

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

COMMERCIAL CASE NO.23 OF 2011

- 1. ANDREW WESTON KALELA NDIMBO.....1ST APPLICANT**
- 2. CHRISTINA ANDREW NDIMBO.....2ND APPLICANT**

VERSUS

- 1. SULEMAN MOHAMED KHAMIS.....1ST RESPONDENT**
- 2. ERIC AUCTION MART & COURT BROKERS.....2ND RESPONDENT**
- 3. ANTHONY KONDE SAKI.....3RD RESPONDENT**

Date of last Order: 03/08/2012

Date of ruling: 05/09/2012

RULING

MAKARAMBA, J.:

This ruling is in respect of a supplementary preliminary point of objection the 2nd and 3rd Respondents raised against the amended application of the Applicants to set aside the sale by public auction of their property.

Mr. Andrew Weston Kalela Ndimbo and **Mrs. Christina Andrew Ndimbo**, the present Applicants, are husband and wife. They were Defendants in the suit, Commercial Case No.23 of 2011, that **Mr. Suleiman Mohamed Khamis**, the Plaintiff thereat, had instituted against them. It is that suit which gave rise to the constested sale order, the

subject of the present application and notice of supplementary preliminary objection. On the 29th November, 2011, the Applicants jointly lodged their application in this Court seeking for orders to set aside the sale of their house situated at Plot No.241 Block G. Tabata, Dar es Salaam. The sale was a consequence of a sale order issued by this Court in the said Commercial Case No.23 of 2011 following a compromise suit both parties to that suit by consent entered on the 1st day June, 2011, thus marking the suit settled as between the parties and a judgment and decree in favour of the Plaintiff was entered. On the 30th August 2011, the Plaintiff applied to this Court for execution of the decree which was accordingly granted, followed by order of attachment of the suit property, Plot No. 241 Block G Tabata Dar es Salaam, the subject matter of the present application. On the 19th day of October 2011, this Court issued an order for proclamation for sale and a sale of the suit property by public auction was scheduled and held by **Eric Auction Mart and Court Brokers**, the 2nd Respondent hereat, at Dar es Salaam on Sunday 30th day of October, 2011 at 10:00 am. On the 9th of July 2012, **Mr. Ally Moshi**, the Principal Officers of the 2nd Respondent hereat, and **Mr. Anthony Konde Saki**, the 3rd Respondent hereat, filed a joint supplementary Counter Affidavit.

In the mean meantime however, on the 29th day of November 2011, almost one month after the sale, the Applicants/Judgment Debtors filed in this Court an Amended Chamber Summons under Order XXI Rule 88(1) of the Civil Procedure Code, Cap.33 R.E. 2002 seeking among other orders, that this Court be pleased to set aside the sale of Plot No.241 Block G Tabata Dar es Salaam on grounds of material irregularities, and to restore

ownership of that Plot No.241 Block G Tabata Dar es salaam to the Applicants/Judgment-Debtors. The Court record shows that the Applicants had first attempted to contest the sale of their property by filing an application in this Court on the 17th of November 2011 under Order XXI Rule 87(1) (a) & (b) of the Civil Procedure Code. Later the Applicants had a change of mind and withdrew their previous application, and brought a fresh one under Rule 88(1) of Order XXI of the Civil Procedure Code. On the 3rd of August 2012, the learned Counsel for the 2nd and 3rd Respondents filed in this Court a Notice of supplementary preliminary objection on a point of law against the Amended Application of the Applicants of 29th November, 2011, that the application was incompetent for non-compliance with the mandatory provision of Order XXI Rule 87(1) (a) and (b) and (2) of the Civil Procedure Code Act, Cap.33 R.E 2002.

The supplementary objection on point of law, by consent of the learned Counsel for the parties was argued orally, **Mr. NASSORO**, learned Counsel for the 1st & 2nd Judgment Debtors, and **Mr. MASAKA**, learned Counsel for the 2nd & 3rd Respondents, and hence this ruling.

Mr. Masaka flagged off his submissions by insisting very strongly that in order for the Applicants' application to stand it must comply with Order XXI Rule 87(1) of the Civil Procedure Code, Cap.33 R.E. 2002. The Applicants must deposit a sum equal to five percent (5%) of the purchase money, and amount specified in the proclamation of sale less any amount which may have been received by the Decree-Holder, Mr. Masaka pointed out. There is no any sum of money deposited by the Applicants as per the mandatory provisions of Rule 87(1) (a) & (b) of Order XXI of the Civil

Procedure Code, Mr. Masaka revealed. In the opinion of Mr. Masaka, the provisions of Rule 88(1) of Order XXI of the Civil Procedure Code must be read in conjunction and not in isolation with Rule 87(1) (a) & (b) of Order XXI of the Civil Procedure Code, and therefore the Applicants' application should be struck out for non compliance with the mandatory provisions of Rule 87(1) (a) and (b) of Order XXI of the Civil Procedure Code.

In his reply submissions Mr. Nassoro, learned Counsel for the Applicants faulted the reasoning of Mr. Masaka, learned Counsel for the 2nd and 3rd Respondents, by arguing that Mr. Masaka has read the law upside down. Mr. Nassoro submitted further that admittedly the Applicants' application has been brought under Rule 88(1) of Order XXI of the Civil Procedure Code, the conditions under which such application can be made being "*material irregularity*" and "*fraud.*" The only condition under Rule 88(1) of Order XXI of Civil Procedure Code, which has to be satisfied in order for the court to set the sale aside, is that the Applicants have sustained substantial injury as result of such fraud or material irregularity, Mr. Nassoro further argued. There is nothing under Rule 88(1) of Order XXI of the Civil Procedure Code which requires the Applicants to deposit a sum equal to 5% of the purchase price or to pay the amount specified in the proclamation of sale, Mr. Nassoro pointed out. Mr. Nassoro submitted further that Order XXI Rule 87(2) of the Civil Procedure Code is to the effect that where a person applies under Rule 88 to set aside sale of his immovable, shall not unless, he withdraws his application be entitled to make or prosecute an application under Rule 87. Mr. Nassoro wondered if you apply to set aside sale under Rule 88 of Order XXI of the Civil

Procedure Code on grounds of fraud or material irregularity either on part of the auctioneer or the Decree Holder, how come then an innocent party, the owner of the purchased property should be required to pay 5% of the sale amount emanating from fraud? Mr. Nassoro also wondered as to why the Civil Procedure Code should allow persons to benefit from their own wrong. Mr. Nassoro submitted further that the first application the Applicants had filed in this Court on the 17/11/2011 had been brought under Order XXI Rule 87(1) (a) & (b) of the Civil Procedure Code, but upon discovering material irregularities and fraud pertaining to the sale of the suit property, the Applicants withdrew the previous application and brought a fresh one under Rule 88(1) of Order XXI of the Civil Procedure Code.

In rejoinder, Mr. Masaka reiterated his submissions in chief that Rule 88(1) of Order XXI of the Civil Procedure Code cannot be read in isolation of Rule 87(1) of Order XXI of the Civil Procedure Code, but in conjunction. The provisions of Rule 88(1) of Order XXI of the Civil Procedure Code were made to protect a bonafide purchaser of the property, Mr. Masaka further argued. Since the suit property has already been sold to a third party, the Applicants must comply with the mandatory requirements under Rule 87(1) of Order XXI of the Civil Procedure Code, Mr. Masaka insisted.

The main bone of contention in the present matter revolves around the interpretation of Rule 88(1) and Rule 87(1) of Order XXI of the Civil Procedure Code respectively. The main controversy has resulted from the provisions of Rule 87(2) of Order XXI of the Civil Procedure Code which stipulates as follows:

*"Where a person applies under rule 88 to set aside the sale of his immovable property, **he shall not, unless he withdraws his application, be entitled to make or prosecute an application under this rule.*** (the emphasis is of this Court).

In my considered opinion, it is a condition precedent under Rule 87(2) of Order XXI of the Civil Procedure Code that where a person has applied under Rule 88 of Order XXI of the Civil Procedure Code to set aside the sale of his immovable property, that person cannot "*make or prosecute an application*" under Rule 87(1) of Order XXI of the Civil Procedure Code, unless he withdraws his application he made under Rule 88 of Order XXI of the Code. In order to bring out the import of Rule 87 and Rule 88 of Order XXI of the Civil Procedure Code so as to the issue as to whether or not the two rules can be applied in conjunction or in isolation, the circumstances under which these two rules come into play are critical. This is how Rule 88(1) of Order XXI of the Civil Procedure Code has been couched:

*"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."

In the wording of Rule 88(1) of Order XXI of the Civil Procedure Code cited above, three categories of persons who can apply to the court to set aside the sale of any immovable property sold in execution of a decree are enumerated. They are either "***the decree-holder,***" or "***any person entitled to a share in rateable distribution of assets***" or "***whose interests are affected by the sale.***" Rule 88(1) also sets down two grounds for setting aside the sale. They are material irregularity or fraud in publishing the sale of such property or in conducting the sale itself. However, the Rule states categorically that in order for the court to issue an order to set aside the sale on the basis of the two aforementioned grounds, it must be established that the applicant has suffered "***substantial injury***" as a result of either the material irregularity or the fraud in publishing the sale of the suit property or in conducting the sale itself.

Now coming to Rule 87(1) of Order XXI of the Civil Procedure Code, it mentions only two kinds of persons who can bring application to set aside the sale of a suit property sold in a public auction in execution of a court decree. They are either a person "***owning such property***" or "***holding an interest therein by virtue of a title acquired before such sale.***" Rule 87(1)(a) and (b) of Order XXI of the Civil Procedure Code goes further to set out two mandatory conditions which an applicant must fulfill as a condition precedent before the application can be entertained by

the court. They are a deposit by the Applicant in court a sum equal to five percent of the purchase-money for payment to the purchaser; and the amount specified in the proclamation of sale as that for the recovery of which the sale was ordered, less any amount which may, since the date of such proclamation of sale, have been received by the decree-holder for payment to the decree-holder. Rule 87(2) of Order XXI also states categorically that:

*"(2) Where a person applies under rule 88 to set aside the sale of his immovable property, he shall not, **unless he withdraws his application**, be entitled to make or prosecute an application under this rule."*

Rule 87(2) of Order XXI of the Civil Procedure Code states categorically that unless an applicant who has applied to set aside the sale of his immovable under Rule 88 withdraws the application, he cannot be entitled to make or prosecute an application under Rule 87. We have seen that under Rule 87(1) of Order XXI of the Civil Procedure Code an applicant must fulfill the prescribed two conditions precedent before the application can be entertained by the court. The implication here is that Rule 87 of Order XXI of the Civil Procedure Code takes exception to the general rule on application to set aside the sale of immovable property sold in execution of court decree on grounds of material irregularity or fraud in publishing or in conducting the sale. An applicant cannot therefore take ride both under Rule 87 and 88 of Order XXI of the Civil Procedure Code conjunctively, if the

grounds for setting aside such sale are material irregularity or fraud in publishing the sale or in conducting it. This is why Rule 87(2) of Order XXI disentitles an applicant who has applied in court under Rule 88 of Order XXI to set aside the sale of his immovable property on grounds of material irregularity or fraud in publishing the sale of such property or in conducting the sale itself from making or prosecuting an application to set aside the sale under Rule 87 of Order XXI of the Civil Procedure Code.

In the present application, the Applicants vide their Amended Chamber Summons lodged in this Court on the 29th November, 2011 have moved the court under Rule 88(1) of Order XXI of the Civil Procedure Code seeking for orders to set aside the sale of their property situate at Plot No.241 Block G Tabata Dar es Salaam, the subject matter of Commercial Case No.23 of 2011, in which the Applicants were judgment-debtors. As per paragraph 6 of their joint affidavit, the Applicants aver that they were aggrieved by the sale of their plot as the whole process of sale was tainted with material irregularities, the particulars of which they have stated under (a) to (e) of the said paragraph. Clearly if the Applicants had elected to proceed under Rule 87 of Order XXI, as indeed they had previously done, they would have been disentitled to come make or prosecute an application under Rule 88 of Order XXI unless they had withdrawn their previous application which they had brought under Rule 87 of Order XXI of the Civil Procedure Code. Since, however, the Applicants through their Amended Chamber Summons have approached this Court under Rule 88 of Order XXI, any attempt to bring them within the ambit of Rule 87(1) (a) and (b) of Order XXI would defeat the whole purpose of their intention to

contest the sale on ground of material irregularities. It is to this extent that I am at one with the submissions by Mr. Nassoro, learned Counsel for the Applicants, that upon the Applicants realizing the pending impediment of proceeding under Rule 87(1) of Order XXI as they had previously done, the Applicants withdrew their previous application which they had preferred under Rule 87(1) of Order XXI and brought an amended application under Rule 88(1) of Order XXI of the Civil Procedure Code. The Applicants wish to avail themselves the opportunity to contest the sale of their property on ground of material irregularities as alleged in their joint affidavit in support of their application. The issue whether they will succeed or not, and what will be the consequences if they succeed in establishing their allegations, is a matter to be left to be determined by this Court at the appropriate stage when dealing with the main application.

As I intimated to earlier in this ruling, under Rule 87(2) of Order XXI of the Civil Procedure Code where a person has applied under Rule 88 of Order XXI to set aside the sale of his immovable property, that person cannot "*make or prosecute an application*" under Rule 87(2) of Order XXI of the Civil Procedure Code, that is, on grounds of material irregularity or fraud, unless such applicant withdraws the application brought under Rule 88 of Order XXI. This approach, in my view, accords more with common sense. In the event an applicant succeeds in establishing to the satisfaction of the court that there is either material irregularity or fraud in publishing the sale of the suit property or in conducting the sale itself, the ultimate order of the court would be to nullify the sale. In other words it will be as if no sale whatsoever had taken place. In my considered opinion, were the

law to require an applicant to contest sale of his property in execution of court decree on grounds of material irregularity or fraud in the publishing or conducting the sale itself to deposit in court the sums of money stipulated under Rule 87(2) of Order XXI of the Civil Procedure Code, for the purpose of compensating the purchaser of a property otherwise obtained through irregular means or fraudulently, the whole purpose of the law would have been defeated. The whole purpose of the law within the scheme of Rule 88 of Order XXI is to prevent illegality or fraud in publishing or conducting the sale of suit property. Doing otherwise in my view the law would be aiding in illegality and fraud by allowing a person who has obtained the suit property through illegal means or fraudulently to be compensated by the very person alleging illegality or fraud in publishing the sale or in conducting the sale of the suit property. I am therefore, to this extent, at one with the submissions by Mr. Nassoro, learned Counsel for the Applicants that the provisions of Rule 88(1) and Rule 87 of Order XXI are to be read in isolation and not in conjunction as Mr. Masaka, learned Counsel for the Respondents would wish this Court to do. And in this respect, specifically where the applicants are alleging that the whole process of sale of the suit property was tainted with material irregularities, the particulars of which the Applicants have stated under (a) to (e) of paragraph 6 of their joint Affidavit in support of their application, the scales of justice would lean more in favour of treating the two provisions of the law in isolation and not conjunctively.

I am alive to the decision of this Court in **Commercial Case No.57 of 2001 between A&SD COMPANY and ALBERT MALANGALILA vs**

CRDB BANK LIMITED and AMBASSADOR HASSAN OMARY GUMBO KIBELLOH (unreported) dated 20/10/2010, where I had occasion to consider among other things, the applicability of Rule 87 and 88 of Order XXI of the Civil Procedure Code. In that case, the Applicant had brought Application to set aside the sale of property sold at a public auction following a court order. The applicant brought his application under among other provisions of the law, section 14(1) of the Law of Limitation Act and Section 95 and Rule 87(1) of Order XXI of the Civil Procedure Code. The application was an omnibus one for two separate and distinct orders, extension of time to set aside a sale and setting aside the sale. In that case, the 1st Respondent contested the application on the ground that it was not proper in court for failure by the Applicants before instituting it to deposit with the 2nd Respondent 5% of the purchase price to the tune of TZS 130,000,000/-, and to deposit in court all the monies owed to the 1st Respondent under the decree plus interest accruing from the date of the proclamation of sale. Of interest in that case to the present application is the remark by Mr. Rutashoborwa (since deceased), the Applicants' Counsel in that case, that the Applicants were not intending to bring any application under Rule 88(1) of Order XXI of the Civil Procedure Code as the 1st Respondent's Counsel in that case had proposed, which Rule is *pari materia* with Rule 90 of the Indian Code of Civil Procedure. Mr. Rutashoborwa cited ***Mulla on the Code of Civil Procedure*** 15th Edition Vol. II (1996) at page 1865, Rule 89(1), which is in *pari materia* with Rule 87(1) of our Civil Procedure Code, that it is the only means by which "***a judgment-debtor can get rid of a sale which has been duly carried***

out", as against a sale which suffers from a material irregularity or fraud as envisaged by Rule 90 of the Indian Code of Civil Procedure, which is in *pari materia* with Rule 88(1) of Order XXI of our Civil Procedure Code. In the opinion of Mr. Rutashoborwa, the circumstances in that case did not call for resort to Rule 88(1) of Order XXI. In that case, the sale had been completed and the purchase money had already been paid to the bonafide purchaser under the public auction sale. According to ***Mulla on the Code of Civil Procedure*** 15th Edition Vol. II (1996) at page 1866, once the sale to the auction-purchaser is confirmed the judgment-debtor, whose property has been sold, ceases to be entitled to get back the property under Rule 89 of the Indian Code of Civil Procedure, which is in *pari materia* with Rule 87 of our Civil Procedure Code, even if he succeeds in having the decree against him reversed, which is why the Rule provides the only means by which a judgment-debtor can get rid of a sale which has duly been carried out by requiring a deposit in court of 5% of the purchase and all the monies owed under the decree plus interest accruing from the date of the proclamation of sale. However, save to the extent of only trying to bring out the import and reach of Rule 87 of Order XXI of our Civil Procedure Code, the facts in that case differ remarkably from the facts in the present application. In that case, the sale was not being contested on grounds of material irregularity or fraud. The judgment-debtor in that case just wanted to "***get rid of a sale which has been duly carried out***" as against a sale which suffers from a material irregularity or fraud as envisaged by Rule 88(1) of Order XXI of the Civil Procedure Code, as presently the case. According to ***Mulla on Code of Civil Procedure***, 15th

Edition Vol.II at page 1873, "*the five percent is intended as compensation to the auction-purchaser for his trouble and disappointment for the loss of that which was perhaps, a good bargain.*" And therefore the reason for the requirement of deposit in court by the applicant of the whole amount specified in sub-rule (1)(a) and (b) of Rule 87 of Order XXI since no sale will be set aside under Rule 87 of Order XXI of the Civil Procedure Code if such deposit has not been done.

A more or less similar situation presented itself in yet another earlier case determined by this Court in **Commercial Case No. 50 of 2000 between CRDB BANK LTD VERSUS MWAMBA ENTERPRISES LTD AND CHARLES MULOKOZI (unreported)**. In that case, this Court had been moved under Order XXI Rules 57, 58, 59, 88(1) and section 95 of the Civil Procedure Code, for among other orders, to set aside the sale of property that had been sold by public auction. The applicant in that case was neither a *decree-holder*, nor a *person entitled to a rateable distribution of assets*, nor a *person whose interests are affected by the sale*. This Court, Nsekela, J., as he then was, held that Order XXI rule 88(1) of the Civil Procedure Code was inapplicable. In that case, the mortgaged property, the subject of the dispute, was in the possession of the objector "*in trust*" for the judgment-debtor, a person who did not fall under any of the category of persons entitled to bring application to set aside sale of property sold by public auction following a court decree under Rule 88(1) of Order XXI of the Civil Procedure Code. Perhaps I should point out here that my task in the present application is confined only to determining whether the present Applicants who have elected to move this Court under

Rule 88(1) of Order XXI of the Civil Procedure Code are required first to fulfill the mandatory conditions under Rule 87(1) (a) and (b) of Order XXI of the Civil Procedure Code. The present Applicants are minded in contesting the sale of their plot on grounds of material irregularity in publishing the sale and in conducting the sale itself. I do not see any valid reason for requiring them to comply first with Rule 87(1) (a) and (b) of Order XXI of the Civil Procedure Code before their pending application can be entertained. As to whether the Applicants are persons competent under Rule 88(1) of Order XXI of the Civil Procedure Code to bring the present application, is a matter to be determined at the appropriate time.

In the whole, and for the foregoing reasons, I hold as I hereby do, that the supplementary preliminary objection raised by the 2nd & 3rd Respondents that the application is incompetent for non compliance with the provisions of Order XXI Rule 87(1) (a) and (b) of the Civil Procedure Code, Cap.33 R.E. 2002 fails. I accordingly hereby dismiss it with costs, which costs shall be in the cause. I accordingly hereby order.



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R.V. MAKARAMBA

JUDGE

05/09/2012

Ruling delivered this 05th day of September, 2012 in the presence of Mr. Nassoro, Advocate for the Judgment Debtor and in the absence of the 2nd and 3rd Respondents or their Advocate.

A handwritten signature in black ink, appearing to read 'R.V. Makaramba', is written over a horizontal dotted line.

R.V. MAKARAMBA

JUDGE

05/09/2012.

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