

IN THE HIGH COURT OF THE UNITED REPUBLIC OF TANZANIA

TANGA DISTRICT REGISTRY

AT TANGA

LAND APPEAL NO. 73 OF 2022

(Arising from Application No. 88 of 2016 of the District Land and Housing Tribunal for Tanga at Tanga)

KASSIM MOHAMED KAMPIRA (As Administrator of the Estate
of the late **MOHAMED SAID KAMPIRA**) **1ST APPELLANT**

MADARAKA KASSIM **2ND APPELLANT**

VERSUS

SIMON ELIUD KIKOTA **RESPONDENT**

JUDGMENT

02/10/2023 & 12/12/2023

NDESAMBURO, J.:

The appellants who stood as respondents before the District Land and Housing Tribunal for Tanga (DLHT) are before this court challenging the decision of the DLHT in Application No. 88 of 2016 rendered on the 21st May 2021 in favour of the respondent.

The brief facts of the matter which gave rise to this appeal are as follows. On 16th March 2013, the house situated at Plot No. 339

Block C Kwanjeka North, the subject matter of this appeal was sold by public auction in execution order by the DLHT in Land Application No. 41 of 2012. The house in question was purchased by the respondent. However, after acquiring the property, the appellants did not give vacant possession, and asserted ownership, claiming that the deceased, Mohamed Said Kampira had purchased it in his son's name from the original owner, Maulid Hamisi Omari. The appellants' refusal to vacate the disputed house prompted the respondent to initiate Application No. 88 of 2016.

Before the DLHT in Application No. 88 of 2016, the facts reveal that the respondent filed a lawsuit, claiming, among other reliefs, to be declared the lawful owner of the disputed house. The respondent asserted that he had successfully purchased the house in an auction conducted by Majembe Auction Mart. On the contrary, as mentioned earlier, the first appellant contended that the disputed house belonged to his late father, who had purchased it on behalf of his son, Kassim Mohamed Kampira, from Maulid Hamisi Omari in 1997. The appellant further explained that in 2013, the disputed house

was auctioned by Majembe Auction Mart, and they subsequently made a follow-up on the matter at the DLHT.

During their inquiry at the DLHT, they discovered that the house had been auctioned due to the failure of Maulid Hamisi Omari, the original owner, to repay a loan advanced to him by Simon Masue. As a result of this failure, Simon Masue initiated Application No. 41 of 2012 against Maulid Hamisi Omari, which was decided *ex parte* in his favour at the DLHT in Tanga.

Following the decision of the DLHT in the above Application No. 41 of 2012, Mohamed Said Kampira, lodged Misc. Application No. 41 of 2012 under Order XXI Rules 57 and 59 of the Civil Procedure Code, Cap 33 R.E 2002 (now R.E 2019) objecting to the attachment and sale of the disputed house claiming that he had purchased the disputed land in his son's name from Mauli Hamisi Omari in July 1997 and that, the transfer of the ownership had not been effected by that time and so, the ownership was still in the registered name of Maulid Hamisi Omari who died in 2000. To support this assertion, he attached the sale agreement between his

son and Maulid Hamis Omari. In the application, Mohamed Said Kampira further asserted that, in 2011, his wife Madaraka Kassim took a loan from Maimuna Ayub and as a security, she deposited the letter of offer of the property in dispute. Later on, Maimuna Ayub gave the said letter of offer to Nasir Omari who took a loan from Simon Masue while depositing the said letter of offer. Mohamed Said Kampira further contended that Maulid Hamisi Omari died in 2000 and therefore he could not be a judgment debtor in the said Application No. 41 of 2012.

In response, Simon Masue challenged the sale agreement for containing a name different from the name alleged by Mohamed Said Kampira and there was no explanation why the person named in the sale agreement did not appear in the DLHT to object to the attachment. He also challenged the agreement for having a different plot number which was referred to as Plot No. 339 Block D Kwanjeka instead of Plot No. 339 Block C Kwanjeka. Further, there was no proof of the death of Maulid Hamisi Omari.

Having heard the application, the DLHT dismissed the application on the ground that, the applicant's wife used the letter of offer as security to secure a loan, therefore, the applicant was to be blamed for his inaction. Further that there was ample evidence from the agreement that, the applicant's wife secured a loan from Simon Masue and deposited the letter of offer as security for the loan. In addition, there is no proof that the applicant purchased the house in his son's name.

The records further reveal after Mohamed Said Kampira's efforts in the objection proceedings proved futile, the execution process proceeded whereas Majembe Auction Mart Limited was assigned with execution and later, the certificate of sale was issued on 22nd November 2016. As alluded to above, despite the auction, the appellants did not give vacant possession an act which made the respondent file Application No. 88 of 2016 which its decision did not please the appellants and hence this appeal.

Expressing their dissatisfaction with the aforementioned decision, the appellants have initiated the current appeal based on

six grounds. However, during the submission, they chose to abandon one ground, resulting in five remaining grounds, which are as follows:

- 1. That, the learned Chairman of the Tribunal erred in law and facts after deciding the case in favour of the Respondent and failed to consider that the auction of the house on Plot No. 339 Block C Kwanjeka North was null and void as the Respondent failed to pay 75 per cent as required by law.*
- 2. That, the learned Chairman of the Tribunal erred in law and facts after deciding the case in favour of the Respondent and failed to consider that the rules which governed auctions were not applied.*
- 3. That, the learned Chairman of the Tribunal erred in law and facts after deciding the case in favour of the Respondent and failed to consider that the Appellants purchased the house on Plot No. 339 Block C Kwanjeka North from Maulid Hamis Omari (Deceased) in 1997 and is living in the house more than 16 years.*
- 4. That, the learned Chairman of the Tribunal erred in law and facts after deciding the case in favour of the Respondent and failed to consider the evidence of RW2, exhibit R3 and R4 that Maulid Hamis Omari died on the 1st day of January 2000 thus it is not possible for the dead man to take a loan in 2011.*

5. That, the learned Chairman of the Tribunal erred in law and facts after deciding the case in favour of the Respondent and failed to consider that the evidence of the Appellants is heavier than that of the Respondent.

On the above grounds, the appellants pray for this court to allow the appeal with costs and for the proceedings and the decision of the DLHT to be quashed and set aside.

By consent, the appeal was argued by way of a written submission, the appellants were being represented by Mr. Ramadhani Rutengwe, a learned counsel, whereas the respondent had the service of Mr. Christopher Wantora, also a learned counsel.

In the first ground, Mr. Rutengwe challenges the validity of the auction for the respondent's failure to meet the obligation of paying 75% of the purchase price. The learned counsel argued that the provisions specified in Order XXI Rule (1) and (2) of the Civil Procedure Code, Cap 33 R.E 2019 (hereinafter referred as Cap 33), Regulation 29(4) of the Land Disputes Court (The District Land and Housing Tribunal) Regulations 2003 (hereinafter referred as Regulations 2003) as well as Order 9(2) of the Guidelines for Court

Brokers and Court Process Servers, 2017, were not strictly adhered to in this particular case. Mr. Rutengwe further emphasized that the respondent had not made the mandatory 75% payment within the prescribed 15-day period from the date of the auction.

Regarding the second ground, which questions the DLHT's decision due to its failure to consider the proper application of auction rules, Mr. Rutengwe strongly asserted that the respondent had not complied with the requirement to deposit 75% of the auction proceeds into the tribunal account within the stipulated 15-day period. He also highlighted the court broker's failure to file a report with the tribunal within 14 days, which he argued violated the provisions of Regulation 29(3)(b) and (4) of the 2003 Regulations, as well as Order 9(3)(4) of the 2017 Guidelines for Court Brokers and Court Process Servers. Moreover, Mr. Rutengwe pointed out that the certificate of sale had been issued three years after the sale took place. These demonstrate that the relevant laws and regulations governing auctions were not adhered to. To support his argument, he cited the case of **Hamisi Bushiri Pazi and 4 others v Saul**

Henry Amon and 4 others, Civil Appeal No. 166 of 2019 CAT (unreported).

Concerning the third ground, Mr. Rutengwe argued that the DLHT failed to consider a crucial aspect: the appellants' long-standing ownership of the disputed house, which they had purchased from Maulid Hamis Omari back in 1997 and resided in for over 16 years. He pointed out that the testimonies of both Kassim Mohamed Kampira (RW1) and Hussein Hamisi Omary (RW2) were corroborated by documentary evidence, including Exhibits R1 (the sale agreement) and R2 (the letter of offer).

Furthermore, Mr. Rutengwe contended that the DLHT made an error by stating that the house sold at auction was located at Plot No. 339 Block C Kwanjeka, while the one purchased by the appellants in 1997 was situated at Plot No. 339 Block D Kwanjeka. He emphasized that there was no dispute that the appellants had resided in the house located at Plot No. 339 Block C Kwanjeka for over 16 years and that the inclusion of the letter "D" in Exhibit R1 was a simple typographical error, a common human mistake.

Regarding the fourth ground of appeal, Mr. Rutengwe complained over the decision of the DLHT's decision, emphasizing that it failed to take into account the fact that Maulid Hamis Omari had passed away on 1st January 2000. This fact rendered it impossible for him to have obtained a loan in 2011, as claimed. Mr. Rutengwe argued that, in light of Maulid Hamis Omari's demise, the sale of the disputed house was fundamentally tainted with fraud and, therefore, void *ab initio* because he was dead by the time Application No. 41 of 2012 was instituted. In addition, he challenged the DLHT for failure to take judicial notice of the death certificate and called an independent witness to prove the death of Maulid Hamis Omari. In support of his argument, he cited the case of **Abdalla Hamis v Karolo Mathias**, Civil Appeal No. 78 of 2003 CAT (unreported).

In his final ground of argument, Mr. Rutengwe strongly contended that the evidence presented by the appellants before the DLHT held greater weight and credibility than that of the respondent. Consequently, he asserted that the DLHT was duty-bound to render judgment in favour of the appellants.

On the opposing side, Mr. Wantora vehemently contested the appeal and put forth several arguments in defence of the respondent's position. On the first ground, he argued that the respondent is a *bona fide* purchaser and cannot be condemned for any alleged shortcomings in the public auction procedures. The respondent, as the highest bidder, participated in an auction that the DLHT had deemed to comply with the law. This was evident in the DLHT's decision to close the execution file in accordance with Regulation 30(1) and (2)(a) of the Regulations 2002. Moreover, the DLHT had issued a certificate of sale, Exhibit A6, to the respondent as proof that he had paid the full amount of the purchase price.

Mr. Wantora also challenged the appellants' decision to contest the public auction of an execution order in Application No. 41 of 2012, which he asserted was legally valid. He contended that the appellants' actions in challenging the procedures in Application No. 88 of 2016 were also misconceived, and contesting it at this stage will not invalidate the still-valid order of the DLHT in Application No. 41 of 2012. According to Mr. Wantora, such orders can only be overturned in the court of the highest authority.

Concerning the second ground, Mr. Wantora argued that the respondent should not be held liable as he was the highest bidder and a *bona fide* purchaser. He further emphasized that the appellants did not challenge the auction procedures conducted during the execution of Decree in the Application No. 41 of 2012, which remains a valid and legally binding order for the sale of the disputed house to the respondent. He asserted that the appellants are attempting to circumvent due process by challenging the execution order through an improper channel and forum. In conclusion, Mr. Wantora pointed out that the appellants had failed to react to the execution process that ultimately led to the auction of the disputed house.

In his response at ground number three, Mr. Wantora argued that the legality of the auction was not a subject matter of Application No. 88 of 2016 before the DLHT. He contended that the respondent, was a *bona fide* purchaser, and the cause of action in the said application revolved around the appellants' refusal to vacate the premises acquired by the respondent through the auction.

Regarding the matter of Maulid Hamis Omari's death, Mr. Wantora argued that the appellants' written statement of defence, particularly in paragraph 7, explicitly states that Maulid Hamis Omari passed away on 1st January 2011. He emphasized the principle that parties are bound by their pleadings, and anything contrary to these pleadings should be disregarded, as established in the case of **James Funke Ngwagilo v Attorney General** [2004] UR 161.

Furthermore, Mr. Wantora pointed out that there is substantial evidence suggesting that Maulid Hamis Omari was alive in 2011, as he was formally introduced by the Msikitini street chairman in Mzingani Ward. This assertion aligns with the findings in the decisions of Application No. 88 of 2016 and Miscl. Land Application No. 41 of 2012.

In his final argument, Mr. Wantora contended that the crucial issue is not a matter of proving ownership of the disputed house. Rather, it revolves around whether the respondent acquired it through a legitimate public auction conducted in compliance with the DLHT's decree. He asserted that the respondent purchased the

contested house through a public auction as per the execution order of the DLHT in Application No. 41 of 2012, emphasizing that all required procedures were followed. Notably, Mohamed Said Kampira did not challenge the execution order and did not initiate a new case as mandated by the law. In support of this position, he referred to the case of **Thomas Kimaro v Paisaria Martine and another** [2002] TLR 369 and Order XXI Rule 62 of Cap 33.

Furthermore, Mr. Wantora highlighted a discrepancy in the appellants' argument, stating that they relied on a sales agreement bearing different names than the appellants, which contradicts their initial pleadings.

In his rejoinder, Mr. Rutengwe reaffirmed his initial submissions, emphasizing the non-compliance with the laws governing auctions. He further pointed out that substantial evidence had been presented to establish that Maulid Hamis Omari had passed away in 2000, with support from the testimony of RW2 and Exhibits R3 and R4, which had not been contested. Additionally, he noted that the alleged street chairman of Msikitini in Mzinga Ward

was not called as a witness, and the purported documents were not formally tendered as evidence.

Having examined the records and considered the arguments put forth by both parties, the central question that this court must address is whether the appeal holds any merit.

I would like to determine grounds number one and two together since they both raise concerns about the validity of the auction and its impact on the disputed property in this appeal. The crux of the matter before this court stems from Application No. 88 of 2016. In that application, the respondent asserts rightful ownership of the contested house, having purchased it through a public auction. Subsequently, the respondent sought vacant possession from the appellants who declined to vacate the premises.

Before the DLHT, the appellants' written statement of defence disputed the respondent's claim alleging that they are the lawful owner of the disputed house having acquired it from Maulid Hamis Omari in 1997.

When the DLHT heard the case, it identified the following key issues to aid in resolving the dispute: **One**, who is the rightful owner of the disputed house? **Two**, whether the respondents are legally occupying the disputed house and, **three** to what reliefs are the parties entitled to.

From the issues delineated and addressed by the DLHT, it is evident that the matter concerning the validity of the execution process was not included in the questions posed and deliberated upon by the DLHT. In my assessment, the DLHT's decision not to incorporate such an issue in the case before it was appropriate since it was not the appropriate forum for questioning the legality of the auction.

I hold the aforementioned perspective for the following reasons. Firstly, the Application No. 88 of 2016 was not the right forum to challenge the execution processes. Even if the Application No. 88 of 2016 was the right form, the appellants were not parties in the main suit and subsequent the execution proceeding, thus they lack the locus to contest the legitimacy of the auction processes.

Hence, it is not appropriate for this court to entertain such an examination. Mr. Rutengwe's decision, as presented by Mr. Wantora, to challenge the legality of the auction through this appeal is misguided.

Secondly, the proper avenue for the appellants to dispute ownership of the house in question was through objection proceedings. Fortunately, the appellants had the opportunity to initiate such proceedings, but unfortunately, their application was dismissed. Following the dismissal of their application, the only recourse available to challenge this decision and seek a reversal was through the initiation of a fresh suit.

The objection proceeding is governed by Order XXI Rule 62 of the Civil Procedure Code, Cap 33 R.E 2022, which explicitly states as follows:

"Where an objection is preferred and an order determining that objection is subsequently made, in terms of Rule 62 of the same Order, the only remedy available to the party against whom that order is made is to institute a regular suit to prove his claim".

The above-cited provision was interpreted by the Court of the Appeal in the case of **National Housing Corporation v Peter Kassidi and 4 Others**, Civil Application No. 294/16 of 2017 (unreported) where it was stated that:

"The only remedy available to the party against whom that order is made is to institute a regular suit to prove his claim".

In the case of **Khalid Hussein Muccadam v Ngulo Mtiga (as legal personal representative of the Estate of Abubakar Omar Said Mtiga) and Another v Mr. Abdaliah Makatta Mwinyimtama T/A Sensitive Auction Mart and Court Broker**, Civil Application No. 405/17 of 2019 (unreported) the Court of Appeal, in dealing with effect of dismissal of an application for objection proceeding, held as follows:

"...that since the application for objections proceedings was dismissed, it means that its determination was final and conclusive".

What the applicants are trying to do here is an attempt to have the ruling on the objection proceeding reversed by this court

through the current appeal. However, this court is not prepared to do so.

It is also essential to note that the decision that triggered the execution of the decree in the disputed matter remains valid, and as elaborated above, an attempt to contest the attached property in Misc. Application No. 42 of 2012 yielded no success.

In light of the points raised in the first two grounds, it is clear that if the appellants had intentions to challenge the execution process and the validity of the sale agreement between Maulid Hamis Omari and Simon Masue, Application No. 88 of 2016 was not the appropriate forum for such challenges. This application lacked the capacity to nullify the decision made in Application No. 41 of 2012, which forms the core of the execution process. For these reasons, grounds one and two are dismissed.

Moving on to grounds three and four, these grounds maintain that the DLHT erred in its judgment by ruling in favour of the respondent and neglecting to take into account the appellants' claim of having acquired the property from Maulid Hamis Omari in 1997

and having resided there for over 16 years. Additionally, it is argued that the passing of Maulid Hamis Omari in 2000 rendered it impossible for him to enter into the agreement that led to the attachment and execution of the disputed house.

As previously established in grounds one and two, the crux of this appeal centres around a house that was auctioned as part of an execution process, initiated from Application No. 12 of 2012.

The evidence presented during the DLHT proceedings by the respondent conclusively establishes his acquisition of the disputed house through a public auction conducted by Majembe Auction Mart on the 16th of March 2000. While it may be accurate that the appellants purchased the house from Maulid Hamis Omari in 1997 and have occupied it since then, it is crucial to emphasize that this court cannot challenge the findings of the DLHT in Application No. 41 of 2012. It is pertinent to note that the current appeal pertains to Application No. 88 of 2016 where the issue of Application No. 41 of 2012 was not the subject of the application. Additionally, it is important to underscore that Maulid Hamis Omari and Simon Masue

were neither parties to Application No. 41 of 2012 nor this current appeal. Any endeavour to address their rights within the context of this appeal would amount to a violation of their fundamental right to be heard. Based on the above deliberation, the third and fourth grounds are bound to fail.

In conclusion, there is no compelling reason to overturn the DLHT's decision, which established that the respondent's evidence, supporting his purchase of the disputed house through the public auction conducted by Majembe Auction Mart, was more substantial than that of the appellants. Consequently, the appeal is dismissed, and the appellants are liable for costs.

It is so ordered.

DATED at **TANGA** this 12th day of December 2023




H. P. NDESAMBURO

JUDGE