

**IN THE HIGH COURT OF TANZANIA
(COMMERCIAL DIVISION)
AT DAR ES SALAAM**

COMMERCIAL CASE NO. 51 OF 2005

**ARCHARD FELICIAN RUGAIMUKAMU AND
KESSY ALI & 87 OTHERS.....APPLICANTS**

VERSUS

JOYCE BURTON.....1ST RESPONDENT

BURTON LUSIGE t/a

MK. BURTON INVESTMENT2ND RESPONDENT

ERIC AUCTION MART & COURT BROKER.....3RD RESPONDENT

R U L I N G

Date of Submissions – 9/10/2006

Date of Ruling – 26/10/2006

MASSATI, J:

The Applicant herein were awarded a monetary decree against the first two Respondents in the sum of Tshs.41,301,000/= plus interests and costs. The decretal amount finally swelled to Tshs.46,425,060.19. The Applicants moved the court to order attachment and sale of the Judgment Debtors' houses situated at Airport Area, Karakata, Dar es Salaam and Mbezi Beach respectively. The court granted their request and appointed the 3rd Respondent, ERIC AUCTION MART AND COURT BROKER, to auction the said properties.

According to the records, the first proclamations of sale were issued in April 2006. It was ordered that the said auctions be conducted on 14/5/2006. On 22/5/2006, the 3rd Respondent reported that the public auctions were unsuccessful. On 10th July 2006, the court issued the second proclamations of sale and appointed the 6th August 2006 as the date of the auction.

On 7/8/2006 the 3rd Respondent filed a report that the house at Karakata was sold for shs.10,500,000/= to one Steven William Mushi and prayed that a certificate of sale be issued. On 14th August 2006 the Registrar signed a certificate of sale. On 11/8/2006 the 3rd Respondent filed a report that the Mbezi Beach House could not be auctioned for lack of willing buyers and applied for extension of the proclamation of sale.

But before this court could consider the application for extension of proclamation the Applicants filed the present application. It was on 21/8/2006. In this application, the Applicants pray for:

- (i) Nullification of the sale of the house (s)
- (ii) Termination of the 3rd Respondent as a court broker in this matter.

- (iii) An order to reauction the said houses.
- (iv) Appointment of an alternative court broker in this matter.
- (v) Costs.

The application is supported by affidavits of ARCHARD T. RUGAIMUKAMU and WILLIAM MARO. The affidavit of RUGAIMUKAMU cites several anomalies in the auctions conducted at both Karakata and Mbezi Beach including accepting a lower price from a person associated with the auctioneer, for the Karakata house and auctioning before the scheduled time at Mbezi Beach. It was also averred that there was a misdescription of the Karakata House, instead of House No. 113 the auctioner pasted an advertisement of sale of house No. 133, although eventually House No. 113 was auctioned. WILLIAM MARO took out an affidavit as an independent participant in the auction, and corroborated what Rugaimukamu had alleged in his affidavit. He cited his own instance where his bid of 11/= million for the Karakata House was rejected in favour of one for 10,500,000/=.

In his counter affidavit one ALI MOSHI, described himself as the 3rd Respondent's principal officer. He said that the

auction was conducted in compliance with the rules, and any persons who posed as buyers were only bent on disrupting the smooth process of the auction. He said, for instance when asked for the second time, WILLIAM MARO withdrew his bid. For the Mbezi Beach House the auction did not take place, and that the Applicants' attitude greatly contributed to the stalemate.

Ms. Majamba, learned Counsel for the Applicants submitted that as a result of the misdescription of the house at Karakata and open favouritism to the 2nd Respondent's driver, the second auction did not fetch a favourable high price as the first which was nullified without the Applicant's knowledge. She therefore prayed for the nullification of the sale in the second auction, and other prayers.

Mr. Mngoya, learned Counsel for the 3rd Respondent submitted that the misdescription of the house did not affect the sale as the public were able to inspect the house. He said the first auction was nullified, but there was an order for reauction. He said the Third Respondent occasionally used a loudspeaker. On the Mbezi beach house, Mr. Mngoya submitted that the auction was prevented by chaos caused by the Applicants. Lastly, Mr. Mngoya submitted that nullification could only be ordered if there was fraud or

irregularities of which proof was lacking in the present case. He thus prayed for dismissal of the application.

In rebuttal, MS. Majamba submitted that the difference in the numbers of the house had a telling effect as it might have affected the inspection of the house in question. She further submitted that as the 3rd Respondent did not deny that the house was sold to his driver at a lower price, this constituted an irregularity. Lastly she said there was no extension of time to sell the Mbezi Beach House, so it is not true that it was not sold, and there is no good reason why the first auction was nullified. She reiterated her` prayers.

This application is brought under ss. 38,95 and O. XXI rr. 71 and 88 of the Civil Procedure Code 1966. Rule 71 of O. 21 provides:

“No officer or other person having any duty to perform in connection with any sale shall, either directly or indirectly bid for acquire or attempt to acquire any interest in the property sold.”

Rule 88 on the other hand, provides:-

“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 interest 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 fact proved the court is satisfied that the applicant has sustained substantial injury by reason of such irregularity or fraud.

According to **SARKAR ON CODE OF CIVIL PROCEDURE** 10th ed. Vol. 2 p. 1593.

“The rule i.e. (88) provides for the setting aside of the sale if the following conditions exist.

- (1) Material irregularity or fraud in conducting the sale.*
- (2) Substantial injury to the Applicant.*
- (3) Such injury must be connected directly with i.e. must be the result of the irregularity or fraud. All the conditions must exist.”*

Back, but nearer home, it was held in **MANDAVIA VS SINGH** [1968] EA 146 that for an irregularity in the sale to lead to a nullification of sale, it must be shown that the Applicant has suffered substantial injury as a result of the irregularities in publishing and conducting the sale.

In the present case the Applicants have fronted a case that there was an irregularity not only in the description of the house at Karakata, having been described as No. 133 instead of 113 but also in the conduct of the sale. It was pointed out by the Applicant that the house was not only sold to the Respondent's driver, but also at a price lower than the next bidder.

On the other hand, the 3rd Respondent admits that the purchaser was their driver but submitted that the misdescription did not affect the sale, as the bidders had opportunity to inspect the relevant house. The issue is whether this was an irregularity and if so whether the Applicants suffered substantial injury?

In my considered view, Rule 71 of Order 21 of the Civil Procedure Code 1966 was not enacted in vain. It had a purpose. And I think that purpose was to ensure that at a public auction it is the market forces that should prevail, not other considerations. The other reason is to ensure that there

is a fair play. To prevent auctioneers and their officers from bidding is to ensure that the auctioneers do not become judges in their own cause and thus avoid conflicts of interests. It is a fundamental rule of natural justice – the rule against bias.

In this case, there is no dispute that the bidder and eventual buyer was seen with the auctioneer in the conduct of sales. The Respondent admitted that he is their driver and he was on duty with him. From the clear wording of Rule 71, I think **the driver** was –

“a person having a duty to perform in connection with the sale”.

He was as important in the sale, as was the officer who physically handled the auction. Therefore in my considered view, the driver in this case was caught up in the web of Rule 71 of Order 21 of the Civil Procedure Code Act 1966. He was not therefore supposed to bid. His bidding was therefore not only irregular but also illegal as it was forbidden by law. In the words of (**SARKAR** op cit) at p. 1593: -

“If the act or omission complained of amounts to material irregularity, the sale is not null and void, it is only voidable and the persons specified in the rule can apply to have it set aside on proof of substantial injury. If, however, the

act complained of is an illegality, it makes the sale void altogether and no substantial injury need be proved.”

On the above premises I find and hold that the sale of the Karakata house to the Respondent's own driver was contrary to Rule 71 of O. 21 and to that extent illegal and void.

But even for the sake of argument I were to accept that the sale was a mere irregularity, I am satisfied in the present case, that the Applicants have suffered substantial injury in terms of the price differentials, considering that in a previous auction the bids were substantially higher and even in the second auction the 3rd Respondent's driver's lower bid was preferred to other higher bidders, facts of which the Respondent does not dispute. It is obvious that with this price the Applicants cannot realise the fruits of their decree. So, even under Rule 88 of Order 21, the Applicants have made out a good case.

For the foregoing reasons, I would allow the application. I declare that the sale of the Karakata house is void, if not voidable and has led to the Applicants suffering substantial injury. The sale is accordingly nullified and set aside. As a result the following consequential orders shall follow:-

- (i) Both houses at Karakata and Mbezi Beach are to be re-auctioned.
- (ii) A new Court Broker be appointed to re-auction the properties.
- (iii) The certificate of sale which was prepared for the Karakata house is hereby cancelled and set aside.
- (iv) The hitherto successful bidder be refunded of the purchase price.

The Applicants shall have their costs in this application. It is so ordered.

S.A. MASSATI

JUDGE

26/10/2006

1,800 WORDS

I Certify that this is a true and correct
 of the original/order Judgement Ruling
 Sign Fubise
 Registrar Commercial Court Dsm.
 Date 27/10/2006