to the Court of Appeal via Civil Appeal No 46 of 2022. Meanwhile, the 1st respondent went ahead to exercise its power of sale by auctioning the suit property to recover the outstanding amount from the applicants. It is further averred that the appellant's suit property was sold through the public auction for TZS. 210,000,000.00/=. Consequently, the applicants came to this court seeking the following orders:

- 1. That the purported auction of the Applicants property registered under certificate of Title No. 102116 Plot. 1230 Block "G" Tegeta within Kinondoni Municipality held on 5th March 2022 be declared a nullity and set aside.*
- 2. That the eviction of the Applicants from the property be declared illegal*
- 3. That the Applicants be allowed to reoccupy the property pending the final determination of their appeal filed on 10th February 2022 and registered as Court of Appeal of Tanzania Civil Appeal No 46 of 2022*
- 4. That the Court be pleased to issue an injunction against any further attempts by the 1st respondent in execution of the judgement and decree of the Applicant's other properties*
- 5. That the costs of this application be borne by both respondents*
- 6. Any other or further reliefs as this Honourable Court shall deem fit to grant.*

The application was brought by a chamber summons made under sections 31, 33, 95, and Order XXI Rule 88 of the Civil Procedure Code (Cap. 33 R. E. 2002). The Application is supported by the applicants herein.

As it stands, the application tends to challenge the auction of the suit property with a prayer to have it declared null and void. The applicant's contention is that the sale was without notice asserting that the auction was in an obvious violation of the procedures governing the auctioning of the mortgaged properties under the lender's power of sale and that it was sold at a price below its market value.

The application was disposed of by written submissions. Having taken into account the nature of the application, parties' submissions, and the featured point I sought it prudent to investigate first the competence of this application before going to its merit. Since the point came during the composition of the ruling and having in mind the right of a party to be heard before any adverse action is taken against a party, I recalled the parties on 24/2/2023 to have them address the court on the point.

Mr. Shuma advocate for the applicants was the first to address the court on the points. While admitting that the auctioning of the suit property was not in the execution of the court decree but under the respondent's power of sale, he said his clients have been cravenly affected by the said sale and being the mortgagors, they came to court to challenge the sale in the sense that auction procedures were flawed and that the property was sold far below the forced market value.

He said though the application was brought during the pendency of an Appeal before the court, which is now decided, still the decision issued by the Court of Appeal is of no effect on this matter.

On the other hand, the respondent's counsel maintained that the auction was in respect of the lender's power of sale and therefore the proper way to challenge it is by way of the suit. His contention was that the prayers sought in the application need proper evidence and attendance of witnesses which cannot be procured through a chamber summons. He challenged the competence of the application for being brought under the wrong provision of the law. To him, the enabling provisions cited envisage an auction conducted after a court decree and not under the lender's power of sale

He, in addition, submitted that the application itself contains multiple prayers such as substantive prayers including injunction prayers which is governed by a separate law altogether. He said, to have a tenable injunction prayer, there must be a pending suit between the parties. In our case, there is no any pending case and therefore prayers for injunctions cannot stand. And further section 95 cited could not be used to move the court for the orders sought because there are specific provisions catering for injunctions and other prayers sought for. He urged the court to strike out the application for being incompetent.

In his short rejoinder, Mr. Shuma reiterated his submission in chief with a prayer not to condemn his clients to costs, should the court finds the application incompetent,

I have considered the application and the rival submissions by the party's counsels. The applicant's main complaint is demonstrated by

their averments in paragraphs 8,9, 10, 12, and 13 of the supporting affidavits by the applicants.

"8. That, acting from and on behalf of the 1st Respondent, the 2nd Respondent purported to sell through an auction the property referred to under paragraph 4 of this Affidavit. The Applicants are not aware of, nor were they ever referred to any advertisement placed in any newspaper notifying the public of the intended auction.

9. That during the purported auction, the 2nd Respondent sold the property for the price of Shs. 10,000,000/-. The Respondents have repeatedly refused and /or frustrated the Applicants' requests to be given a copy of the Certificate of Sale

10. That irrespective of the Lack of such a certificate, I state that the property was sold at a price that was far below its market value of Shs 400,000,000/- or its forced sale value of Shs. 380,000,000/-, according to the Valuation Report dated January 2013. The valuation exercise was carried out by M/S GIMCOAFRICALIMITED upon the instructions of the 1st Respondent. The 2nd Respondent knew, or ought to have known, the contents of this valuation report or some other measure of a possible reserve price.

12. I also state that in spite of the existence of a date showing the value of the property in 2013, and despite the lack of any date showing that the property was in a state of disrepair and maintenance, the property was

sold at a price that did not address the need to repay the outstanding liability or to protect the interests of the Applicants as mortgagors.

13. That, in a further indication that the property was in good order and should not have been sold at a throw-away price, it is now being offered for sale for shs 550,000,000/- by a company known as Dar es salaam Brokers company through an advert placed in various social media accounts ...

17. That when the property was put up as collateral for the credit facilities in 2013, its market value was officially certified as Tshs. 400,000,000/-, with a corresponding forced sale value of Shs. 380,000,000/-"

The above paragraphs assert a *breach of the statutory duty* by the 1st respondent imposed by sub-section (1) of section 132 of Cap 113. The applicant's counsel confirmed that the sale was in relation to the Lender's powers of sale and that the applicants are not contesting the right of enforcement but feel strongly that the property was worth far more than Tsh 210,000,000/= stressing on the nullification of the auction.

I think this point should not detain the court further. As hinted above, this application was brought under sections 31,33 and Order XXI Rule 88 of the Civil Procedure Code governing execution of the court's decree which are inapplicable under the circumstances of this case for it was not a sale envisaged by the cited provisions of the law.

Section 31 for instance says:

The provisions of this Code relating to the execution of decrees shall, so far as they are applicable, be deemed to apply to the execution of orders.

Section 33 refers to a court on which the decree may be executed: The section says:

33. A decree may be executed either by the court which passed it or by the court to which it is sent for execution.

Similarly, Rule 88 of Order XXI talks of a situation where the property is sold in the execution of the decree. It says:

*88.- (1) Where any immovable **property has been sold in execution of a decree**, the **decree-holder**, or any person entitled to share in rateable distribution of assets, or whose interests are affected by the sale, may apply to the court to set aside the sale on the ground of a material irregularity or fraud in publishing or conducting it: 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.*

I need no authority to state here that citing a wrong and inapplicable provision in support of the application renders the application incompetent.

Further to that, since the complained auction of the suit property was in respect of the lender's power of sale, the proper way to challenge it would have been by way of the suit where the proper trial would be

conducted to ascertain the validity or not of the complained sale by allowing proper tendering of evidence, including sale documents and attendance of witnesses which cannot be procured through a chamber summons.

Suffice to conclude here that the application is incompetent and proceed to strike it out with costs. Order accordingly.

Dated at Dar es salaam this 28th Day of February 2023



E. Y Mkwizu
Judge
28/2/2023

