

**IN THE HIGH COURT OF TANZANIA**

**(COMMERCIAL DIVISION)**

**AT DAR ES SALAAM**

**MISC. COMMERCIAL APPLICATION NO. 77 OF 2022**

**(Arising from Commercial Cases No. 83 and 84 of 2018)**

**QUALITY GROUP LIMITED ..... APPLICANT**

**VERSUS**

**NATIONAL MICROFINANCE**

**BANK (NMB Bank ) PLC ..... 1<sup>ST</sup> RESPONDENT**

**ADILI AUCTION MART LIMITED ..... 2<sup>ND</sup> RESPONDENT**

**Date of Last Order: 05/07/2022**

**Date of Ruling: 29/07/2022**

**RULING**

**MAGOIGA, J.**

This ruling is in respect of the orders of extension time out of time and upon grant of extension of time and consider the applicant's application to set aside sale of properties in Plot No.22/1 and 189/1 Pugu road, Dar es Salaam arising out of Commercial Cases No. 83 & 84 of 2018, costs and any other relief this court deem fit to grant made by way of chamber summons under section 14(1) of the Law of Limitation Act, [Cap 89 R.E.2019], Order XXI Rule 88(1) and section 95 of the Civil Procedure Code, [Cap 33 R.E. 2019].



The application was supported by an affidavit of Mr. ELIYA RIOBA, learned advocate for the applicant stating the reasons why this application should be granted.

Upon being served, each respondent filed counter affidavit stating the reasons why this application should not be granted.

The facts as gathered from the parties' pleadings or affidavits and counter affidavits are simple and straight forward. The 1<sup>st</sup> respondent vides Commercial Cases No. 83 and 84 of 2018 in this court successfully sued the applicant, among others, for breach of the loan facilities. Subsequently, the 1<sup>st</sup> respondent applied for execution of the decrees and the 2<sup>nd</sup> respondent was dully appointed to execute the decrees by selling the mortgaged properties. Sale was, after several attempts, successful and the landed properties of the applicant were put on sale.

Against the above background and dissatisfied by sale, the applicant has approached this court mainly for extension of time and upon grant of extension, proceed to consider the reasons thereto and set aside sale of the disputed properties, hence, this ruling.



The applicant is enjoying the legal services of Mr. Eliya Rioba, learned advocate and whereas the respondents are enjoying the legal services of Mr. Godwin Nyaisa, learned advocate.

This application was argued by way of written submissions. Both learned advocates for parties adopted their respective affidavit and counter affidavits in support of their respective stances.

Mr. Rioba arguing for extension of time told the court that for extension of time to be granted an applicant must demonstrate good cause. Guided by the case of *PRINCIPAL SECRETARY, MINISTRY OF DEFENCE AND NATIONAL SERVICES vs. DEVERAM VALAMBIA* [1992] TLR 185, Mr. Rioba argued that extension of time can be granted where there is an illegality apparent on the face of the record.

The learned advocate for the applicant readily told the court that in this application, the only reason for extension is illegality. The illegalities, the learned advocate pointed out are sale without giving 30 days notice contrary to Rule 67 of Order XXI of the CPC and section 12(2) of the Auctioneers Act, [Cap 227 R.E. 2019] and failure to publish notice of auction by confusing it with notice of settling decretal sum. In support of this points cited the case



of GODBETRTHA RUKANGA vs. CRDB BANK LIMITED AND 3 OTHERS, CIVIL APPEAL NO. 25/7 OF 2017 in which the Court of Appeal observed that:

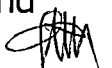
***"secondly, giving a notice with accordance with the law would afford the appellant sufficient time to arrange for redemption of the mortgage...."***

***" ... the provisions of section 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 properties is not a mere procedural irregularities."***

On that note the learned advocate for the applicant argued that failure to comply with the above provisions is not a mere irregularities and same should be construed to constitute illegalities and this court be pleased to extend time.

On setting sale aside, the learned advocate for applicant argued that Rules 67, 68 and 90 of Order XXI of the CPC were not followed and as such asked this court to set aside sale.

Further reason to set aside sale was that the applicant has suffered irreparable loss for the properties in dispute were sold at far low and



unrealistic price considering their location and the valuations conducted way back before mortgaged and the valuations conducted during sale were too diametrical different.

On the foregoing reasons, the learned advocate for the applicant strongly invited this court to grant the two prayers as contained in the chamber summons with costs.

On the other hand, Mr. Nyaisa argued that for extension of time to be granted on illegality, the illegality has to be apparent on the face of the record and not an issue that has to be drawn from analysis of evidence. In support of his stance cited the case of FINCA (T) LIMITED AND ANOTHER vs. BONIFACE MWALUSIKA, CIVIL APPLICATION NO. 589/12 OF 2018 in which the Court of Appeal held that illegality should not be discovered by a long-drawn argument or process.

Further Mr. Nyaisa argued that illegality that warrant extension must be significant one such as on jurisdiction, denial of right to be heard and the Court of Appeal in the case of MZA RTC TRADING COMPANY LIMITED vs. EXPORT TRADING COMPANY LIMITED, CIVIL APPLICATION NO.12 OF 2015 insisted that:-



***" ... not very point of law will necessarily carry the day in an application for extension of time. The point of law must be significance as to warrant the attention of the Court..."***

Mr. Nyaisa denied that Rules 67, 68 and 90 of Order XXI of the CPC to be abrogated as well as section 12(2) of the Auctioneers Act, [Cap 227 R.E. 2019] and equated the submissions of the applicant's advocate as blatant lies and misleading. Not only that, but also pointed out that despite irregularities being there, in the case of GODABERTHA (supra) no sale was set aside as argued by Mr. Rioba.

On setting aside sale, Mr. Nyaisa argued that much as the sale followed all legal laid down procedures and where it was not possible, the re-auction was repeated, then, no way setting aside sale can be entertained here. According to Mr. Nyaisa, mere irregularities alone without committing fraud or misrepresentation cannot be ground for setting aside sale.

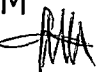
On substantial injury, it was the reply of Mr. Nyaisa that same is only pegged on variation of valuation reports conducted during sale and creation of mortgage. According to Mr. Nyaisa, this kind of injury is not a result of irregularities. To buttress his point the learned advocate cited the famous learned author Mulla "The Code of Civil Procedure" 16<sup>th</sup> Edition Volume

Three at page 2462 in when discussing Rule 90 which is par material to our Rule 88 of the CPC in this words:

***"No sale of immovable property can be set aside on the grounds of irregularities or fraud in publishing or conducting the sale, unless, upon the fact proved, the court is satisfied that the party seeking to set aside the sale has sustained substantial injury by reason of such irregularity or fraud (r. 90(2). No application to set aside a sale shall be entertained upon any ground which the applicant could have taken on or before the date the proclamation of sale was drawn up. (r. 90(3)."***

Guided by the above legal position, Mr. Nyaisa argued that no such injury is proved in this application.

On valuation reports it was his quick reply that valuation are carried and approved by the Chief Government Valuer and expire after every three years. In the circumstances, the valuation reports carried in 2012 cannot be basis for setting aside sale while there are new reports which revealed the status of the lands in disputed, and the new value thereon which can fluctuate up and down. The learned advocate cited the case of ZUM ZUM



INVESTMENT LIMITED vs. HABIB BANK LIMITED, COMMERCIAL CASE NO.60 OF 2013 (2014) eKLR in which the court held that:

***"In my view, the plaintiff has not demonstrated satisfactorily why this court should disregard the defendant's valuation report and only rely on the plaintiff's valuation reports. It is not sufficient for the plaintiff to merely claim that the intended selling price is not the best price obtainable at the time by producing a counter-valuation report. The plaintiff must satisfactorily demonstrate why the valuation report that the defendant intends to rely on in disposing of the suit property does not give the best price obtainable at the material time. The plaintiff needs to show for instance that the defendant's valuer is not qualified or competent to carry out the valuation, or that the valuation was carried out in consideration of irrelevant factors, or that the valuation was done way before the time of intended sale. The plaintiff has not raised such grounds."***

Further, Mr. Nyaisa argued that under section 51 of the Valuation and Valuers Registration Act, Act No. 7 of 2016 provides for a person not





satisfied with valuation to seek verification from the Chief Government Valuer and much as this was not done, then, the same remain realistic.

According to Mr. Nyaisa, a mere lower price cannot be ground for setting aside sale but can be a ground for claiming damages against a person exercising such powers as provided for under section 135(4) of the Land Act, [Cap 113 R.E. 2019].

Further reply by Mr. Nyaisa was that much as no complaint on fraud or misrepresentation in respect of sale, then, if sale is set aside it is the bona fide purchaser who will be affected and who must be protected.

Lastly but not the least Mr. Nyaisa attacked the arguments of Mr. Rioba that the 1<sup>st</sup> respondent entered and demolished the suit premises and developments therein as serious allegations from the bar not featuring in the affidavit, hence, should be out rightly disregarded. No point in time the 1<sup>st</sup> respondent took possession of the suit premises, charged Mr. Nyaisa. According to Mr. Nyaisa, demolition, if any, was carried out by the applicant because the 2<sup>nd</sup> respondent reported what he found on the ground.

On the foregoing reasons, the learned advocate for the respondents prayed that the instant application be dismissed with costs for want of merits.



No rejoinder was filed and this marked the end of hearing of this application.

The noble task of this court now is to determine the merits or otherwise of this application. I will start with extension of time, if granted, will proceed to determine the prayer for setting aside sale.

Having carefully considered the rivaling arguments of the learned advocates for parties, in my view, the first issue for determination in this application is as rightly noted by Mr. Nyaisa and rightly so in my view under the first prayer is whether there is illegality apparent on the face of the record warranting extension of time and proceed to determine the merits of setting aside of sale.

According to Mr. Rioba, the illegalities in question are pegged three points; one, on the sale of the suit properties before expiry of 30 days from the date of issuance of proclamation for sale, two, the 2<sup>nd</sup> respondent not notifying the applicant with notice of 14 days prior the said sale and the valuation reports of 2022 used for sale showed way below the market value when mortgage was created way back in 2012.

On the other hand, Mr. Nyaisa strongly opposed the raised issues as illegality because are not apparent on the face of the record but need long



drawn arguments and are couched in a way but are misleading as to what really happened.

In my respective view and with due respect to Mr. Rioba, these grounds are akin to fail in the circumstances of this application. I will explain. One, Mr. Rioba deliberately avoided both in the affidavit and in his submission in chief to tell the court how many days were abrogated as required under Rule 67 of the CPC. This court observed that proclamation was issued on 06<sup>th</sup> January 2022 and sale was conducted on 4<sup>th</sup> February 2022 right on the 30<sup>th</sup> the day of the proclamation for sale.

Two, The words used in Rule 67 in gauging 30 days are ***"take place after the expiration of at least in 30 days in case of immovable property."*** (emphasis mine). In my considered opinion the phrase ***"at least"*** is not necessary to be strictly 30 days but can be less depending on the circumstances of each case. In this application, much as the sale was done exactly on the 30<sup>th</sup> day of the proclamation for sale no way it can legally be held that the provisions of Rule 67 were abrogated.

In the circumstances, I declined to associate with Mr. Rioba's arguments on this point and proceed to say the provisions of Rule 67 of the CPC were



complied to the letter because sale was conducted on the 30<sup>th</sup> day of the proclamation for sale as correctly argued by Mr. Nyaisa.

The second reason for determining illegality was that sale of the disputed properties was done in far below the price during mortgage. According to Mr. Rioba, this illegality was perpetuated by relying on valuation reports done in July 2021 compared to that of 2012 when mortgage was created.

On the other hand, Mr. Nyaisa strongly opposed this ground to constitute an illegality. In his view, not every illegality shall warrant extension of time and cited a number of decisions to support his stance. The learned advocate went on to urge this court to reject this point as being an illegality for want of proof.

I have carefully considered the rivalling arguments but with due respect to Mr. Rioba, this point as well has to fail in its face value. I will explain as well. One, the valuation in 2012 cannot be basis for determination of price after elapse of such period and as rightly argued by Mr. Nyaisa, the valuation done in 2021 are current and were verified by the Chief Government Valuer and no evidence was brought to counter or challenge their authenticity in any way. Two, I fully adopt the holding in the Kenyan case of ZUM ZUM INVESTMENT LIMITED (*supra*) on challenging of the valuation report should

be on grounds of qualification, consideration of irrelevant factors, valuation was done before sale, and I wish to add that, if valuation was obtained by fraud. None of the above grounds was proved in this application to warrant same to be an illegality.

In the circumstances of this application no illegality has been shown or proved but a just mere allegation without an iota of any evidence.

The last ground on illegality was that no notice of 14 days was published and served to the applicant notifying the applicant prior to the said sale. Mr. Rioba on this point was that section 12(2) of the Auctioneers Act, [Cap 227 R.E.2019] was abrogated and to him, constitute an illegality. He cited the case of GODBERTHA RUKANGA (supra) to support his stance. On the other hand, Mr. Nyaisa strongly argued that section 12(2) of Cap 227 was not abrogated and was complied to the letter and not an illegality.

I have carefully followed what transpired and what is at issue now here and I am bold to hold that this point was argued out of context and because in the counter affidavits of the respondents there are several notices which were served to the applicant's advocates one Winjanet Lema, advocate from Stallion Attorneys under section 12(2) who were representing the applicant. It is indeed unheard now to argue that section 12(2) of the Auctioneers Act

was abrogated. The purpose of section 12(2) is to give the applicant an opportunity for redemption of the mortgage which was done through her lawyers but failed to do so, hence, this application is distinguishable from the case of GODBERTHA(supra).

On the totality of the above reasons, I have utterly failed to find any illegality to warrant extension of time.

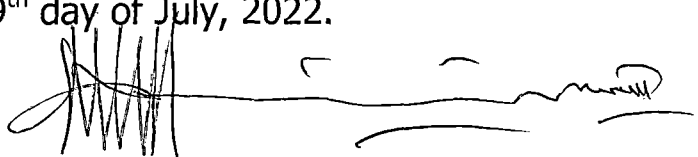
That said and done, the instant application stand to fail. Much as extension has failed I find it being academic exercise to consider the grounds for setting aside sale. However, even if I had to consider, still was to fails because it was same grounds advanced for setting aside sale.

In the event, the instant application is dismissed with costs to the respondents.

It is so ordered.

Dated at Dar es Salaam this 29<sup>th</sup> day of July, 2022.



  
**S. M. MAGOIGA**  
**JUDGE**  
**29/07/2022**