

**IN THE HIGH COURT OF TANZANIA**

**(COMMERCIAL DIVISION)**

**AT DAR ES SALAAM**

**MISCELLANEOUS COMMERCIAL APPLICATION NO. 153 OF 2021**

**(Arising from Commercial Case No. 106 of 2017)**

**NAWAB ABDULRAHIM MULLA..... APPLICANT**

**Versus**

**INTERNATIONAL COMMERCIAL BANK**

**(TANZANIA) LIMITED .....1<sup>st</sup> RESPONDENT**

**CRISPIN JOSEPH SEMAKULA.....2<sup>nd</sup> RESPONDENT**

Date of last Order: 10<sup>th</sup> October 2022

Date of Ruling: 28<sup>th</sup> November 2022

**RULING**

**MKEHA, J:**

The present application traces its genesis from loan facilities secured by the applicant from the 1<sup>st</sup> Respondent more than five years ago. To secure the said loan, the applicant executed legal mortgages over his commercial properties on C.T. No. 13996, L.O No. 18781 and C.T No. 13997, L.O No. 18790, Plots Nos 1 and 2 respectively, Block 'C' Mbeya

Township, registered in the applicant's name. When the applicant failed to liquidate the said loan, the 1<sup>st</sup> respondent instituted Commercial Case No. 106 of 2017 in view of recovering the loan amount that remained unsettled. The said Commercial Case resulted into a consent decree in favour of the 1<sup>st</sup> respondent and against the applicant. The said decree is annexed as Annexure MK2 to the applicant's affidavit. The manner in which the purported decree was extracted and thereafter executed is what prompted filing of the present application. To easen reference making exercise, the decree whose execution is being challenged in this application, is reproduced as hereunder:

"IN THE HIGH COURT OF TANZANIA

COMMERCIAL DIVISION

**AT DAR ES SALAAM**

COMMERCIAL CASE NO. 106 OF 2017

BETWEEN

INTERNATIONAL COMMERCIAL BANK (T) LTD.....PLAINTIFF

VERSUS

NAWAB ABDULRAHIM MULLA..... DEFENDANT

**DECREE**

**WHEREAS**, (sic) the plaintiff claims and pays for the following orders and reliefs: -

- 1) Judgment in favour of the plaintiff against the defendant for US \$ 999, 550.81 or its equivalent (sic) in Tanzania Shillings at the exchange rate prevailing on the date of judgement;
- 2) Interest on the aforesaid sum at the agreed rate of 7.5% per annum plus 2% per annum default interest, total 9.5% per annum from 14<sup>th</sup> June 2017 until judgement or sooner payment;
- 3) Interest at the court rate post judgement;
- 4) The defendant be ordered to pay the costs of this suit and
- 5) Such further orders and reliefs this Hon. Court deems just, equitable and convenient.

This suit coming today for recording Deed of Settlement on 28<sup>th</sup> day of August 2016 (sic) before Hon. H. T. S, Judge in the presence of Mr. Dilip Kesaria Learned Advocate of the Plaintiff and Ms. Claudiah Nestory, the Learned Advocate of the Defendant.

**THIS COURT DOTH HEREBY ORDER THAT**

That the deed of settlement filed in court is entered as judgement of the court in the following terms: -

1. Judgment enter (sic) in favour of the plaintiff for the amounts and reliefs claimed in the plaint.
2. The defendant is required to pay the judgement debt in full on or before 30<sup>th</sup> November in default of which the plaintiff shall be at liberty to enforce the judgement in any manner the plaintiff deems fit including the sale of the judgement debtor's immovable properties located on plots Nos. 1 and 2 Block "C" Mbeya Township, Title Numbers 13996 and 13997 by Public Auction or by private treaty without further court process.

Given under my hand and seal of the court this 28<sup>th</sup> day of August 2017.

Sgd.

DEPUTY REGISTRAR

Extracted this 28<sup>th</sup> day of August 2017.

Issued on 30<sup>th</sup> August 2017.”

According to paragraph 5 of the applicant’s affidavit, upon procuring consent judgement and decree, the plaintiff/1<sup>st</sup> respondent moved ahead to sell the landed properties put as securities by the defendant claiming to execute the Decree of this Court dated 28<sup>th</sup> day of August 2017 to satisfy the decretal amount without any execution order. Paragraph 6 of the Applicant’s affidavit indicates that, the applicant came to know about the sale of his properties on 18<sup>th</sup> January 2020 when he was served with a letter from the 1<sup>st</sup> respondent that the mortgaged house was sold on 24<sup>th</sup> December 2019 to a bonafide purchaser but that, the same fetched an amount which could not fully liquidate the loan amount and therefore demanding payment of the unliquidated amount. The said letter which is annexed to the applicant’s affidavit provides in part as hereunder:

“Dear Sir,

**RE: SALE OF MORTGAGED COMMERCIAL PROPERTY LOCATED ON PLOT NUMBERS 1 & 2 BLOCK “C” MBEYA CITY WITH CERTIFICATE OF TITLE NUMBERS 13396/13997 (sic)**

By the powers vested under the Mortgaged Deed executed between Mr. Nawab Mulla and ICBTL, and **in execution of the High Court Decree**, (High Court Commercial Division Case No. 104/2017 (sic) International Commercial Bank (Tanzania) Limited versus Nawab Mulla dated 28<sup>th</sup> August 2017, the aforementioned property was duly sold by the Bank to the bonafide purchaser on 24<sup>th</sup> December, 2019 which fetched a sale price of Tanzania Shillings One Billion One Hundred Million (TZS 1,100,000,000/=only.

However, the said proceeds of sale are not sufficient to fully liquidate the term loan facilities given that the outstanding dues owed to the Bank as of date stands at United States Dollars One Million, One Hundred Ninety One Thousand Five Hundred Twenty one and Nine Cents (USD 1,191,521.09) being the total balance amount to term loan 1 & term loan 2.

Therefore, the Bank is demanding repayment of the outstanding balance and payment should be done within fourteen (14) days of this letter and on your failure to do so, the Bank shall continue with recovery actions against you and the Guarantors, to ensure full recovery of the outstanding balance.

Kindly be advised accordingly.

For, INTERNATIONAL COMMERCIAL BANK (TANZANIA) LIMITED

Sgd

Villy Vellayappan

Chief Executive officer"

The applicant was not pleased with the way the decree against him was purportedly executed. He therefore successfully sought and obtained an order for extension of time to file an application to set aside what he considered to be illegal sale of his properties. (Paragraph 13 of the applicant's affidavit).

Having obtained an order for extension of time to challenge the purported sale done in execution of the decree against him, the applicant is moving the court to be pleased setting aside sale of the landed properties with C.T No. 13996 LO No. 18781 and CT. No. 13997 L.O No. 18790, Plots Nos. 1 and 2 respectively, Block "C" Mbeya Township, registered in the name of NAWAB ABDULRAHIM MULLA, in execution of the decree of Commercial Case No 106 of 2017 dated 28<sup>th</sup> day of August 2017. The application is made under Order XXI Rule 88 (1) of the Civil procedure Code. The application is supported by an affidavit affirmed by Mr. NAWAB ABDULRAHIM MULLA, the applicant. On the other hand, the application is contested through counter affidavits sworn by Mr. Vitalis Evarist Salimu, Principal Officer of the 1<sup>st</sup> respondent and that affirmed by Mr. Ahmed Said El- Maamry, Advocate for the 2<sup>nd</sup> respondent. Whereas Mr. Paul Mgaya learned advocate represented the applicant, Mr. Zacharia Daudi learned advocate represented the 1<sup>st</sup> respondent and Mr. Ahmed Said El- Maamry learned advocate represented the second respondent.

Substantially, the 1<sup>st</sup> respondent does not dispute having sold the applicant's property in the manner complained of by the applicant. It is stated in paragraph 4 of the 1<sup>st</sup> respondent's counter affidavit that, in

the compromise of suit which led to the consent decree of this court, it was agreed that the applicant (then the defendant) would pay the judgement debt in full on or before 30<sup>th</sup> November 2017 and in default to pay the judgement debt, the 1<sup>st</sup> respondent (then the plaintiff) would be at liberty to sell the properties located on Plot Nos. 1 and 2 Block "C" Mbeya Township with Certificates of Title Number 13996 and 13997 by **public auction or private treaty without further court process.**

According to paragraph 5 of the 1<sup>st</sup> respondent`s counter affidavit, sale of the applicant`s properties was consequential to the applicant`s default to pay the judgement debt as agreed between the applicant and the 1<sup>st</sup> respondent in Commercial Case No. 106 of 2017 and as decreed by the court, hence the 1<sup>st</sup> respondent proceeded to execute the consent decree in compliance with terms of the Consent Decree. And further that, the purchase price of the properties of the applicant was TZS 1,100,000,000/= following depreciation of value of real estate in Tanzania, at the time of sale (Paragraph 8 of the 1<sup>st</sup> respondent`s counter affidavit).

The 2<sup>nd</sup> respondent is the person in whose favour the applicant`s properties were sold by the 1<sup>st</sup> respondent by way of private treaty on pretext that the decree in Commercial Case No 106 of 2017 was being

executed. In paragraph 3 of the counter affidavit affirmed on behalf of the 2<sup>nd</sup> respondent, it is stated that, the 1<sup>st</sup> respondent executed the decree in Commercial Case No. 106 of 2017 dated 28<sup>th</sup> day of August, 2017 and that, the enforcement of the judgment was in any manner, without further court process.

In terms of the applicant's affidavit and submissions by Mr. Paul Mgaya learned advocate, the main points of complaint were the unprocedural means used to execute the decree in Commercial Case No. 106 of 2017 as well as the price at which the mortgaged properties were sold. The learned advocate explained the price to be a throw away price.

Mr. Zacharia Daudi learned advocate for the 1<sup>st</sup> respondent submitted in reply that, since the parties had agreed that upon default to pay the judgement debt on part of the applicant/ judgement debtor, the 1<sup>st</sup> respondent would proceed with sale of the disputed properties **without further court process, either by public auction or private treaty,** the 1<sup>st</sup> respondent cannot be faulted for enforcing the decree in the manner she did. According to the learned advocate, the parties had agreed to waive the due process of execution. In view of the learned advocate, that was proper. Mr. Said El – Maamry learned advocate had similar position with the learned advocate for the 1<sup>st</sup> respondent.



According to the learned advocate for the 2<sup>nd</sup> respondent, the agreement to the effect that upon default to pay, the disputed properties would be sold by public auction or private treaty without further court process was in any way binding upon the applicant/judgement debtor.

From the foregoing arguments of the learned counsel for the parties and the relevant paragraphs of affidavits and counter affidavits, the following issues arise for determination:

- (i) Whether there was a decree capable of being executed in Commercial Case No. 106 of 2017.
- (ii) Whether the parties to a civil suit can agree to execute a decree in a manner contrary to the dictates of mandatory provisions of the law.

As indicated earlier in this ruling, the most operative part of the decree purportedly executed by the 1<sup>st</sup> respondent provides as hereunder:

“That the deed of settlement filed in court is entered as judgement of the court in the following terms:-

1. Judgement enter (sic) in favour of the plaintiff for the amounts and reliefs claimed in the plaint”

In the 1<sup>st</sup> respondent's letter to the applicant dated 16<sup>th</sup> January 2020, the former notified the latter that, in execution of the High Court Decree dated 28<sup>th</sup> August 2017 the applicant's property was duly sold by the Bank to the bonafide purchaser on 24<sup>th</sup> December 2019. Assuming that the 1<sup>st</sup> respondent had powers to execute the court's decree in the manner she did, was there any such decree to be executed? I ask myself the said question while mindful that the executing court has no powers to go behind the decree. It has to execute the decree as it finds it. However, since it is the court's decree or order that is capable of being executed, the said question is inevitable. In terms of Order XX Rule 6 (1) of the Civil Procedure Code, apart from specifying the reliefs claimed, the decree should as well clearly specify the reliefs granted or other determination of the suit. In other words, decrees should be drawn up in such a way as to make them self-contained and capable of being executed without referring to any other document. **See: Mulla, The Code of Civil Procedure, 16<sup>th</sup> Edition at page 2372.** See also: **MANTRAC TANZANIA LIMITED VS RAYMOND COSTA, CIVIL APPEAL NO.74 OF 2014, CAT, AT MWANZA.**

The operative portion of the extracted decree in Commercial Case No. 106 of 2017 does not indicate any specific relief granted to the plaintiff/

1<sup>st</sup> respondent. It is that latter part of the decree which is normally presented before the executing court for purposes of execution. The decree merely refers to the "*amounts and reliefs claimed in the plaint*". In principle, there can be no execution or specific enforcement of a liability without there being previous determination of the liability by a court and incorporated in a formal document called a decree. It is this document which the executing court is concerned with for purposes of execution. In the circumstances of the present case, picturing the operative portion of the extracted decree, which does not indicate the specific reliefs granted, there was no decree capable of being executed in Commercial Case No. 106 of 2017. The reason being that, up to when the 1<sup>st</sup> respondent purported to execute the said decree, a proper decree capable of being executed had not been drawn and extracted.

Regarding the second issue, it was the respondents' position that when the 1<sup>st</sup> respondent sold the applicant's properties to the 2<sup>nd</sup> respondent by way of private treaty, she was executing this court's decree in Commercial Case No 106 of 2017 dated 28<sup>th</sup> August 2017. It was submitted by the learned counsel for the respondents that, since the applicant and the 1<sup>st</sup> defendant had agreed that the decree between them could as well be executed through sale of the mortgaged

properties by way of private treaty, there was nothing wrong on part of the decree holder/ 1<sup>st</sup> respondent to sell the said properties in the manner she did i.e. by way of private treaty. In view of the learned advocate for the applicant, sale by way of private treaty is only acceptable when the mortgagee exercises his remedy of sale without having taken steps of procuring a court's decree. In his view, once a court's decree is in place, it has to be executed in the manner permitted by the Civil Procedure Code that governs the aspect of execution of court's decrees.

The submission by the learned advocate for the applicant on this issue is highly persuading. A combined reading of sections 127 (1), (2) (a) and (d), 132 (1) to (4) and 134 (1) (a) to (g) of the Land Act suggests that, sale by a private treaty is only permissible in situations whereby the lender opts to exercise his remedy of sale without resorting to the court for purposes of procuring a court's decree. After a court's decree is obtained, its execution has to follow the procedure provided under the Civil Procedure Code. In other words, where a mortgagee has obtained a decree for payment of money in satisfaction of a claim arising under a mortgage, he is not entitled to bring the mortgaged property to sale otherwise than by adhering to what the Civil Procedure Code instructs.

Order XXI Rule 64 of the Civil Procedure Code empowers the executing court to sell the property of the judgement debtor and to pay out of the sale proceeds the decretal sum to the decree holder. The said provision reads as hereunder:

*“Save as otherwise provided, every sale in execution of a decree shall be conducted by an officer of the court or by such other person as the court may appoint in this behalf and shall be made by public auction in the manner prescribed”.*

It is thus clear from Rule 64 of Order XXI of the Civil Procedure Code that every sale in execution of a decree has to be made by a public auction. The public auction has to be conducted by an officer of the court or by such other person as the court may appoint and nobody else. The said public auction is to be conducted in the manner prescribed. Rule 64 of Order XXI of the Civil Procedure Code does not appear to exempt mortgage decrees.

Rule 65 of Order XXI of the Civil Procedure Code enacts that, where any property is ordered to be sold by public auction in execution of the decree, the court should cause a proclamation of the intended sale to be made in the language of such court. Sub rule (2) of Rule 65 provides for drawing up of a proclamation by the court after issuance of notice to the decree holder and the judgment debtor. Times without number, the courts have held the absence of such a proclamation before conducting

sale, to be an incurable irregularity. **Read: BALOZI ABUBAKARI IBRAHIM AND ANOTHER VS. MS BENANDYS LIMITED AND TWO OTHERS, CIVIL REVISION NO. 6 OF 2015, CAT AT DAR ES SALAAM.**

The parties are in agreement that sale of the applicant's properties which was purportedly done in execution of the court's decree was by way of private treaty. No doubt such a sale cannot be said to be sale by public auction which the Civil Procedure Code recognizes. If I may be permitted to refer in this regard, to the Halsbury's Laws of England, the word auction, is explained as "a manner of selling or letting property by bids usually to the highest which those who bid can be tempted to offer by the skill and tact of the auctioneer under the excitement of open competition." **See: The Halsbury's Laws of England, Volume 2, Fourth Edition, Paragraph 701 at page 360.**

It is thus clear that an auction is held by public competition wherein every bidder has a right to raise his own bid. It is also clear that in public auction the atmosphere therein created by open bidding can tempt the bidder to raise his bid and thus enhanced price can be fetched through the said mode. In a sale by private treaty, no such opportunity is available. That is so because, sale by private treaty is a process of

selling an asset by way of a privately negotiated deal between a seller and buyer without recourse to an auction process: **Source:** *<https://uk.practicallaw.thomsonreuters.com>*. That is why the applicant complained that, his properties were sold at a throw away price to which the learned advocate for the 1<sup>st</sup> respondent replied that, at the time of sale there was depreciation of the value of real estate in Tanzania.

Therefore, if the requirement of Rule 64 of Order XXI of the Civil Procedure Code is that every sale in execution of a decree should be by a public auction, then the sale held in any other manner is a nullity. The parties to a civil suit are not permitted to agree executing a court's decree in a manner that is contrary to mandatory provisions of the law. However, provided that the decretal liability is left unaltered the executing court can accept any compromise, not breaching the law, arrived at by the parties with regard to the mode of execution. **See: LAEMTHONG RICE CO. LTD VS. PRINCIPAL SECRETARY, MINISTRY OF FINANCE ZANZIBAR, CIVIL APPEAL NO. 259 OF 2019, CAT, AT DAR ES SALAAM.**

From the foregoing, it cannot be disputed that there was material irregularity in not proclaiming sale of the applicant's properties and in

selling them by private treaty instead of selling them through a public auction that might attract higher bids from different competing bidders. That is possibly the reason why, a property with an open market value of TZS 2.462 billions and Force sale value of TZS 2.092 billions ended up fetching TZS 1,100,000,000/= only. No doubt, in that way, the applicant sustained substantial injury because of the irregularities committed by the 1<sup>st</sup> respondent in disposing the disputed properties contrary to the dictates of mandatory provisions of the law.

For the foregoing reasons, sale of the applicant's landed properties with C.T No 13996, L.O No. 18781 and C.T No. 13997, L.O No. 18790, Plots Nos 1 and 2 respectively, Block "C" Mbeya Township, registered in the name of NAWAB ABDULRAHIM MULLA, in execution of the decree of Commercial Case No. 106 of 2017 dated 28<sup>th</sup> day of August 2017 is hereby set aside. In terms of Rule 91 of Order XXI of the Civil Procedure Code, the 1<sup>st</sup> respondent is ordered to refund the purchase price to the 2<sup>nd</sup> respondent. The 1<sup>st</sup> respondent is ordered to pay interest of 7% per annum to the 2<sup>nd</sup> respondent on the purchase money from when the same was paid to her to the date of final payment of the said money. To recover the decretal sum, the 1<sup>st</sup> respondent is advised to pursue proper execution proceedings in respect of a properly extracted decree in the



manner provided under Rules 63 to 71 of Order XXI of the Civil Procedure Code. Her Worship the Deputy Registrar of the High Court is directed to make arrangements that will enable immediate collection of a properly extracted decree by the parties to Commercial Case No. 106 of 2017. I make no order as to costs.

DATED AT DAR ES SALAAM this 28<sup>th</sup> day of November 2022.



  
**C.P. MKEHA**

**JUDGE**

**28/11/2022**

**Court:** Ruling is delivered on this 28<sup>th</sup> day of November 2022 in the presence of Advocates Zacharia Daudi for first respondent also holding brief of Advocate Alphonse Nachipyangu for the Applicant and Ahmed El-Maary for second respondent.



  
**O. N. KIPETA**

**AG. DEPUTY REGISTRAR**

**28/11/2022**