

**IN THE HIGH COURT OF UNITED REPUBLIC OF THE
TANZANIA
(COMMERCIAL DIVISION)
AT DAR-ES-SALAAM
MISC. COMMERCIAL APPLICATION NO.45 OF 2023
(Arising from Commercial Case No.51 of 2012)**

BETWEEN

EDMUND AARON MWASAGAAPPLICANT

VERSUS

LETICIA VEDASTO NGILILEA

t/a LETISCO SUPPLIES.....1ST RESPONDENT

GODFREY RUTAIHWA RUTECHURA..... 2ND RESPONDENT

Last Order: 25/07/2023

Date of Ruling: 11/08/2023

RULING

NANGELA, J.:

This is an application brought under a certificate of urgency. The application was premised on section 55 & 95 and rule 95 (1) and (2), rule 96 of the Order XXI of the Civil Procedure Code, Cap.33 R.E 2019 and any other enabling provision of the law. The Application was supported by an affidavit of the Applicant.

Briefly stated, the Applicant seeks for the following orders:

1. That, this Honourable Court be pleased to put the Applicant into possession of the property situated at Plot No.1270 Block "A" Mbezi Luis, Dar-es-Salaam by way of evicting the Judgement Debtors and any other person occupying the premises through the said Judgment Debtors.
2. Any other relief this Honourable Court may deem fit to grant.
3. Costs of the Application be borne by the Respondents.

When this application was called on for orders on the 02nd day of May 2023 Mr. Roman Masumbuko, Learned Counsel, appeared for the Applicant. The Respondents were absent. Similarly, he appeared on the 07th May 2023 and the Respondents were absent despite being duly served.

On that material date, the Applicant's learned counsel prayed that the matter be heard *ex parte* as the Applicant had effectively served the Respondents. I did give him audience but later it turned out that on the material date the 1st Respondent did appear in court late after the court had

set for a date of ruling. This court vacated its earlier orders and decided to grant audience to the Respondents.

On the 25th of July 2023, this court heard both parties. Mr. Walter Shayo, learned advocate, appeared for both Respondents while Mr. Masumbuko continued to represent the Applicant. In his submission, Mr. Masumbuko briefly reiterated his earlier submissions. In short, he told this court that, the application is for eviction orders due to resistance by the Respondents to vacate from the disputed property.

He submitted the Applicant is a bona fide purchaser of the property described as Plot No.1270 Block "A" Mbezi Luis, Dar-es-Salaam, which property he lawfully bought following a lawful auction sanctioned by this court, and a certificate of sale issued by this court is dated 21st of April 2022. He also told this court that the Applicant has even processed and obtained a Certificate of Title ("CT. NO.78611 dated 24 May 2022).

Mr. Shayo opposed the application and filed a counter affidavit. He urged this court to refuse the application for eviction orders. The reasons assigned by Mr. Shayo were that the auction which vested the title of *bona fide* purchaser on

the Applicant was improperly carried out as no Notice was ever issued as required under section 12 (2) of the Auctioneers Act, Cap.227 R.E 2002. He therefore labelled it as an “illegal auction”.

He also faulted the legality of the price obtained arguing that, the same was below the actual market price of the property as it fetched a price of TZS 46 Million while according to the Facility Agreement which was the basis for the loans advanced to the Respondents who later failed to discharged them and hence the suit from which this application arose, does indicate that the security (house on Plot No.1270 Block “A” Mbezi Luis, Dar-es-Salaam) had a forced marked value of TZS 60million in year 2008.

Mr Shayo submitted that; it was surprising that the same property was auctioned in the year 2022 for a price of TZS 46million which is lesser than the real market price of the said property. He argued that, that fact does not add up given that landed property ordinarily appreciate instead of depreciating. Referring to section 113 (1) of the Land Act, Cap.113 R.E 2019, Mr. Shayo contended that, where a mortgaged property is disposed of, the law requires that, it

be disposed of at its best and reasonable price at the time of sale. He contended that, this provision was not adhered to at the time of sale by way of auction.

It was as well Mr. Shayo's contention that, as per the records of the court, the purchaser who is the Applicant, was a legal manager of the Mortgagee, the bank that advanced the loans to the Respondents. He referred this court to Annexure LD-2 to the counter affidavit filed by the Respondents.

He contended that, the Applicant was also the same person who was assigned to handle the affairs between the Respondents and the Bank from which the loans were sourced and, that, now, it turned out to be the same person who purchased their property as a highest bidder.

He also submitted that there was an issue of conflict of interest as he was the same person who was handling the issues of loan repayment between the lender (Bank) and the Respondents. He contended therefore that, even the Certificate of Title and the Certificate of Sale cannot stand the test of legality. He relied on the case of **NBC vs. Walter T, Czeum** [1998] TLR 380 to support his submission and

concluded that, based on all such irregularities, this court should decline the orders sought on the grounds of there being illegality.

In his brief rejoinder, Mr. Masumbuko rejoined that, much as the Respondents' learned counsel has narrated what transpired and pointed out various irregularities, all such are matters which should have been raised before an executing court and not at this stage when the Applicant is seeking for eviction. He contended that, this court has gone past all such stage and the mortgaged property got attached and sold in an auction which was legally conducted.

Mr. Masumbuko rejoined further that, under rule 57 to 62 of Order XXI of the Civil Procedure Code, Cap.33 R.E 2019, the room was open for objection proceedings by the Respondents and, that, they could as well utilise the avenue provided for under rules 63 to 92 of the Order XXI of the Civil Procedure Code as well to dispute the matter before the sale became absolute.

To strengthen his submissions, he referred to this court the case of **Mohamed Kanji vs. Mac Group Ltd**, Civil Appeal No.391 of 2022. In that case, the Court of Appeal of

Tanzania was of the following opinion regarding the absoluteness of a sale:

“...under Order XXI rule 90(1) of the CPC, a sale pursuant to a court order in execution of a decree becomes absolute where no application under rules 87, 88 and 89 is made or if made, where the sale is disallowed and the sale confirmed. ”

Mr. Masumbuko submitted that, the sale having been absolute the court becomes *functus officio* as the certificate of sale has already been issued under rule 92 (1) of Order XXI of the CPC. He also contended that the application before this court is not even about sale but about eviction. He contended that if the Respondents are questioning the sale, they should come to the court by other means such as an application to set aside the sale but not in this application.

Mr. Masumbuko contended that, although section 113 of the Land Act provides a correct position of the law, the same cannot be relied upon in this application but one ought to have raised it before the executing court and all other

issues raised should have been raised in an application for setting aside the sale.

Mr. Masumbuko submitted that; the Respondents may also opt to file a separate suit under section 38 (1) of the CPC if they want to claim ownership. He told this court that the NBC's case (supra) was rightly held as it was about setting aside a sale and hence, not one on eviction order as the matter at hand. On such an account, he urged this court to grant the application.

I have given a careful thought to the submissions made by the Learned Counsel for the parties herein. The issue to consider is whether this court should grant the prayers sought by the Applicant. In my view, I should not be detained by long arguments. The Applicant herein is seeking for eviction orders of this court following a successful auction in which he took part as a purchaser of the disputed property.

As contended by Mr. Masumbuko, this is no longer an executing court where I will sit to determine matters which ought to have been raised at the time when the Decree holder was seeking to execute the decree by way of

attachment and sale of the property involved in Commercial Case No. 51 of 2012. That stage, as correctly contended by Mr. Masumbuko is long gone, and the property having been attached was auctioned.

All matters considered to constitute illegality as contended by Mr. Shayo, should have been raised by then and not at this stage or in this application for eviction of the Respondents. If the respondents seek to challenge the ownership which was long vested in the Applicant following the successful execution proceedings, then they should follow the law and challenge the same in a separate suit or application to set aside the sale.

On those premises, I do not find it appropriate to accommodate those views aired by Mr. Shayo however good they might be. They have come rather late or should have been brought through a different means other than in this application. That being said, it follows that the Applicant's prayer for eviction has not been challenged to a level that convinces this court that the same should be rejected. I find that, his prayers are valid and should be granted as follows:

1. That, in that case the Judgement Debtors and or/any other person occupying the premises through the said Judgment Debtors are hereby ordered to voluntarily vacate property situated at Plot No.1270 Block "A" Mbezi Luis, Dar-es-Salaam in question within a period of 30 days from the date of this ruling.

2. That, in case the Judgement Debtors refuses to voluntarily vacate the premises in question within the stated period of time, the Applicant being a bona fide purchaser of the property situated at Plot No.1270 Block "A" Mbezi Luis, Dar-es-Salaam is hereby granted order to

forcefully and through the aid of the relevant law enforcement organs, evict the Judgement Debtors and any other person occupying the premises through the said Judgment Debtors.

3. That, in the circumstances of this case, each party shall bear its own costs.

It is so ordered.

**DATED at DAR-ES-SALAAM, THIS 11TH DAY OF
AUGUST 2023**



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DEO JOHN NANGELA
JUDGE