IN THE HIGH COURT OF TANZANIA

(COMMERCIAL DIVISION)

AT DAR ES SALAAM

COMMERCIAL REVIEW NO. 5 OF 2019

(ARISING FROM COMMERCIAL CASE NO.27 OF 2002)

M/S ILABILA INDUSTRIES LIMITED ..... 1ST APPLICANT

JOHN MOMOSE CHEYO ..... 2ND APPLICANT

NGULA VITALIS CHEYO ..... 3RD APPLICANT

VERSUS

TANZANIA INVESTMENT BANK ..... 1ST RESPONDENT

OSCAR PHILIMON MGAYA (Legal Representative of Philimon Mgaya T/A ERICK AUCTION MART) .....2ND RESPONDENT

VICTORIA REAL ESTATE DEVELOPMENT ..... INTERESTED PARTY

Date of Last Order: 17/03/2022

Date of Ruling: 22/04/2022

RULING

MAGOIGA, J.

The applicants, M/s. ILABILA INDUSTRIES LIMITED, JOHN MOMOSE CHEYO AND NGULA VITALIS CHEYO preferred this application under the provisions section 78 (1) and Order XLII Rule 1(1) (b), (2) and (3) of the Civil Procedure Code, [Cap 33 R.E. 2019] (to be referred herein after as the **"Code")** seeking review of the ruling and order of this honourable court dated 14th September, 2004 by His Lordship Kalegeya, J (as he then was)

denying to set aside sale and declare the auction and sale of the landed property standing on plot No. 1472 Masaki area, Dar es Salaam null and void by way of amended memorandum of review on the following grounds of review, namely:-

1. That after hearing and determination of the application to set aside the auction and sale of the property named Plot No.1472, Masaki area Dar es Salaam, the applicants discovered important facts and evidence that the auction which took place on 5th day of September, 2004 was tainted with irregularities and fraud perpetuated by the 2nd respondent herein mainly as follows:
   (a) That there is no evidence that the successful bidder Mr. TWAHA YAKUB of P.O Box 78076 Dar es Salaam did deposit Tshs. 35,750,000.00 being 25% of the purchase price at the fall of the hammer as per condition stipulated in the advertisement contained in the Guardian Newspaper dated Friday August, 2004;
   (b) That Tshs. 143,000,000.00 had been paid by cheque No. 00241 by a company known as VICTORIA REAL ESTATE DEVELOPERS LIMITED who was not among the bidders at the auction;

(c) That VICTORIA REAL ESTATE DEVELOPERS LIMITED and/ or its representative never attended the auction;

(d) That the purchase price of Tshs.143,000,000.00 was paid in whole by the second respondent into the Commercial Court on the 20th September, 2002.

On the strength of the above grounds, the applicants asked this court to review its ruling and declared the sale was null and void with costs and any other relief this court may deem fit to grant.

None of the respondents filed any reply to the ground of review after being served, for obvious reason that is not requirement of law.

Facts leading to this application are imperative to be stated for better understanding the gist of this application. By Deed of Agreement dully signed and recorded by the court between the 1st respondent (as plaintiff) and the 1st and 2nd applicants (as defendants) emanating from Commercial Case No. 27 of 2002 instituted by the 1st respondent claiming, among others, Tshs.221,983,824.68, being an outstanding amount on credit facility granted to 1st applicant, a decree of the court was issued. The said facility was secured, among others, by the 2nd and 3rd applicants' personal

guarantees as well as legal mortgage of the property in dispute. However, in the said arrangement, the 3rd applicant did not sign the Deed of Settlement.

Consequently, 1st and 2nd applicants failed to adhere to the terms and conditions of the settlement, triggering an execution which culminated into sale of the disputed property at the price of Tshs.143,000,000.00. Attempts to set aside sale was in vain by the ruling of this court dated 14/09/2004, hence, this application for review of this court's ruling on sole ground of discovery of new and important evidence.

The applicants, at all material time have been enjoying the legal services of Mr. Seni Malimi, Ms. Ritha Chihoma and Ms. Joyce Maswe, learned advocates. On the other hand, the 1st respondent has been enjoying legal services from Ms.Jenifer Msanga and Ms. Kause Kilonzo, learned State Attorneys; the 2nd respondent was as well enjoying the legal services of Mr. Jovinson Kagilwa and Ms. Neema Richard, learned advocates and the interested party has been enjoying the legal services of Mr. Juma Nassoro, learned advocate.

Parties learned trained minds for both parties' each filed written skeleton arguments in support and opposing this application and made oral

submissions in support of their respective stance for and against the grant of the application.

Mr. Malimi arguing the application prayed to adopt the written skeleton argument in support of this application. Basically in their written skeleton arguments, the learned advocate started by giving a long detailed and protracted historical background of this legal dispute culminating to this application for review. According to the learned advocates for the applicants, the sale by auction that was conducted by the 2nd respondent in respect of the property over plot No.1472, Masaki area, Dar es Salaam city was tainted with irregularities and fraud. The irregularities, according to Mr. Malimi, were: the 2nd respondent herein on 5th September, 2004 auctioned the suit premise, and, one, Twaha Yakubu emerged the successful bidder, but who for unknown reasons never paid Tshs.35,750,000.00 being 25% of the purchase price of Tshs.143,000,000.00) at the fall of the hammer as stipulated in the advertisement contained in the Guardian Newspaper dated Friday August, 2004 and proclamation for sale, in particular item 8, hence, contrary to law. The learned counsel for the applicants pointed out that the above state of facts are supported by affidavits of Philimon N. Mgaya, Azim

Hooda (the 2nd highest bidder) who attended auction, Suleiman N. Alhilal director of the interested party and Anneth Kirethi.

Mr. Malimi, therefore, argued that the sale by auction was to be conducted according to the key conditions of the sale set out in the advertisement and proclamation for sale. Failure to follow the stated conditions in the proclamation for sale rendered the auction null and void abi initio, insisted Mr. Malimi. Mr. Malimi, further argued that, Regulation 10(1) of Land (Conduct of Auctions and Tenders) Regulations, 2001 was abrogated and to buttress his point cited the cases of BALOZI ABUBAKAR IBRAHIM AND ANOTHER vs. Ms. BENANDYS LIMITED AND 2 OTHERS, CIVIL REVISION NO. 6 OF 2015 AND MILCOM (TANZANIA) N.V. vs. JAMES ALAN RUSSEL AND 5 OTHERS, CIVIL REVISION N0. 3 0F 2017 (CAT) DSM (UNREPORTED).

As to the purchase price paid by the interested party who was not among the bidders and had no representative was done after the 2nd respondent sought the 2nd highest bidder as proved by the affidavits Azim Hooda and Director of the interested party one Suleiman N. Alhilal but who did not participate in the auction. According to Mr. Malimi, what was conducted by the court broker and interested party was fraudulent and contrary to the conditions for sale and the law regulating execution of decree.

Lastly was that the purchase price was paid in whole by the 2nd bidder into Commercial Court on 20th September, 2004 and certificate of sale was issued in the name of the interested party who did not participate in the auction and equated this as irregularity and fraud. According to Mr. Malimi, it is a trite law, citing regulation 10(3) of the Land (Conduct of Auctions and Tenders) Regulations, 2001, that where highest bidder fails to pay 25% of the bid amount at the fall of the hammer on the day of sale, the property will be put up again for sale after sufficient notice had been made and advertised as required by the law and would not by any circumstances be offered to the 2nd highest bidder and failure to follow the conditions in the proclamation for sale rendered the whole exercise null and void.

On the foregoing grounds for review, the learned advocates for the applicants urged this court to find this application is merited and grant it with costs.

On the other hand for the 1st respondent Ms. Kause, learned State Attorney readily prayed to adopt their skeleton written arguments in opposing this application. According to the learned Attorneys, in order for review to be granted, the applicants must demonstrate that there is discovery of new and important matter of evidence which after exercise of due diligence was not

within the applicant's knowledge or could not be produce by him at the time when the decree was passed or that there is an error apparent on the face of the record, or for any sufficient reason as provided under Order XLII Rule 1 (1) of the Code. The learned Attorney pointed out that Order XLII Rule 1(1) read together with section 78 of the Code give the High Court powers to review its own decisions but on restricted grounds. The learned Attorneys then tried to venture on other sufficient reason and concluded that anything outside the grounds stated in the law will amount to abuse of the powers of the court.

Back to the point in issue, the learned Attorney pointed that no discovery of new and important matter or evidence in this application has been proved for failure of the applicants to establish due diligence and that the existence of the evidence discovered was not in his knowledge.

According to the learned Attorney, the alleged new and important evidence was within the knowledge of the Court Broker, so the applicants as interested parties, if were to be vigilant, they would have got them from the court broker and the court records. The learned Attorneys argued that the conduct of the applicants is prompted by an afterthought and are trying to re-litigate through their own negligence in disguise to review. In the absence

of due diligence in handling the matter, the learned Attorneys pointed out that, no review can be maintained being a restricted application not to be an appeal in disguise and filing in the gaps to already decision made on merits. To buttress their point cited the cases of NATIONAL BANK OF COMMERCE vs. DEOGRATIUS JOHN NDENJEMBI, COMMERCIAL REVIEW NO. 04 OF 2019 (HC) DSM (UNREPORTED) in which the court held that review, in my considered opinion, is a restricted remedy that is available to a party who has been aggrieved by the decision without making an appeal in disguise or is not remedy for the applicant to fill gaps in its lacking evidence at the first trial. Review must be restricted to the grounds as stated in the law or other grounds peculiar to the circumstances of the case as may arise.

The learned Attorney equally cited the case of FRANCIS NYERERE SAID vs. BUNDA TOWN COUNCIL AND OTHERS, CIVIL REVIEW NO. 3 0F 2021 (HC) MUSOMA (UNREPORTED) in which it was held that failure of the applicant to show any efforts or exercise due diligence cannot be regarded to be new evidence at all.

Another case cited by the learned Attorneys was the case of I & M BANK TANZANIA LIMITED vs. GENERAL MOTORS AND OTHERS, COMMERCIAL REVIEW NO. 2 OF 2021 (HC) DSM (UNREPORTED) in which it was held that

the discovered matter should not be an afterthought. The applicant's explanation is not sufficient as to why she was not in possession of the documents which were just held by the auctioneer who conducted the sale at the instant of the same applicants.

On that note, the learned Attorney concluded that, the alleged discovered new and important evidence was to be got from the broker but no efforts were made to get them, hence, purely an afterthought new evidence not allowable for review. Thus, they invited this court to dismiss this application with costs.

Next was Mr. Kagilwa for the 2nd respondent, who equally prayed to adopt their written skeleton arguments in which they appreciated that the law allows review but on restricted grounds. On the ground of discovery of new and important matter, it was their respective submissions that is not automatic, but the applicant must show that, he did due diligence and that same was not within his knowledge and could not be produced at the time when the decree was passed. To Buttress the point, Mr. Kagilwa cited the case of FAYAZ SHAMJI vs. REGISTEERED TRUSTEES OF ITHNA ASHERI JAMMAT MWANZA AND 5 OTEHRS, REVIEW NO. 01 OF 2021(HC) MWANZA (UNREPORTED)

Mr. Kagilwa went on attacking the grounds set for review that, had the applicants made due diligence he could be aware of what happened. The applicants never involved the court at all but what the applicant was busy with, was filing of irrelevant applications. Allowing this application, will amount to rehearing of the application, insisted Mr. Kagilwa. According to Mr. Kagilwa, this application amounts to re-litigating or appealing in disguise which is not allowed at all.

In the alternative, Mr. Kagilwa argued that all procedures for sale were complied with and no way re-hearing of the application can be entertained and be allowed now.

On the alleged and disputed arrangement of sale of the disputed property, from the 2nd respondent and the interested party, Mr. Kagilwa sees nothing wrong much as the money that was given by the highest bidder was paid at once and blessed by the court. The learned advocate for the 2nd respondent referred this court to see the affidavits of 2nd respondent, director of the interested party, Azim Hooda and that of Annete Kirethi and John Momose Cheyo.

To Mr. Kagilwa, the 2nd respondent acted within the law and there is no way can be faulted of what he did. Hence, urged this court to dismiss this application with costs.

Next was Mr. Nassoro, learned advocate for the interested party. Mr. Nassoro adopted his written skeleton arguments and basically sees nothing wrong with the arrangement of payment of money between Azim Hooda and Interested party. The mere use of the words successful bidder cannot invalidate sale and much as the applicants have failed to comply with the law. By failure to comply with the law, Mr. Nassoro guided by Sakar on Law of Civil Procedure 8th Edition who interpreted section 90 which is in pari materia to Rule 88 of Order XXI meant that under Order XXI Rule 88, the proviso thereto, the applicant must prove to have suffered substantial injury which is not the case here by reasons of such irregularities. According to Mr. Nassoro, a mere allegation of irregularities and fraud without prove of substantial injury is not enough to invalidate already declared sale to be absolute. The learned advocate went on to argue that, no law prohibits arrangement done by the 2nd respondent, Hooda and the interested party.

On the strength of the above reasons, Mr. Nassoro urged this to dismiss this application with costs.

In rejoinder, Mr. Malimi argued that much as it was public auction, it should not be conducted in alternative with private arrangements and in abrogation of the proclamation for sale. Mr. Malimi insisted that, the arrangements done were illegal which this court cannot condone. More so, Mr. Malimi argued that even the certificate of sale was fraudulently drafted that the highest bidder was Victoria Real Estate Developers while it was not so and as such misleading because the interested party was not there.

According to Mr. Malimi, it is true that the rule 88 of Order XXI of the CPC as argued speaks of irregularities and fraud but here there was illegality in the whole process which need no prove of the injury. On due diligence, it was the argument of Mr. Malimi that, the conduct of the applicants upon discovery of the new evidence demonstrate due diligence and strongly denied to re-litigate or appeal in disguise in this application.

The learned advocates for the applicants conclusively prayed that this application be allowed as prayed.

Having dutifully heard the rivaling submissions for grant and against the grant of the application, I find imperative to state the law which allows review, and, which basically both parties are at one that High Court under

the provisions of section 78 ready together with Order XLII rule 1(1) of the Code has powers to review its own decision. Section 78 of the Code provides:-

Section 78 (1) Subject to any condition and limitation prescribed under section 77, any person considering himself aggrieved-

(a) By a decree or order from which an appeal is allowed by this Code but from which no appeal has been preferred; or

(b) By a decree or order from which no appeal is allowed by this Code, may apply for review of the judgement to the court which passed the decree or made the order, and the court may make such order thereon as it think fit.

(2) Notwithstanding the provisions of subsection(1), and subject to subsection (3) no application for review shall lie against or be made in respect of any preliminary or interlocutory decision or order of the court unless such decision or order has the effect of finality determining the suit.

(3) Subsection (2) shall not apply in relation to any application to review a decision or order given to the

exercise by the mortgagee of the powers to sell or enter in possession of the mortgaged land or in an action brought by a mortgagor to suspend or stop sale of the mortgaged property.

And Order XLII Rule 1(1) of the Code provides as follows:-

Rule 1(1) Any person considering himself aggrieved-

(a) By a decree or order from which an appeal is allowed but from which no appeal has been referred; or

(b) By a decree or order from which no appeal is allowed,

and who, from the discovery of new and important matter or evidence which, after the exercise of due diligence, was not within his knowledge or could not be produced by him at the time when the decree was passed or order made, or on account of some mistake or error apparent on the face of the record, or for any other sufficient reason, desire to obtain review of the decree passed or order made against him, may apply for review of the judgment to the court which passed the decree passed or made the order.

(2) A party who is not appealing from a decree or order may apply for review of judgement notwithstanding the pendency of an appeal by some other party except where the ground of such appeal is common to the application and the appellant, or when, being respondent he can present to the appellate court the course of which he applies for review.

Going by the literal wording of the above provisions, no doubt that jurisdiction of the court to review its decision is creature of the statute and not inherent power of the court. Section 78 of the Code, therefore, prescribe the power of the court to review its own decision and Order XLII stipulates the rules (grounds) for review. However, it should be noted and insisted that, application for review is a restrictive application limited to the grounds as stated in the law with a purpose to serve, namely, bringing litigation to an end. See the cases of NATIONAL BANK FO COMMERCE vs. DEOGRATIUS JOHN NDEJEMBI, COMMERCIAL REVIEW NO.4 OF 2019 (HC) DSM (UNREPORTED) and P9219 ABDON EDWARD RWEGASIRA vs. THE JUDGE ADVOCATE GENERAL, CRIMINAL APPEAL NO. 5 OF 2011 (CAT) DSM (UNREPORTED).

Therefore, under the Rules, the grounds set forth for review are; one, ***discovery of new and important matter or evidence which, after exercise of due diligence, was not within his knowledge or could not be produced by him at the time when the decree was passed or made***; *two,* ***error apparent on the face of the record; and,*** *three,* ***or for any other sufficient reason. (Emphasis mine).***

From the above position of the law and having heard both the learned trained minds for the parties', I found out that, the issues in this application for review are; whether there was new and important matter or evidence worthy for entertaining this review; and if yes, whether the applicants exercised due diligence upon getting the new evidence as required by law and was not within their knowledge or could not be produced by them at the time when the decree was passed or order made. Further issues is whether in the absence of substantial injury review cannot stand as per rule 88 (1) proviso thereto of Order XXI of the Code.

I have carefully followed the conduct of the applicants in the instant application, after the sale and what happened, I find that, the arguments that the applicants did not exercised due diligence is misconceived. I will try to explain. **One,** on 24th September, 2004 when the 2nd applicant became

aware of the dubious auction done, did file a supplementary affidavit in the application before Kimaro, J (as she then was) complaining of the irregularities and fraud committed by the 2nd respondent. **Two,** on the same token, it cannot be said that what was deposed by the 2nd applicant was not new while Kimaro, J (as then was) had this to say at page 14 of her ruling:

> ***"Frankly speaking, the supplementary affidavit introduces completely new matters which were not before the court when the application for setting aside the sale was heard and determined by this court."***

So from the above excerpt of the ruling, I find out that the applicants acted diligently and raised the matters which were new by all standards. Suing in a wrong forum does not by itself deny or bar one to use the same grounds when in the right track. Equally, having assessed the circumstances of this application, it cannot be said that the applicants were aware of the new and important evidence when the first ruling was made. So the arguments that the new and important evidence was within the applicants is not true and nothing useful was put forward to suggest and prove by the respondents who alleged that they are coming as an afterthought. I don't associate with such arguments for the above obvious reasons.

On the argument that review cannot be entertained unless the applicants have demonstrated that they have sustained substantial injury. I agree that this is true but subject, only if, there was a valid auction conducted but for reasons of irregularity and fraud in advertising and conducting sale.

However, in the circumstances we have here and considering wholly what transpired in the whole process of private arrangement as opposed to public auction as demonstrated in the affidavits in support of this review of Mr. Philimon Mgaya,(the court broker) Azim Hooda, Suleiman N. Alhilal the director and Victoria Real Estate Developers Limited who was dubiously declared to be successful bidder out of private arrangement and that of Annethe Kirethi tells it all that the said private arrangement was sham, illegal and null and void abi initio. It is, therefore, my considered opinion that in illegal transactions, like this at hand, the applicants, as correctly argued by Mr. Malimi, and rightly so in my own opinion, need no prove of injury.

More so, in public auctions, there is nothing like second highest bidder or third highest bidder, these are terms used in tendering procedures where bidder are after evaluation are grouped in numbers. In my considered opinion, in public auction we have only the highest bidder after the fall of the hammer, period!

Much as Mr. Twaha Yusuf who was declared highest bidder failed to pay 25% of the purchase price, then, the whole process of auction was to start afresh. The reasons are very obvious to avoid collusion between parties at the detriment of the owners of the properties to be auctioned.

From the discovery of new evidence as evidenced through the affidavits of Mr. Philimon N. Mgaya (court broker), Azim Hooda, Suleiman N. Alhilal (director of the interested party-declared to be the successful bidder) and that of Annethe Kiriethi advocated for the 2nd respondent all in their totality proves that there was a transaction arranged privately for sale between Philimon Mgaya, Azim Hooda, Suleiman N. Alhilal which culminated into declaring the interested party as successful bidder. This cannot be a public auction so to speak. This is not what a public auction is expected of. In my respective opinion, the moment, Mr. Twaha Yusuf, who was declared highest bidder failed to deposit or pay 25% of the purchase price, in law and practice, the public auction done on 5th September, 2004 had failed. The sale of the disputed premise, if any, was to be put again and resold after following the law laid down procedures as stipulated in the proclamation for sale.

Therefore, the private arrangements done between the broker, Mr. Azim Hooda and then Victoria Real Estate Developers Limited was illegal and void abi abi initio. There is no such thing in auction as second highest bidder and the broker has no legal authority to sell a house directly without involvement and supervision by the court. The procedures adopted by the court in this application, were new and completely unacceptable and no court of justice will allow such conduct to stand. Indeed, in law, there was no meaningful auction done to warrant the court issue a certificate of sale in the circumstances. What I gathered from this review, the court broker deliberately designed his own ways of putting the disputed property on sale with no authority to do so and misled the court into this legal morass.

Therefore, even then report that caused the certificate of sale to be issue was fraudulently created and this goes and vitiates the whole purpose of sale by public auction. The whole process of private arrangement and sale of the disputed property amounts to have a game without rules if allowed and is to put sale of immovable property under the unchecked whims of the court brokers. This is improper from the day go and not acceptable at all. No court of law will allow such conduct. Therefore, much as the sale was illegal no proof of injury is required at all.

On the foregoing, I find this application merited and without much ado hereby review the ruling of my brother Kalegeya, J (as he then was) and proceed to vary his order dismissing this application and consequently proceed to grant the application on the sole ground of discovery of new and important evidence. In the circumstances, I declare the illegal auction done under private arrangement illegal, null and void to stand. Therefore, same is hereby set aside by the order of this court. The sale and auction, if any, to start afresh by following laid down procedures and under supervision of the court.

The applicants will have costs of this application.

It is so ordered.

Dated at Dar es Salaam this 22nd day of April, 2022

S.M. MAGOIGA

JUDGE

22/04/2022