

**IN THE HIGH COURT OF TANZANIA**  
**(DAR ES SALAAM SUB DISTRICT REGISTRY)**  
**AT DAR ES SALAAM**  
**CIVIL APPEAL NO. 85 OF 2022**

(Arising from the ruling and drawn order of the District Court of Kinondoni at Kinondoni in Misc. Civil Application No.215 of 2021 dated 2<sup>nd</sup> July,2022 before H.S. Msongo -SRM)

**IDDE ALLY ALHEY.....APPELLANT**

**VERSUS**

**MWINYI AYOUB SIMBA..... 1<sup>ST</sup> RESPONDENT**

**CHIKU MUSA MPAMKA.....2<sup>ND</sup> RESPONDENT**

**ABDALLAH MAKATTA t/a SENSITIVE**

**AUCTION MART AND COURT BROKERS.....3<sup>RD</sup> RESPONDENT**

**JUDGMENT**

*Date of last order: 15/06/2023*

*Date of Judgment: 14/07/2023*

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

Before the District Court of Kinondoni at Kinondoni Idde Ally Alhey ( the appellant herein) filed an application to nullify sell of the matrimonial property located at Kimara Suka Bwawani area within Ubungo Municipality in Dar es Salaam on the allegations that, the same was marred with material irregularities and fraud. In its ruling delivered on 2<sup>nd</sup> June, 2023, the court found the appellant had failed to prove her claims thus, her application was dismissed.

In a nutshell the factual background of the case is simple to tell and goes thus, the appellant herein contracted Islamic marriage with the 1<sup>st</sup> respondent before the same was dissolved on 24/06/2015 by the District Court of Kinondoni and the matrimonial properties ordered to be divided at a share of 15% and 85% to the appellant and 1<sup>st</sup> respondent respectively. Among the matrimonial properties was the house above mentioned and subject of this appeal. It was the appellant's assertion that; the house was sold without notice issued to her hence marred with procedural irregularities before she called for court's intervention to nullify the said sale, but lucky was not on her side as the application was dismissed. Disgruntled, the appellant preferred this appeal fronting five (5) grounds of appeal going thus;

- 1. That the learned trial magistrate erred in law and fact by holding that there is no any fraud from issuance of notice, public auction and sale of matrimonial property which was made by the 3<sup>rd</sup> respondent.*
- 2. That the trial magistrate erred in law and fact by not taking into consideration the heavy and credible evidence of the appellant*
- 3. That the trial magistrate erred in law and fact by failure to evaluate evidence adduced by the appellant that the sale of property was*

*marred by serious irregularities such as failure to notify the appellant on day of sale of the matrimonial house located at Kimara Suka, Bwawani area, within Dar es Salaam City instead he relied on a weak and incredible respondent's evidence.*

*4. That the trial magistrate erred in law and facts by not assessing the whole evidence of the appellant on how sale was made of the disputed property a matrimonial house to the second respondent without proper notice to the appellant.*

*5. That the trial magistrate ruling lack legal reasoning.*

During hearing of the appeal both parties appeared represented as appellant hired the services of Mr. Denis Malamba while the respondents enjoyed the services of Mr. Charles B. Shipande, both learned advocate and by consensus, the appeal was disposed by way of written submission.

In his submission, Mr. Malamba prayed for the court's leave to join the 1<sup>st</sup> and 4<sup>th</sup> and argue them together, argued the 2<sup>nd</sup> and 5<sup>th</sup> grounds separately, while dropping the 3<sup>rd</sup> ground.

Submitting on the first ground as combined grounds No. 1 and 4 of appeal as to whether the trial magistrate was in error to find there was no any fraud by the 3<sup>rd</sup> respondent in issuance of notice and conducting public auction

and sale of parties' matrimonial property Mr. Malamba argued that, the law under section 12(1) of the Public Auctioneer Act, [Cap. 277 R.E 2002] provides a clear procedure on how sales of landed property should be conducted, the law in which all court brokers are bound with. He argued that the sale conducted on May 2020 by the 3<sup>rd</sup> respondent was without notice to the appellant, tainted with serious irregularities thus breeding to illegal sale of the property to the 2<sup>nd</sup> respondent. As the appellant was not served with notice of fourteen days stating the time, date and month in which auction of the matrimonial property resulted from court's order made by Hon. Mushi in Matrimonial Cause No. 69 of 2013 delivered 24<sup>th</sup> June, 2015, the whole exercise was tainted with illegality for want of transparency as she was denied of her right to agree or object the price obtained by the highest bidder. According to Mr. Malamba the 3<sup>rd</sup> respondent maliciously failed to notify the appellant for furthering ill intent of disposing of the property below the valued price of Tshs. 128,000,000/= in the evaluation report and the forced value as the adverts in the newspaper was meant to notify the public only and that is why the house was sold to the 2<sup>nd</sup> respondent who is the biological mother to the 1<sup>st</sup> respondent who had an interest in the property.

The case of **Mremi Enterprises Limited and Another Vs. BOA Bank**

**Tanzania and 2 Others**, Land Case No. 195 of 2014 (HC-unreported) was cited to support the contention that sale of the landed property to the party with an interest therein renders the entire exercise illegal, the remedy of which is to nullify the same. The learned counsel argued further that, the appellant doubts if the auction (sale) was really done, certificate of sale issued, current evaluation report present and if there was the 2<sup>nd</sup> highest bidder as the 2<sup>nd</sup> respondent who bought that property has a conflict of interest over the same, something which shows the whole exercise was tainted with fraud. He therefore pressed the Court to find the sale was tainted with illegality hence proceed to allow the appeal by nullifying the same.

In response to this ground, Mr. Shipande attacked appellant's submission contenting that, she has totally failed to show/ establish how the alleged fraud was committed during the said auction as the thumb rule as per section 110 (1) and (2) of the Evidence Act, [Cap 6 R.E 2022] and the case of **Anthony M. Masanga Vs. Penina (Mama Ngesi) and Another**, Civil Appeal No. 118/ 2014 is that, he who alleges bears evidential burden of proof and the standard is on balance of probability. On the issue of failure to issue the appellant with notice before conducting the 2<sup>nd</sup> auction he

contended the cited section 12(2) of Public Auction Act does not apply to the circumstances of this matter as the 3<sup>rd</sup> respondent being a court broker is governed with The Court Brokers and Process Servers (Appointment, Remuneration and Disciplinary) Rules, 2017, GN. No. 363 published on 22/09/2017 (the Court Brokers Rules), in particular the mandatory requirement of issuing a notice to the judgment debtor under Rule 21 which she complied with by advertising the auction through the newspaper namely Habari Leo dated 17<sup>th</sup> May, 2020. He argued, in addition to that much as the appellant admits to have been present at the unsuccessful first public auction conducted by the 3<sup>rd</sup> respondent in September, 2019, as well as in court when the order for the 2<sup>nd</sup> auction was issued, her claim for issue of notice in the 2<sup>nd</sup> auction lacks legal legs to stand on claim for being aware of what was going on. He opined that following those circumstances, the 3<sup>rd</sup> respondent as court broker informed the parties via mobile phones that, the property was to be subjected to sale hence should buy the newspaper with advertisement in which they responded to hence the auction was transparent at both were aware of the date, month, year and place auction was to take place. According to him the public auction was successful as it was attended

by a number of the would-be purchasers and the 2<sup>nd</sup> respondent emerged as the highest bidder of the sale.

On the contention of disposing of the house at a throw away price Mr. Shipande recanted it stating that, there is no evidence in terms of valuation report or whatsoever tendered before the court to prove that the purchase price was far below the market price. In his view, the price of 35,000,000 was the best price obtained market price at the auction on that day after the advertisement was done in the mentioned newspaper and the announcements made before the auction took place, hence no evidence of breach of duty in obtaining the best price during the auction.

Concerning the contention of 2<sup>nd</sup> respondent's interest in the property he said, it is immaterial as the said relationship in itself cannot establish or show that, she had interest over the property for attending the auction as any other person following the public notice issued to by the 3<sup>rd</sup> respondent. He said the house was sold to the 2<sup>nd</sup> respondent at the highest bid price of Tshs. 35,000,000 and the difference in price is always brought by the market fluctuations and locations of the property. Concerning the case of **Mremi Enterprises Limited and Another** (supra) cited by the appellant he said,

the same is distinguishable to the facts of this case. He thus invited the Court to dismiss the application with costs.

In rejoinder submission, Mr. Malamba argued that, the circumstance and nature of this case is quite different with other cases because the 3<sup>rd</sup> respondent is the one who was inclined to prove if the proper procedure for sale of a property subject to matrimonial property was adhered or not. He maintained that the appellant was not notified after the first auction had failed. He said the submission that, the 3<sup>rd</sup> respondent notified the appellant is untrue as she was able to attend the first auction only because she was properly notified, since she become aware after the house had been already sold to the 2<sup>nd</sup> respondent and that there is taxation pending to the court.

According to him, 3<sup>rd</sup> respondent did not adhere to two procedures of one, notifying both parties of the date of auctioning the property which was a matrimonial property in which both were interested parties for the purposes of maintaining transparency before sale, and second, advertisement the auction in newspaper in order to notify the public over the intended sale. Otherwise, he reiterated his submission in chief.

I have dispassionately considered and weighed the rivalry submission by the counsels from both sides and examined the available records, with a view to



ascertaining the appellant's grievances in this ground of appeal. In answering this ground, I wish to be guided by the principle in proof of civil cases that, he who alleges must prove and the onus of so proving lies on the party who would lose the case if the alleged existing facts are not proved, as the standard of proof is on the balance of probabilities. This is in terms of sections 3(2)(b), 110(1) and (2) and 111 of the Evidence Act, [Cap. 6 R.E 2019], and the case of **Abdul Karim Haji Vs. Raymond Nchimbi Alois and Another**, Civil Appeal No. 99 of 2004 (CAT-unreported)

Going by the records, it is not disputed that the appellant complained before the District Court that the auction exercise of their matrimonial house was tainted with irregularities and fraud for want of notice before conducting the 2<sup>nd</sup> auction and lack of transparency, but the trial Court ruled out that she had failed to prove the alleged irregularities and fraud hence dismissal of her application for nullification of sale. In the present appeal Mr. Malamba maintains that, there was procedural irregularities and fraudulence in the whole exercise of auctioning the property in dispute which was sold to the 2<sup>nd</sup> respondent at the throw away price, while Mr. Shipande holds the contrary view submitting that, the procedure was followed and the exercise was transparent as the auction was advertised and announcements made

even during the auction day where the 2<sup>nd</sup> respondent emerged the highest bidder, hence the appellant was aware of what was going on. And further that, regarding to the requirement of issue of notice the Public Auctioneers Act is not applicable to the 3<sup>rd</sup> respondent what binds her is the Court Brokers Rules, in which Rule 21 was adhered to. To disentangle parties from locking their horns on the above issue, four sub-issues have to be considered and determined against the available evidence in record and the submission made by both parties. **One**, whether the Public Auctioneers Act is applicable to the 3<sup>rd</sup> respondent as a court brokers under the circumstances of this case, **second**, if yes, whether there was a requirement for issue of notice to the appellant before conducting 2<sup>nd</sup> auction, **third**, if response to the 2<sup>nd</sup> issue is in affirmative, whether the appellant was legally issued with notice before the 2<sup>nd</sup> auction was conducted and **fourth**, whether there was any irregularities and fraudulence in the whole exercise of auctioning the parties matrimonial property.

In this ruling I am proposing to start with the first sub-issue as to whether the Public Auctioneer Act is applicable to 3<sup>rd</sup> respondent as court broker in discharge of his functions. I wish restate from the outset the settled principle that each case is decided basing on its own facts. To answer the above sub-

issue, I am of the settled view that, the Public Auction Act is applicable and binds the court brokers in discharging their function despite the fact that, there is in place now the "Court Brokers Rules" governing appointment of court brokers and process servers, their duties and their disciplinary procedures and the mode in which execution of orders and decrees of the court are to be effect. The reason I am so opining is not far-fetched as **one**, it is undisputed fact that court brokers as auctioneers when executing court orders must have first undergone registration and licenced under Auctioneers Act, the requirement which is mandatory under Rule 5(1)(b) of the Court Brokers Rules for them to be eligible for appointment as court brokers. For clarity Rule 5(1)(b) of the Court Brokers Rules reads:

*5.-(1) Where the Committee is satisfied that a person:- (a) is a citizen and resident of Tanzania who has attained the age of majority;*

*(b) **is director of a company incorporated in Tanzania or partner of an entity which is registered and licensed under the General Auctioneers Act;***

*(c) N/A. (Emphasis added)*

**Second**, owing to the nature of the sold property in this matter which was a matrimonial property and the auction order issued by the Court, the 3<sup>rd</sup> respondent cannot claim to have solely acted under Court Brokers Rules in

exclusion of the Auctioneers Act. My view is fortified on the fact that, the 3<sup>rd</sup> respondent could not have employed the provisions Rule 21 of Court Brokers Rules purporting to be in compliance with the requirement of issue of notice be it to parties involved or members of the public before conducting the auction as she would want to impress upon the this Court, since the 14 days notice referred therein and as provided in form No. 10 to the first schedule is issued to judgment debtor to require him to settle the decretal amount before the attachment and sale of the property as ordered by the court, while in the present matter there was no any decretal amount directed by the Court to be realised through auction of the disputed matrimonial house. As there was no decretal amount ordered by the Matrimonial Court and since there was no agreed or reserved price by the parties, I do not subscribe to Mr. Shipande proposition as the 3<sup>rd</sup> respondent was also bound to employ the provisions of Public Auctioneers Act, in conducting the auction ordered by the Court. Hence the first sub-issue is answered in affirmative.

Moving to the second sub-issue as to whether there was a requirement for issue of notice to the appellant before conducting 2<sup>nd</sup> auction. Without wasting court's time the answer to this sub-issue is in affirmative as the law under section 12(2) of Public Auctioneers Act as rightly submitted by Mr.

Malamba provides that, a 14 days public notice must be issued before the public auction is conducted. The said section 12(2) of the Auctioneers Act reads:

*(2)No sale by auction of any land shall take place until after at least fourteen days public notice thereof has been given at the principal town of the district in which the land is situated and also at the place of the intended sale.*

From the above exposition of the law, it is evident to me that, the law is very straight and categorical that, no land will be sold by way of auction after lapse of 14 days of the issue of public notice. It goes further to qualify that the said notice must be issued in the principal town where the landed property is situated and at the place where the intended auction is to take place. This goes without saying that, in this matter by issuing notice in the principal town be it by way of placing it in conspicuous places and in the place where the advertence, the appellant would have deemed to have been served with a notice. Issue of notice of the intended auction by the 3<sup>rd</sup> respondent was pivotal not only to the appellant but also the 1<sup>st</sup> respondent so as to make them aware and probably avail them with opportunity to participate in the said public auction or agree on the reserved price is no

valued price of the property or satisfy themselves with compliance of the auction procedure and amount of money obtained out of it.

Next for determination is the third sub-issue as to whether the appellant was legally issued with notice before the 2<sup>nd</sup> auction was conducted. Mr. Shipande submits that, she was involved in the 1<sup>st</sup> auction which was not successful and was present in court when the 2<sup>nd</sup> auction was ordered to be conducted. And further that, acknowledged the realised amount and taxation by the 3<sup>rd</sup> respondent when called to collect her share though she refused to accept the same, hence was aware of the whole auction process which was fairly and transparently conducted as the sale was advertised in Habari Leo newspaper of 17<sup>th</sup> May, 2020, annexed as annexure MC3 to the counter affidavit. With due respect to the learned counsel, I do not purchase his proposition that, apart from the sale notice advertised in the newspaper appellant's attendance during the 1<sup>st</sup> auction and her presence in Court during the issue of an order for 2<sup>nd</sup> auction, amounted to sufficient and legal notice as per the requirement of the law.

Regarding to the said advert of 17<sup>th</sup> May, 2020 as per annexure MC3 to the 1<sup>st</sup> and 2<sup>nd</sup> respondents' counter affidavit, having paid a deep look on it though purporting to be in compliance with the law as submitted by Mr.

Shipande, I find the appellant was not properly served with the notice of 2<sup>nd</sup> auction before the same was conducted for contravening the provisions of section 12(2) of the Auctioneers Act, that puts mandatory issue of 14 days public notice prior to the public auction. I so hold as while the notice is purported to have been issued on 17<sup>th</sup> May, 2020 as per annexure MC3 to the 1<sup>st</sup> and 2<sup>nd</sup> respondent's counter affidavit the proclaimed date for conducting the said auction was 21<sup>st</sup> May, 2020, four (4) days after issue of the notice and ten (10) days prior to lapse of fourteen (14) days statutory notice in terms of section 12(2) of the Public Auctioneers Act. The third sub-issue is therefore answered in negative.

Lastly is the fourth sub-issue as to whether there was any irregularities and fraudulence in the whole exercise of auctioning the parties' matrimonial property. Taking into consideration the findings of this Court in the third sub-issue above and other factors to be deliberated on soon herein, I answer this sub-issue in affirmative. The reasons I am so holding are not far-fetched as **one**, the notice was in contravention of the provisions of section 12(2) of the Public Auctioneers Act for being of four (4) days instead of fourteen (4) days, which undoubtedly prejudiced the appellant as she was denied of her right to participate in the said auction, propose or set the reserved auction

price by consensus with the 1<sup>st</sup> respondent if possible and witness transparency of the whole exercise. Hence such infraction of the law was fatal irregularity. See also the cases of **Godebertha Rukanga Vs. CRDB Bank Limited & 3 Others**, Civil Appeal No. 25/17 of 2017 (CAT-unreported) and **Judith Athuman Shani Vs. National Microfinance Bank PLC and 2 Other**, Land Appeal No. 5 of 2021 (HC-unreported). It was held in the case of **Godebertha Rukanga** (supra), in the situation akin to the present one that, a short notice before auctioning the mortgaged property was fatal irregularity for depriving the appellant therein with the option for redemption of her property. In so doing the Court echoed thus:

*"The provisions of s. 12 (2) of the auctioneers Act is couched in mandatory terms and therefore, in our considered view, failure to give fourteen days notice before auctioning the mortgaged property is not a mere procedural irregularity."*

The Court went on at page 25 of the said judgment to conclude that:

*In sum, the breach of the provisions of s. 12(1) of the Auctioneers Act prejudiced the appellant because, as shown above, it deprived her the right to obtain the best price of the suit property at the time of its sale.*

**Second**, having proved to the Court that, she failed to attend the 2<sup>nd</sup> auction for want of notice hence doubting whether the said 2<sup>nd</sup> auction was



conducted and whether the 2<sup>nd</sup> respondent was in attendant and emerged the successful bidder out of a number of others in attendance, in terms of section 115 of the Evidence Act, [Cap. 06 R.E 2022], the respondents' legal duty in particular the 3<sup>rd</sup> respondent to exhibit to the Court that, the said auction was indeed conducted, when was it and where was it conducted and a number of persons in attendance on date, the duty which they failed to discharge. **Third**, there is no evidence tendered by the 2<sup>nd</sup> respondent proving to the Court's satisfaction that, she was the highest bidder during the auction, whether the sale was absolute and she paid the purchase price in full and issued with the certificate of sale so as to exhibit that was a bonafide purchaser. The blatant violation of the mandatory issuance of notice by the 3<sup>rd</sup> respondent before conducting the 2<sup>nd</sup> auction and none disclosure of such important evidence by all respondents, in my firm view amounted to proof of irregularities and fraud in the whole process of auctioning the said matrimonial property. Had the learned trial magistrate considered all those three above deliberated reasons, I believe she would not have arrived to the findings that, the appellant failed to prove irregularities and fraud during the auctioning process.

In view of the above discussed sub-issues I find the first issue as combined is answered in affirmative that, the trial magistrate was in error to make a finding that, the auction and whole sale of the property located at Kimara Suka Bwawani area, within Ubungo Municipality in Dar es salaam Region was not marred with material irregularities and fraud. This ground alone suffices to dispose of the appeal and I see no reason to labour much on the remained grounds as that will be an academic exercise in which I am not prepared to venture into.

For the fore stated reasons and the fact that irregularities and fraud during the sale of the said property, I find the whole exercise was a nullity, hence proceed to allow the appeal. It is hereby ordered that, the sale of property located at Kimara Suka Bwawani area, within Ubungo District Dar es salaam region, as appellant and 1<sup>st</sup> respondent's matrimonial property is hereby nullified and set aside. Parties are at liberty to conduct a fresh auction in compliance with the order of the court and in accordance with the law.

Given the nature of the case I order each party to bear its own costs.

Ordered accordingly.

Dated at Dar es Salaam this 14<sup>th</sup> July, 2023.

E. E. KAKOLAKI

**JUDGE**

14/07/2023.

The ruling has been delivered at Dar es Salaam today 14<sup>th</sup> day of July, 2023 in the presence of the appellant in person, Mr. Charles Shipande, advocate for the respondent and Mr. Oscar Msaki, Court clerk.

Right of Appeal explained.

E. E. KAKOLAKI

**JUDGE**

14/07/2023.

