IN THE HIGH COURT OF THE UNITED REPUBLIC OF TANZANIA

(LAND DIVISION)

AT DAR ES SALAAM

LAND CASE NO. 337 OF 2015

TABITHA MGABE NSHOYA NYAMHANGA MAGOTI.....PLAINTIFF

VERSUS

LEONIA SENGO.....1ST DEFENDANT

JOHNSON IZENGO.....2ND DEFENDANT

TANZANIA BUILDING AGENCY.....3RD DEFENDANT

REGISTRAR OF TITTLES.....4TH DEFENDANT

THE ATTORNEY GENERAL.....5TH DEFENDANT

JUDGEMENT

OPIYO, J.

The plaintiff's claim against the defendants mentioned hereinabove, jointly and severally is for:-

1. A declaration that the plaintiff is the rightful and beneficial owner of and a *bonafide* purchaser for value the suit property, and that the second defendants claim over the said property are wrongful

2. An order of permanent injunction against the 2nd defendant, personal legal representative from in any way interfering with the plaintiffs peaceful and quite possession, occupation and use of the property

3. An order restraining the 4th defendant from changing ownership of the suit property in favour of the 2nd defendant.

4. Alternatively, and only in the alternative and without a prejudice to the foregoing reliefs, a declaration that the developments and the use of the suit property were and are valid, justified and lawful.

5. In the further alternative an order against the defendants jointly and severally for payment of monetary value of all the developments effected on the suit property, from 2012 to date, as shall be assessed by the government valuer.

6. An order against the defendants jointly and severally, for payment of general damages to be assessed by the Honourable court.

7. Costs of this suit

8. Any other relief(s) as the court will deem fit to grant.

The background of this suit emanates from the fact that, the plaintiff bought a suit property on a public auction on 21/02/2011 at a price of 350,000,000/= (say Three Hundred and Fifty Million only). The sale of the said property resulted from an *ex-parte* decree issued by Kinondoni

Primary Court in a Matrimonial Cause No. 51 of 2010, between Leonia Kajala Sengo (1st Defendant) and Johnson Izengo (2nd Defendant). It is further stated that, the suit property was originally owned by the Government of Tanzania which sold the same on loan to the 2nd defendant. The 1st defendant by virtue of being a wife of the 2nd defendant was alleged to have acquired interests on the suit property as it was held to be a matrimonial property by the Primary Court of Kinondoni in the said matrimonial cause, hence the said decree. The pleadings further show that, it is the 1st defendant also who paid 18,285,000/= vide Account No OJ1042989800 CRDB Azikiwe on 11/2/2011 to the 3rd defendant, as an outstanding amount remained on the loan for the suit property.

It is further stated in the amended plaint that, when the plaintiff approached the 3rd defendant for changes of ownership of the suit property to her name following the said purchase, she was reluctant owing to the allegations that the sale of the suit property to the plaintiff was erroneously made. However, the plaintiff moved further to the Registrar of tittles (4th defendant) in a bid to register the suit property in her name. The move was successful and she was availed with a Certificate of Tittle No. 92715 bearing her name on 10/1/2012.

On 20th January 2012, the plaintiff received a notice of Caveat from the 4th defendant. The Caveat was entered by the 2nd defendant against the ownership of the suit property by the plaintiff, as he claimed to have interest over the same. Despite requests from the plaintiff to the 4th defendant to cancel the Caveat by the 2nd defendant, the 4th defendant declined to cancel the said caveat. Later on, the plaintiff was informed by

the 4th defendant that, there is an application for transfer of the suit property by operation of law from the 2nd defendant which would have effect on the ownership of the suit land from her to the 2nd defendant. This followed the successful challenging of an e*x-parte* decree that led to the sale of the suit property to the plaintiff. Plaintiff believing being a bonifide purchaser sued the above-named defendants seeking to be declared *inter alia* as a lawful owner of the suit property.

Responding to the suit against them, each of the five defendants hereinabove denied the allegations contained in the case at hand on varied extent. The 1st defendant on his part admitted to that, the plaintiff is a bonafide purchaser of the suit land as claimed, but disputed all other claims from the plaintiff, including her alternative prayer for refund for her purchase price and compensation for unexhausted development.

The 2nd defendant on the other hand pleaded that, the plaintiff has no right over the suit land. She has no right to any claim or action whether for monetary compensation or otherwise against the 2nd defendant. That, the sale of the suit property was illegal and did not follow the required procedures and the same was by way of a private arrangement not on a public auction as alleged. Above all, the 2nd defendant was a 3rd party to the said sale arrangement. He imputed forgery on part of the 1st defendant. He alleged that the 1st defendant forged a letter dated 14 February 2011 purporting to have been written by the second defendant that enabled her to acquire certificate of title over the property from 3rd defendant and wrongly subjecting the same to the Kinondoni Primary court in *ex parte* divorce proceedings as matrimonial property.

He pleaded further that, upon knowing the existence of the *ex parte* decree against him and subsequent sale of his property he successful applied for setting aside *ex parte* judgement and decree against him. Consequently, Matrimonial cause no 51/2010 was heard inter parties leading to the decision that the disputed property was not a matrimonial property, thus not subject to sale. The sale of the property to the plaintiff was consequently nullified. That, the plaintiff attempted to set aside the said judgement nullifying the sale of property to her, but she failed as her Revision No 4B/2014 was dismissed for lack of merits. Still she did not gave up, as she filed yet another matter, Revision no 30/2015 before Kinondoni District Court which was equally dismissed with costs.

His further averment is that, the first defendant in collaboration with the plaintiff and unknown person impersonated as the second defendant and forged the signature of the second defendant and I managed to alter and forge a letter dated 18th May 2011 to the Magistrate in charge of Kinondoni Primary Court purporting to show that the second defendant was requesting to be paid his share after sale. They eventually acted through the said forged letter together with forged identification card from the National Electoral Commission, purported to be issued on 22nd May 2005 and forged introduction letter from Msasani Ward Executive Office, one Omary Kione led the court to prepare payment voucher no 40VC10008204 in favour of the purported 2nd defendant to the tune of Tshs. 143,107, 500 which was eventually collected.

In their joint Written Statement of defence, the 3rd, 4th and 5th defendants pleaded that, the claims by the plaintiff are tainted with misrepresentations. That, at the time of delivery of the judgment issued in a matrimonial Cause No. 51 of 2010, dated 21st January 2010, the suit property was not a matrimonial property and selling it on a public auction was unlawful. The same was still a subject of performance of an executory agreement of sale between the 2nd defendant and the 3rd defendant. The purchase price for the same was yet to be fully paid up for full execution of the sale agreement between them. Therefore, at that particular time it had not yet acquired a status of being a matrimonial property competent to be tied in a matrimonial suit. Furthermore, the suit property was not part and parcel of the proceedings in the said case, hence it was unlawfully and un procedurally tied in execution of the said judgment and in this suit. However, they admitted that, the suit property was sold to the 2nd defendant by the Government.

It was further stated by the 3rd defendant that, she had taken measures to create awareness to the 4th defendant regarding the status of the property in dispute and that she does not recognize any further proceedings undertaken over the suit premises between the plaintiff and whomever.

It is against this background the instant suit was called for hearing on the following issues: -

1. Who is the lawful owner of the disputed property?
2. To what reliefs are the parties entitled to.

The plaintiff had one witness and thirteen exhibits to prove her case, while the 1st defendant had one witness. Two witnesses came for the 2nd defendant, while the 3rd, 4th, and 5th defendants jointly had two witnesses. Also, the defense case comprised 17 exhibits in total. The parties enjoyed the legal services of the following Learned counsels; Edward Lisso appeared for the plaintiff, Yuda Thadei for the 1st defendant, Dr. Fredrick Ringo for the 2nd defendant while the 3rd, 4th, and 5th defendants were jointly represented by Selina Kapange and Janeth Kimambo, learned State Attorneys.

The case for the plaintiff was as follows, PW1 Tabitha Mugabe Stanslaus Nyamhanga Magoti testified that in February 2011, she came across a notice of auction of the house in dispute (exhibit P1) by Nsombo Auction Company which was to take place on 12/2/2011, which was however was postponed and finally took place on 21/2/2011. She emerged, the highest bidder at the auction and managed to purchase the property at 350,000,000/= (say Three Hundred and Fifty Million Tanzanian shillings). She paid the whole amount through a Bankers cheque (exhibit P2 collectively) also exhibited by payment receipts by auctioneer (exhibit P3). She was then supplied with the acknowledgement letter by the auctioneer receiving 45,500,000/ as their service charge (exhibit P4). PW1 went on to state that, after that, she was availed with the contract of sale of the suit property between her and the auctioneer, CRDB payment slips proving the payment of balance to TBA of 18,285,000/=, decision by Kinondoni Primary Court dated 24th September 2010 dissolving the marriage between the 1st and the 2nd defendants decreeing sale of

disputed property as matrimonial property between the two and two certificates of sale which were collectively admitted as exhibit P6. She consequently wrote a letter to the Land Commissioner dated 5/10/2011 (exhibit P5) and attached the said documents requesting for transfer of title over the suit property to her. Her letter was replied to on 21/11/2011 (exhibit P7), signifying that, her application was dully received by the Commissioner. The process of transfer of the ownership of the suit property was initiated by paying of all necessary fees (exhibit P8), after the same was completed, she was issued with a tittle deed no. 92715 of 10th January 2012 in her name (exhibit P9). Izengo was then informed of her ownership over the suit property through a letter dated 12/12/2011 by the Ministry (exhibit P10).

Her further testimony was that, at some point later, she received a caveat and a letter from the Registrar of Tittles (exhibit P11 collectively) informing her of the intention to change the ownership of the property to Izengo, second defendant. PW1 continued to testify that, at the time she bought the suit premises, it was vacant and in bad condition. She did incur a lot of costs in repairing and renovating it and now the same is in very good and habitable condition. That, her developments to the property has increased its value beyond Two Billion as of now, envisaged by recent valuation report she tendered (exhibit P13). However, she has never had peaceful enjoyment in using the property due to second defendant's constant harassments and eviction threats and attempts. Following those actions by the second defendant, plaintiff was forced to institute the instant suit joining 3rd to 5th defendants via a notice dated 10/6/2015 (exhibit P12).

On cross-examination by Advocate Yuda Thadei, PW1 stated that, the house was sold as a result of a lawful court order as per the exhibits tendered following a Matrimonial cause. That, at the time of sale she did not know the owners as she bought the suit property on a public auction. PW1 went on to say that the transfer of the suit property to Izengo was stopped by a court order from Kinondoni District Court.

When cross-examined by Advocate Ringo, PW1 stated that, the sale contract was signed between her, the Magistrate, Leonia and Nsombo Co, as Auctioneer. That, the same mistakenly indicated that, the sale was conducted on 17/2/2011 instead of 21/2/2011 as indicated in the corrected Certificate of sale. That, the auction as per the notice was to take place on 12/2/2011, but it did not take place as scheduled it was postponed to 21/2/2021. She further stated that, after being issued with certificate of sale, some discrepancies on the date of sale was noted. The certificate referred to the original date of 12/2/2011. Request for correction was made and corrected certificate of sale was accordingly issued reflecting the correct date of auction, 21/2/2011. Further that, before purchasing the suit property, PW1 was given a CRDB Bank slip proving that the house was not in any debt as it had been fully paid for to the Tanzania Building Agency (TBA), the original vendor. She insisted that she did not know the 1st and 2nd defendant before buying the suit property.

On cross-examination by Kapange, PW1 stressed her point that, she came to know the identity of the owners after purchasing the suit house and

the documents over the same had landed on her hands. The payment for the house was through Bank and was done at Backlays Bank, Pugu Road Branch, where the amount was paid in full. PW1 insisted that, the value of the property is 2 billion and 48 million Tanzanian shillings for now. That, Mr. Izengo keeps bothering her because he does not want to accept the fact that she is the legal owner of the suit house having legally purchased the same and kept paying all the required charges including land rent until recently when the suit property was transferred into the name of Izengo without her knowledge. That, notwithstanding the transfer, the property is still in her possession and care. She even printed land rent assessment and paid land rent in her name after the property was supposedly transferred to Izengo. She finally reiterated her prayer for grant of the reliefs as prayed for in the amended plaint.

The defence case was opened by the testimony of Leonia Kajala Sengo, 1st defendant herein. In her testimony she insisted that, the claim originated from matrimonial Cause No. 51/2010 between her and the second defendant. That, she was married to Johnson Izengo (2nd defendant) since 2nd of August 1997. Latter her ex-husband went for further studies in South Africa and married another wife in 2004. She stayed until 2009 without any maintenance from her husband. Her husband told her to rent the suit property which was in fact sold to them by the Government. The house was rented, but her husband was coming secretly to collect proceeds and going back to South Africa. She then instituted a matrimonial case which was heard *ex-parte* after the 2nd defendant failed to appear. Their marriage was dissolved and properties divided 50/50.

DW1 went on to say that, the property in question was sold to them by TBA through a loan at 20,300,000/=, therefore DW1 made a follow up and found out that the remaining balance that was to be paid to TBA was 18,285,000/= to settle the debt. DW1 notified the court on the status of the loan, the court informing her that the house cannot be sold until fully paid for. DW1 informed her sister who lent her some money to pay the outstanding balance as per pay slip dated 11/2/2011 (exhibit D1 collectively). After debt settlement, the property was auctioned. After the sale was completed, she was given the cheque of Tshs. 141,000,000/= (Say One Hundred and Forty-One Million) as her share. She then left with her child to start a new life until she received a call from Police to answer the charge against her for fraudulently selling 2nd defendant's house. She was later charged, convicted and sentenced to 3 years imprisonment. She however, successfully appealed to the High Court as per exhibit D2. DW1 went on to say that, she did not know the buyer of the suit property by the time the property was auctioned by court's order. That, later on her husband challenged the decision and the court held that the said house was not a matrimonial property as it was still under the Government not in Izengo's ownership (exhibit D3). It nullified the sale of the disputed property to the plaintiff. She also stated that, as the decision nullifying sale did not give Izengo absolute ownership to the property which was held to be still under the Government, he should not bother plaintiff over the occupation of the property. She also insisted that, apart from the amount she received after the sale, she did not receive any other amount from the proceeds of sale. And after she took her share, she never made

any follow-up to know if her husband collected his share or not. Therefore, the 2nd defendant is not the owner of the house, but the plaintiff.

Upon cross-examination by Ringo, DW1 insisted that, before filing the matrimonial case, she discovered that her husband had rented the house to Sudi Industries for ten years contract at the rate of 600 USD per month and each year he was secretly coming to Tanzania to collect the rent but, was not providing for her maintenance. She admitted that, the property was owned by the Government and her husband was working with Tanzania Harbours Authority (THA), therefore, the purchase contract over the house was in his name by virtue of his employment. DW1 went on to say that, she was the one who made follow-ups over the sale and signed everything as second defendant's wife since her husband was in South Africa by then. That, she was the one who was paying the money to TBA and not her husband irrespective of the fact that he was the one receiving rent over it. That, the court refused to sell the house which was not fully paid for at the time, therefore, she decided to process the payments of balance to release the house from loan. DW1 stated further that, the evaluation of the suit house was done as directed by the court.

On the date the auction took place she stated that, originally, the auction was to take place on 12/2/2011, but due to non-payment of the balance due to TBA, the sale was postponed to 21/2/2011. And that, so far there is a pending appeal at the Court of Appeal of Tanzania over the second decision of Kinondoni Primary Court by Hon. Mwingira as it affected the ownership of the suit property.

When cross-examined by Kapange, DW1 testified that, at the time she filed the matrimonial case, they were in the process of paying for the house for a prescribed period of 10 years. The same was sold to them in 2004, but now the property is owned by the plaintiff after the same was sold to her as a result of a lawful court order.

When cross-examined by Advocate Lisso, DW1 maintained that, the decision of Hon. Mwingira came at the time when the house had already been sold and the court did not touch anything regarding proceeds of sale it nullified the sale. That marked the end of testimony of the 1st defendant.

The second defence witness was Johnson Malimi Izengo who testified as DW2. He stated that he was once an employee of TPA from 1986 as an engineer. Later he shifted to TPA college as a lecturer in 1990. He then went to work in South Africa and not for further studies as claimed by the 1st defendant. He returned to Tanzania on 11/5/2011.as he was very sick by then, he spent a day in Dar Es salaam and headed to Mwanza on the next day. That, when he was working with TPA he was allocated a house as a senior staff at Masaki Chole Road in 1987. He lived there with his first wife and his children. In 1997 he remarried the 1st defendant and continued to live there with her siblings and his other children from his first marriage. In 2003 the house was sold to him on credit after the change of policy by the government to sale the said houses to employee occupants. He was to pay 23 million and at the time he was leaving for south Africa he had paid only 3.2 million and never paid for the house for the whole period he was in South Africa. In 2005 he resigned from THA and went to work in South. While he was still in South Africa in 2010, he

was informed by his ex-wife that she was about to sale the property however as he believed that as the property was still in the hands of the Government and he was the one who had the sale agreement, it could not be sold. However, in 2011 first defendant called him again informing him that, she had sold the house and collected her share, leaving his share in court.

He continued to state that, he verified the truth of what Leonia was telling him about the sale of the house when he came in the country towards the end of 2011. When he visited the property, he found the property was already in the hands of the plaintiff. He filed a suit at the High Court for vacant possession as the plaintiff was a trespasser, but it was decided that he should challenge the process which led to the sale of the house. He therefore went back to Kinondoni Primary Court and successfully challenged the *ex-parte* judgment which led to the sale of the house. The court consequently nullified the sale of the property to the plaintiff. After the nullification, he wrote a letter to the Ministry of Lands for transfer of title from the plaintiff to him (exhibit D4). The Registrar wrote a letter to the Commissioner for Land (exhibit D5) which directed the plaintiff to surrender the tittle for the changes to be affected. The notice was not obeyed by the plaintiff, instead she sued him claiming that, the suit property is hers vide Civil Revision No. 4B/2014 before Kinondoni District Court (exhibit D6). The case was dismissed (exhibit D7) and later the plaintiff instituted this case. DW2 went on to state that, he once came across the notice of the purported auction, but it had no court seal or auctioneer's seal. He also denied having wrote a letter to TBA dated 14/2/2011 as he was still in South Africa By then (exhibit D8). DW1 also

stated that there are contradictions in certificates of sale tendered in court. The first one indicates that, it was issued on 21/2/2011, but it shows that the house was sold on 12/2/2011 and the magistrate signed on 21/2/2011. Another Certificate shows that, the sale was on 21/2/2011.

His further testimony is that, the property is his as he got hold of a letter from TBA directed to the court (exhibit D9) which proved that the house in question was not yet a matrimonial property by the time it was sold to the plaintiff. He went on to say that, according to counter affidavit of the plaintiff filed in Misc. Civil Application no. 103/2013 (exhibit D10) and some attachments including the certificate of sale and other documents (exhibit D11) prove that, there was no auction in respect of the suit property. DW2 also tendered a letter from the plaintiff and a tittle deed No 1005249 from the Registrar (exhibit D12 and D13) to prove that he is a legal owner of the suit house, hence, he prayed for the suit to be dismissed and his costs be paid by the plaintiff.

When cross-examined by Advocate Yuda Thadei, DW2 testified that, he went to South Africa in 2006. By the time he left for South Africa he had not completed payments of the house loan as he had only paid 2 million, but, he was the owner of the suit house as per the purchase agreement stipulations. That, when he came back, he found the loan had already been paid by those who forged documents in order to sell the suit property including the 1st defendant. The payment receipt was in his name as he was the one the house was sold to. DW2 insisted that, he sued the plaintiff for vacant possession (exhibit D14), but he was ordered to go back to the Primary Court challenging the decision that led to the impugned sale. DW2

maintained that, the suit property has never been a matrimonial property and the 1st defendant has no contribution over its acquisition. That, the 1st defendant paid 18,000,000/= to settle the debt, but he did not ask her to make the payments. That, payments were made after the *ex-parte* decision and that shows the bad motive towards making them.

On cross-examination by Selina Kapange, DW2 stated that, before the suit property was sold to him, he had stayed in it for 17 years. The conditions attached to the purchase of the property are that one is not allowed to sale, mortgage or guarantee someone after completing the payments until the lapse of 25 years.

When cross-examined by Advocate Lisso, he maintained that, he stayed in the said property since 1988 with his children before marrying the 1st defendant. That, he signed the sale agreement in 2004 and the beneficiaries named in there were his ex-wife, Leonia and the children. The payment for the same was to be done in installments to TBA, for a period of 10 years.

On re-examination, DW2 insisted that, his resignation from TPA did not deprive him of the property as he had already qualified for its purchase.

DW3, Hamis Shaban Nsombo, a Court Broker of Temeke Dar Es Salaam testified that, he has been in the business for 20 years, working with courts and other Government Institutions. That, in court brokerage there are well settled procedures to follow before selling any property. It starts with issuing of a warrant of sale followed by the sale after the notice

indicating date of sale is issued. That, the courts normally direct the advert to be fixed within court's notices board and other named places including in the newspapers. The notices show the time, date, and the place the auction is to take place, a number of relevant case file leading to the sale and the items to be sold. After sale, a certificate of sale is issued to the buyer.

When referred to exhibit P1, DW3 stated that, the headed paper resembled that of his company, but denied the same being from his company. He also denied executing exhibit P6, (the sale agreement between Nsombo Company and plaintiff) or knowing the plaintiff in the first place. When he was referred to exhibit D11, said that, the same concerns Jumanne Msafiri who is a court broker indicated therein. He as well could not admit recognizing exhibits P3 (receipt for 350,000,000/= paid by the plaintiff), and P4 (acknowledgement of receiving 45,500,000/ out of 350,000,000/- as service fee) although they seem coming from his office looking at the headed paper.

When cross-examined by Selina, DW3 disputed ever being assigned any work concerning the parties appearing in exhibit D3. On cross-examination by Advocate Thadei, DW3 insisted that, the documents shown by the Advocate while giving his testimony are not known to him. He maintained that all the documents from his company have phone numbers of Directors, but those received in respect of this case as exhibits do not have any numbers.

DW3 went on to state when cross-examined by Advocate Lisso that, Nsombo and Company Ltd is located at Mnazi Mmoja, Bibi Titi Mohamed Street, Hatwhade Building, formerly known as Bakwata building and it has never been in the address stated in exhibit P1. He insisted that, he has never seen Msafiri Jumanne, therefore rejected all the documents tendered in this court as exhibits from his office. In re-examination, DW3 testified that, he knew Johnson Izengo just recently.

When he was asked questions by the court, DW3 stated that, his, company is no longer dealing with execution of court orders as he did in the past. That, currently he is dealing with execution of assignments from other institutions, both private and public, not the courts. In execution of their duties, usally a special person is assigned to do the job. That, in 2011 they were 10 persons in Nsombo company Ltd, namely Nassoro Mkweta, Mohamed Saki Maganga, Maganga Msafiri, Maulid Msolopa, the late Francis, Sudi Dibwe, Abdallah Massoud, Abdallah Dwime, Asha Kassim and Hatia Chenja. By then they had only one office in Dar Es Salaam. He admitted knowing Hon. Masamalo (PC Magistrate) of Kinondoni Primary Court as they used to work with her in the past. He also ruled out the possibility of the court giving a document of work assignment for Nsombo to a different person from Nsombo's representative. That, the court usually kept the records of those who collected the documents from them.

DW4 was Honory Elias Maliwa, a Principal Technician, Ministry of Works. He testified that, he now works at the records department that keeps the records of sale of Government houses. He also deals with preparation of

contracts for those approved to buy the houses. That, as per their records, the 2nd defendant as former civil Servants was the one who was approved to buy the government houses he was residing in. He purchased house No. 70/20 in plot No. 1826/2, Msasani Estate in April 2004 at 20,300,000/=, to be paid within 10 years as per exhibit D16.

DW4 went on to say that, they received a letter from Kinondoni Primary Court notifying them on the presence of Matrimonial cause involving their client (2nd defendant), which informed them of the sale of the disputed property by auction as a result of the court order. The letter stated that, the house was sold to Tabitha Magoti. DW4's office replied to the letter by a letter dated 10th May 2011 (exhibit D17), and informed the Magistrate concerned on the irregulates attached to the sale as the law did not allow the sale of the said property before the lapse of 25 years and that the payments were not fully made by the time of sale. They also sent a letter to the Commissioner for land informing him the same and that title should not pass to the buyer. DW4 insisted that, according to the clause prohibiting sale of the house before 25 years, the said house is therefore still the property of Izengo. He stressed the same points in cross examination by the counsels for the other parties.

Followed the evidence of Waziri Masoud Mganga, Registration Officer at the Ministry of Land and Human Settlement as DW5. He stated that, he works with the Ministry for Land since 15/10/2015. His duties are to receive documents relating to tittle deeds, transfers and transmissions. That, Plot No. 1826/2, Msasani Penisular was registered on 9/1/2012 in the name of Tabitha Mgabe Nshoya Nyamhanga. After that, they received

a Caveat from Johnson Izengo, claiming to be the lawful owner of the suit property and that, there was a matrimonial cause that was on revisional stage at the time. That after receiving the complaint from Izengo, they followed all the procedures including issuing of 30 days' notice to the one whose name appeared in the tittle at a time, Tabitha Nshoya Nyamhanga (exhibit P11). The notice directed her to surrender the tittle deed in order for it to be transferred to Izengo. Tabitha did not heed to the notice, hence, her tittle was cancelled. After expiry of the notice and still they did not transfer the title to Izengo, they received yet another complaint from him about the issue. They had to consult the legal department at the Ministry and they were able to make transfer cancelling plaintiffs title as the property was not matrimonial property and was not supposed to be sold until after 25 years.

On cross-examination by Advocate Thadei, DW5 stated that, according to history available, Tabitha had bought the property from auction by the court order. That, according to section 71 of the Land Registration Act, the registrar has no power to override the court order. That, the Commissioner for Land realized that, there were irregularities on the sale and wanted to rectify the records, constituting the reason for change irrespective of court order. And when cross examined by Advocate Ringo, DW5 maintained that, when Tabitha applied for registration, she never attached the sale agreement.

On cross-examination by Advocate Lisso, he stated that, the 1st registration over the property was done in 2012. There was no objection from TBA or Izengo and the plaintiff paid all the necessary taxes for the

same to effect transfer. That, the Izengo's reached them in 2015. He also admitted being aware of the court order prohibiting the registration of the property pending the determination of the suit, but they were obliged to change as there was application from the Land Commissioner in terms of section 99(1). He denied being aware that, plaintiff had substantially developed the property. He concluded that, as of now their records shows that Johnson Izengo is the lawful owner of the suit property.

After the trial, the counsels had a chance to address court through their impressive final submissions. Their enormous efforts are highly appreciated as all of them defended their respective stands in detailed arguments. The contentions in their respective submissions will be made reference to in discussion of part they fall relevant.

The first issue for determination is determining the lawful owner of the disputed property between the plaintiff and second defendant. However before embarking in the journey of disposing this issue, it is found pertinent to say a word or two on some legal issues arising by necessary implication, from the circumstances of this matter. This is the issue of jurisdiction of this court in determining the matter at hand raised by Dr. Ringo, in his final submissions.

The dispute at hand is far from having a straight forward background as envisaged by the summary of facts and testimonies of the parties above. On one hand, there is allegation of a valid sale of disputed property on auction on 21 February 2011 to the plaintiff as a result of a lawful court *ex parte* decree in Matrimonial cause no 51 of 2010 between the 1st and

the 2nd defendants. On the other hand, the said sale was subsequently nullified by the same court, Kinondoni Primary Court on 10th October 2013 upon setting aside its own *ex parte* order that resulted to the sale of the property to the plaintiff. At the time of nullification, the title and possession of the disputed property had already passed to the plaintiff. When the matter was heard inter parties, the court released the property from a possible sale reasoning that, it was not yet a matrimonial property capable of being sold in matrimonial proceedings outcome.

Therefore, here is a plaintiff, claiming *bonafide* purchase having bought the property from a lawful court order, but, whose purchase was subsequently nullified, without settling on what befell consideration she parted with as a purchase price for the property and costs of unexhausted improvements and maintaining the property for the whole period it has been lawful in her hands. On the other side we have the 1st defendant who had already parted with her 50% share from the sale price for more than a decade now, whose wishes and argument is that, the property was matrimonial entitling her to retain the share she received. Yet on the other hand we have the 2nd defendant whose claim is that, the nullification of sale of the property and subsequent decision that it was not a matrimonial property, technically reverted the property ownership in his hands alone in exclusion of 1st defendant, his ex-wife. From his pleadings and testimony, he strongly believes that, the nullification relinquished all plaintiff's rights over the property, entitling him to immediate vacant possession.

The above are three main interests, for which balancing is a big concern of this court. The none settlement of the plaintiff's interests during nullification of the sale of the property to her as noted above, by necessary implication still retained her interest in the disputed property making matter even harder to determine. Such hardship is envisaged by a stiff and long legal battle between these parties at different stages and forums, until it landed in this court in the current suit.

From pleadings, testimonies and submissions of the 2nd defendant, there is a point of law that is brought in the limelight derived from Dr. Ringo's first argument in final submissions on attainability of the suit by this court. Being a point of law, it requires determination first before going into determination of the issues agreed upon. Dr. Ringo has submitted at length on this court' lack of jurisdiction to determine this suit. He argued that, there cannot be two valid decisions of courts of competent jurisdiction on the same cause of action between substantially the same parties. The basis of his argument is that, there exists a valid and finally determined court judgment in matrimonial cause No. 51 of 2020 (The Primary Court at Kinondoni (Hon Mwingira PCM) dated 31/10/2013 which finally determined ownership of the suit property issue. He argues that, unless that decision is set aside, either on revision or appeal, that determination by the court of competent jurisdiction is valid and remains unchanged against the whole world, burring this court from re-determination of ownership issue through this suit.

I have noted his argument with a deserving concern. However, after painstakingly going through the records available, I realized this issue of

jurisdiction comes before me in a form of a *'second bite on a cherry'* as Dr Ringo calls it. I say so because, this court had already widely dealt with it at the preliminary stages of this same suit as an objection. This same court has already given its reasons on it through Mgonya J, on 19/7/2019 as a predecessor Judge who dealt with this matter before me, by holding that, this court has jurisdiction to determine this suit. She categorically stated as follows at page 10 of her ruling in overruling the preliminary objection on this court's lack of jurisdiction: -

> *'From the above I have to insist that I believe that this court have absolute jurisdiction and it gives room to file a fresh suit to establish ownership of the property in dispute... under the circumstances therefore, I don't see any point which will defeat the plaintiff in instituting the instant suit for determination before this court seeking for the remedies sought. In the event therefore, both points of preliminary objection are overruled with costs for being meritless and let the case proceed with hearing on merits.'*

From the above holding, it is therefore, obvious that, bringing this issue as a second bite before the same court is tantamount to asking the court to re-determine something it has already determined as preliminary objection, something it cannot do. Supposing I proceed with determination of this issue and got satisfied that, contrary to Mgonya, J.'s decision on record, the court has no jurisdiction, how will it proceed from there? That cannot be, because otherwise, we will have two decisions diametrically opposite of each other on same matter amounting to setting aside previous decision. Will the same court set aside the decision it

already entered? That is not possible, as the court becomes *functus officio* in relation to the matter there to **(see TUICO-OTTU and Another versus NBC (1997) Ltd and Two Others (2000) TLR 306)**. In as much as this court had already held that, it has jurisdiction to determine the suit, no turning back at this point is an option for it now. Therefore, I take it from this court's previous decision by Mgonya, J. that, this court has jurisdiction to proceed with determination of this suit on merits. I understand that, the nullification of the sale has put some limitations on the extent this court can go in determining some aspects of this suit, but it did not completely reap its jurisdiction to deal with it as argued by Dr. Ringo.

The above stance that, this court indeed has jurisdiction to determine this suit is even more strengthened by the fact that, the nullifying court (Kinondoni Primary Court) never said anything regarding plaintiff's vested interest in the disputed property. In the circumstances, should this court now leave the matter as it is by keeping a blind eye on the Plaintiff's claim as suggested by Dr. Ringo? Of course not, as that will leave the Plaintiff's case hanging, undetermined, visibly justice will not have been done to the action she mounted. This court will be falling on the same trap, the Kinondoni Primary Court fell in when it nullified the sale but, left plaintiff's interest on consideration she had paid and other entitlements, if any as a purchaser, hanging. The question is, what is to be done in the circumstances of the alleged nullification order remaining unchallenged? My considered view is that, this is the chance for determining where plaintiff's claims stand in relation to a nullified sale of the property to her, that remains unsuccessfully challenged to date.

The above conclusion, inevitably turns my attention to the determination of the framed issues. The counsels for the partied had chances to say something regarding the issue of ownership in their final submissions in defending their respective stands. a property by public auction acquires a good tittle after it is shown a certificate Mr. Lisso, counsel for the plaintiff submitted that, there is no dispute that, the auction was carried out legally. And if the 2nd defendant was aggrieved by the said sale, he could have objected the auction by filling a suit for nullification thereof on the ground of fraud, but he did not do that, meaning thereby, he was satisfied with the way the auction was conducted by the auctioneer, Nsombo and Company Limited through her employee, one Jumanne Msafiri. The plaintiff's counsel referred this court to the case of **Peter Adam Mboweto versus Abdallah Kulala and Mohamed Mweke, (181) TLR 335,** where it was observed that, a person who bought of sale was duly issued and confirmed.

He insisted that, in the matter at hand, the sale was conducted on 21/2/2011 as proved by exhibit P6, therefore, the ownership of the property passed to the plaintiff immediately.

He further argued that, since the plaintiff was not privy to the contract between the 2nd and 3rd defendants over the suit property, it means that, there existed no encumbrance on her part in relation to the property to be registered in her name. He went on to insist that, the plaintiff has taken all necessary actions to acquire the property legally and she is a *bonafide purchaser* as stated in **Omary Yusuph versus Rahma Abdul Kadri**

(1987), TLR 169, that; a bona-fide purchaser who is stranger to the decree does not lose his tittle to the property by the subsequent reversal or modification of the decree. Therefore, on the balance of probabilities, his view is that the plaintiff has proved her case and deserves the reliefs sought in the plaint.

Mr. Thadei, (counsel for the first defendant) argued on the first issue that, as the sale to the plaintiff emanated from matrimonial cause between 1st and 2nd defendant in which the property under declared a matrimonial property, thus, subject of sale in the distribution of matrimonial assets, the trial court in setting aside its *ex parte* order had no jurisdiction to nullify sale. That, it was the duty of the party which was affected by the order of sale to file application to set it aside as setting aside order made *ex parte* in matrimonial proceeding did not automatically set aside the sale.

He continued to argue that, under Order rule 88 of Civil Procedure Code Cap 33 R.E 2019 the sale can only be set aside on two grounds, namely; material irregularities or fraud in publishing or conducting it. And in this case, there is no application which was filed by either party to set aside the sale. There is no proceeding which declared specifically that the sale was a nullity on the grounds of irregularities or fraud. Therefore, plaintiff should be declared the owner of the property since as of now, no orders of any court has set aside the sale in question. The proceeding setting aside *ex parte* matrimonial proceeding did not at all affect sale which was absolute. The plaintiff in this case did not to go back to the court to challenge sale therefore the sale is still valid.

He finally submitted that, the plaintiff being a *bonafide* purchaser for value, she is entitled to retain the property no matter the purported nullification. And since the plaintiff collected part of the sale proceeds, it shows he agreed with transaction of the sale, he cannot be heard to challenge the same.

On the other hand, Advocate Fred Ringo, for the 2nd defendant in his final submissions maintained that, since the judgement of the primary court of Hon Mwingira (exhibit D4) which reversed the former decision of the same court has not been challenged, it is obvious that, the house in dispute was sold illegally. Hence the Registrar of Tittles as evidenced by the testimony of DW5 Waziri Maganga, was right to rectify the mistakes and register the property into the name of the 2nd defendant who was declared owner. Therefore, the defendant deserves the reliefs prayed in his Written Statement of Defense and his costs be paid by the plaintiff.

Selina Kapange, State Attorney representing the 3rd, 4th and 5th defendants jointly, in her final submissions relied on the provisions of Section 110 (1) (2) and Section 111 of the Evidence Act [CAP. 6 R.E. 2019 and maintained that the plaintiff failed to prove her suit on balance of probabilities. It was argued further by the learned State Attorney that, for the plaintiff to succeed in the suit at hand, she had to prove that, she is a bona fide purchaser. The evidence of PW1 failed to prove that fact, hence, the plaintiff's suit must fail for the reasons that, the evidence of Defence side was not contradicted by any of the Plaintiff's evidence.

She continued to argue that, the property in dispute was firstly owned by the 3rd Defendant. Later on, it was sold to the 2nd Defendant on the condition that he was not to transfer his title or interest on the property by the way of sale, or by any other form of transfer of his title in the property to the third parties, except after the period of twenty-five years from the date appearing on the deed of transfer of the property from the seller to the purchaser. Since the sale contravened this condition, the same is illegal. The learned State Attorney maintained that, this court should make a finding that plaintiff had no any claims against the 3rd, 4th and 5th Defendants as public auction via Nsombo & Company Court Broker were not legally conducted. The suit property belongs to the 2nd defendant.

It is now a turn of this court to resolve the first issues as to who is the lawful owner of the disputed property. In doing so, I start by taking cognizance of the provisions of section 42 and 43(1) and (2) of the Evidence Act, Cap. 6 RE 2019 which provides for recognition of the previous judgments, orders or decree in subsequent proceedings. The sections provides that:-

> *'42 The existence of any judgement, order or decree which by law prevents any court from taking cognizance of a suit or holding a trial is a relevant fact when the question is whether such court ought to take cognizance of such suit or to hold such trial.*
>
> *43.-(1) A final judgement, order or decree of a competent court, in the exercise of probate, matrimonial, or insolvency jurisdiction,*

which confers upon or takes away from any person any legal character, or which declares any person to be entitled to any such character, or to be entitled to any specific thing, not as against any specified person but absolutely, is relevant when the existence of any such legal character or the title of any such person to any such thing, is relevant. (2) A judgement, order or decree referred to in subsection (1) is conclusive proof- (a) that any legal character which it confers accrued to the person when it was conferred.

In this case, the primary court of Kinondoni in its matrimonial jurisdiction impliedly conferred to 2nd defendant a title to the disputed property by taking it away from the plaintiff who had it through a valid court order. This was done when the decision that decreed the sale to the plaintiff was nullified. Mr. Thadei tried to argue against this fact by stating that the sale to the plaintiff was not nullified by the trial court when it was setting aside its *ex parte* arguing that, the trial court had no jurisdiction to nullify sale as that is not what it was asked to do. However, I think this argument is misconceived. This is because when the *ex parte* order was set aside by the trial court, it also nullified all orders emanating therefrom including order for sale of the disputed property. The issue as to whether the nullification was proper or not can only be afforded in a appeal of revision forum against the impugned decision, not in fresh suit like the one at hand. It remains that the order for sale was one of the orders that were nullified along side order to proceed *ex parte.*

Therefore, as the nullification order stands unchallenged to date, what this court is entitled to is to take cognisance of the same, as a conclusive

proof that plaintiff's title to the property that was conferred to her through sale was reaped off by nullification order, until the same is set aside in a successful challenge before a competent court. For the reasons, as there is a title conferred to different person by the competent court in matrimonial proceedings this court appreciates the import of the above provisions cited that the decision of Kinondoni Primary Court remains conclusive on the ownership issue, thus, this court is barred from re-determination of the ownership of property in this forum, not being revision or appeal forum. This is partly in agreement with Dr. Ringo's argument, but only on issue of ownership, not determination of the whole suit. My point of departure with Dr. Ringo's line of argument is on the consequence of the nullification order. To him it automatically conferred ownership to the 2nd defendant, while to be it did not owing to the reason for nullification as we will see shortly. It therefore remains that, this is not a proper forum for dealing with the validity of Kinondoni court's decision nullifying the sale as it was not moved in challenging the nullification order but, asked to determine plaintiff's ownership based on purchase as a result of a lawful court order which unfortunately for the plaintiff, was already nullified, hence, non-existent as of now. The following question is, did the nullification conferred automatically conferred a title to the second defendant?

After the sale nullification, the court re-heard the matrimonial cause inter parties and came to the conclusion that, the property was yet to constitute matrimonial property capable of division in matrimonial proceedings. The reasoning of the court runs in the following words:-

"Nyumba tajwa kwa hakika imepatikana wakiwa ndani ya ndoa lakini je nyumba hii ni mali ya wadaawa? Yaani mali ya ndoa? Je mkataba wa ununuzi wa nyumba tajwa baina ya Johnson Izengo na serikali ya Jamhuri ya Muungano wa Tanzania umekamilika?

Katika kifungu cha 16 cha exhibit U1 agreement for sale kinasomeka kwamba.

> *'The purchaser shall not even after the mortgage of the property to the government is discharged or the purchase price is fully paid, transfer his title or interest in the property to third parties, except after a period of twenty five years from the date appearing on the deed of transfer of this property from the seller to the purchaser'*

Kwa tafsiri nyepesi kifungu hiki mnunuzi hapashwi hata baada ya kukamilisha kuukomboa mkopo huo toka serikalini au kulipa fedha yote ya manunuzi kuhamisha umiliki wake au haki alizonazo katika mkataba wa nyumba hiyo kwa mtu wa tatu (mtu wa nje ya mkataba huu) isipokuwa baada ya miaka 25 kuanzia tarehe ya mkataba huu kutoka kwa muuzaji kwenda kwa mnunuzi.

Katika nakala ya barua exhibit U2 ambayo makakama hii inayo barua halisi muuzaji aliandikia mahakama hii... tarehe 10/5/2011...taratibu nyingine za mauzo zilikuwa hazijakamilika kuweza kumpatia mnunuzi halali ya nyumba hiyo ya serikali ... nyumba hiyo kisheria haikuwa imefikia hatua ya kuwa mali ya 'wana

ndoa' kwa sababu mkataba wa ununuzi wa nyumba hiyo bado unaendelea kutekelezwa na taratibu za makubaliano bado zinaendelea kufuatwa hazijavunjwa kisheria...

Katika kipengele cha 6 cha mkataba ni kipengele kikubwa (condition) ili nyumba tajwa iweze kutajwa imeuzwa kwa mdai ni lazima kifungu cha 16 kiheshimiwe kwa kutimiza masharti yake kwa kutohamisha umiliki au haki zake katika nyumba hiyo kwa mtu wa nje ya mkataba huo kwa kuuza au uhamisho wa haki yake kwa njia yoyote kwa mtu wa nje ya mkataba...

Ili mdai aweze kupata mgao wa mali ya ndoa ni lazima kuwe na mauzo ya nyumba tajwa kati ya mdaiwa na serikali, maadamu hakuna mauzo ya nyumba tajwa hivyo hakuna mali ya mdaiwa ambayo ingepelekea kuitwa mali ya ndoa ambayo mdai angekuwa ana haki nayo kwa mgao ambao Mahakama ungeona amestahili kupewa kutokana na mchango wake..."

From the reasoning of the court above, the 2nd respondent was not given absolute ownership of the disputed property as argued by Dr. Ringo, but conditional upon continued fulfilment of the contractual conditions and warranties contained in their sale agreement (exhibit D16) including clause 16 quoted above. Therefore, as this court is not re-determining the ownership issue in this forum as noted above, it only takes cognisance of the conditional ownership rights as was awarded by the Kinondoni Primary Court on 16th January 2013, (Hon. Mwingira- Hakimu). This is especially because, I wish to refrain from determination of the issue on validity of

that award that is not before this court as I should not try to act as revisional court for the orders of the Kinondoni Primary court. That said, it is my view that, guided by the principle enunciated in the provision quoted above, the paramount question on the title to the disputed property can technically be answered on the basis of the decision entered to by the Kinondoni Primary court on 31/10/2013 nullifying the sale to the plaintiff and the one dated 26/1/2012 by the same court.

By holding that, the disputed property was yet to be matrimonial property capable of being divided among the spouses technically vested a title of the disputed property to the second defendant. Therefore, this court cannot re-determine the ownership again with likelihood of a contrary decision, it suffice to say that, as long as the decision remain unchallenged, the 2nd defendant has a better title, until otherwise decided by the competent court.

Even more the court was told that, there is matter at the Court of Appeal trying to challenge the said Kinondoni Primary Court nullification order. On inquiry, it was found out that, the matter which is at the court of appeal is still at the stage of prayer for extension of time to file an appeal, not appeal itself as originally insinuated by the 1st defendant in her testimony. Anyhow, whatever the case, it is still the battle of some kind challenging the decision nullifying the sale. Being a battle in a matrimonial cause, it is between the first defendant and second defendant only in exclusion of the plaintiff. This obviously entails, a long wait for the plaintiff to have her rights on hold, had she opted to wait. After fighting long endless battles she decided to take up this suit to have her rights determined. She could have opted to take a different route by challenging

the Kinondoni Primary Court order that nullifying sale to her as advised by the Kinondoni District court, Hon. S. R. Ding'ohi RM in Civil Revision no 4B of 2014. In that case Hon Ding'ohi had stated:-

' I have considered myself as to whether the judgment of the trial court dated 16th January 2014 had the house with CT NO. 92715 situated at lot number 1826/ Msasani Peninsular Area, purchased by the applicant at the public auction. Subject to what I have just said herein above, I am of the view that judgment of the trial court dated 16 January 2014 has no effect of nullifying the sale.

It is my settled view that, the decision by the trial court dated 31st October 2013 which set aside the ex parte judgment is the one which has the effect nullifying the sale of the house purchased by the applicant. Very good is very clear that's the trial court set aside it's ex parte judgment and all of the orders. For the avoidance of doubt in the judgment of 31 October 2013. The trial court said inter alia that

'...Mahakama kwa pamoja yanakubali maombi haya na kutengua hukumu ya shauri hili iliyotolewa tarehe 24/9/2010 pamoja na amri zake zote...'

All of the orders referred to in the above quotation obviously includes the order of the sale of the house in question. The applicant was therefore expected to challenge the decision by the trial court dated 31st October 2013 which actually set aside the sale of the

said house. I would advise the applicant to challenge the trial court's decision dated 31 in October 2013 which affected her purchase of the house; if still interested.'

My take from the above passage is that, her prayer for revision in the Civil Revision no 4B of 2014 failed simply because, she mistakenly preferred wrong order for revision, rather than the one affecting her purchase, though by the same court. Had she preferred the correct order for revision, this issue would be long solved through that avenue. That notwithstanding, her failure to take that option does not make her claim before this court undeterminable as insinuated by Dr. Ringo in his final submissions. She was seemingly, tied of the long chain of events that is yet to take place between the parties to the matrimonial proceedings resulting from matrimonial cause no 51/2010. I am saying so because, some questions related to this matter is still pending in court of appeal. As noted above, the record shows, that the 1st and 2nd defendants are still in a battle over determination as to whether the suit property was a matrimonial property subject of division or not at the time of sale. It is also noted that, as the nullification was based on conditions attached to the sale agreement between the 2nd defendant and the 3rd defendant, it is unlikely that such determination will end on that single contractual condition of expiry of 25 years in terms clause 16 only. After all, this condition itself still have a long way to go if it stands. According to exhibit 16, the 25 years counts from the date appearing on the deed of transfer of this property from the seller to the purchaser. The date on the deed according to exhibit D13 title deed no DSM 1005249 stands in the year 2020 when it was issued. Therefore, if 25 five years restriction stands

from here, there is still about 24 years for the property to be eligible for transfer to third parties. Even if we take it that, the counting dates back to when the plaintiff got the title deed as the defendants could be eligible too by then, that is in the year 2012, still the property is tied up to about 14 years to be transferable by the second defendant.

And given the nature of the sale agreement in exhibit D16, I bet, that is not the only condition that may stand in plaintiff's way in pursuing her right over the property. There are more clauses which may do the same if called to question. Take for example clause 5 in exhibit D16 which entails discussion whether second defendant was still eligible to pay for the property in 2011, about six years after his termination of service with the Government in 2006 as per his own words that he left employment with the Government for greener pastures, not studies as it was stated by Leonia in South Africa since 2006. But, by the time he left for South Africa he had not completed payments of the house loan, upon such termination in terms of clause 5, as he had only paid 2 million. And when he came back in 2011, he found the loan had already been paid by those who forged documents in order to sell the suit property including the 1st defendant.

The plaintiff has shown how she met a number of legal bottlenecks in pursuing her rights in this matter to the extent of getting tired. Thus, she kept as an alternative prayer for refund of her purchase price and compensation for unexhausted improvements she made to the property for the time it has been in her hands. In as much as the court has no much to say in relation to determination of ownership of the suit property

based on the unchallenged decree, it is still vested with powers to determine plaintiff's rights in relation to the alternative prayers for refund of purchase price and compensation for unexhausted improvements. This brings to the front the importance of discussing the nature of transaction that brought her in the picture, that is, whether she was a *bonafide* purchaser for value to be entitled to any of the prayers in the first place.

Given the circumstances of this case, it is true that, determination of plaintiff's status of purchase of disputed property is necessary. Defendants side save for the first defendant strongly argue that plaintiff was not a *bonafide* purchaser to the property in dispute. Dr. Ringo specifically argued that, the plaintiff is not a *bonafide* purchaser as she did not acquire the suit property in good faith. She had the burden to prove that she is an innocent buyer, but she failed to do so. She could have been a *bonafide* purchaser of the suit property only if she had acquired the tittle from a legal and valid public auction. However, the plaintiff took the ownership of the suit house by a private treaty. She is therefore barred by the rule of Caveat Emptor. He argued that, as a purchaser of the suit land, she was supposed to ensure that, she is dealing with the rightful owner. She could have done that through an official search to the Registrar of tittles. Instead of conducting search as stated in her pleadings, she moved to pay the sum of money required to the auctioneer immediately upon sale. Mr. Ringo cited the **Indian case of Chinnammal & 4 Others versus P. Arumugham & Another, 1990, SCR(1) 72,** where it was decided that:-

"The true question in each case is whether the stranger auction purchaser had knowledge of the pending litigation about the decree under execution. If it is shown by evidence that he was aware of the pending appeal against the decree when he purchased the property, it would be inappropriate to term him as a bonafide purchaser. Indeed, he is evidently a speculative purchaser and, in that respect, he is in no better position than the decree holder purchaser..... Similarly, the auction purchaser who was a name lender to the decree holder or who has colluded with the decree holder to purchase the property could not also be protected to retain the property if the decree is subsequently reversed.... The evidenced on record is sufficient to hold that the auction purchaser was not a bonafide purchaser. The auction sale in his favour must, therefore, fall for restitution. The Court cannot lend assistance for him to retain the property of the judgment- debtor who has since succeeded in getting rid of the unjust decree."

Other cases cited by Mr. Ringo included **Desh Bandhu Gupta versus N.L Anand and Rejinder Sing 1994 1994 SCC (1) 131, JT 1993(5) 313**

Ms. Joined the line of argument on the effect of plaintiffs sale nullification. She then added that in order for someone to sue successfully for ownership of land he has to prove being a *bonafide* purchaser for value which arises from the sale in public auction. That plaintiff failed to prove as to whether notice was made to the public as the date stated on her plaint is not the one provided by the auctioneer. She also argued that, as

there is alleged change of date of auction from 12th to 21st Feb 2011, there is no proof of there being a valid court order to for that change. she therefore argued that such irregularities tainted plaintiff's purchase taking her from *bonafide* purchaser box.

Mr. Lisso and Yuda Thadei joined in their thoughts to argue for the affirmative answer that plaintiff was a *bonafide* purchaser. Their argument is to the effect that, as the plaintiff purchased the property in dispute in public auction conducted by the order of the court, she is a bonified purchaser for value in market overt without notice of defect of title and having complied with all legal processes to acquire and retain the property. she is entitled to remain in peacefully enjoyment of the property. Mr. Thadei added that, the 2nd defendant can pursue his right against the decree holder who put the machine into motion insisted of challenging plaintiffs title to the property. He made reference to the case of **Peter Adam Mboweto Vs Abdallah Kula-A and Mohamed (1981) TLR 335.** It is a trite law that, where there is a public auction the buyer purchasing such auction property, becomes a *bonafide* purchaser for Value having exclusive right over such property.

It is not disputed that; the plaintiffs purchase was out of execution of court decree resulting from a matrimonial cause no 51/2010 when the matter was heard *ex parte* in absence of the 2nd defendant. That was before the second defendant challenged the decision leading to setting aside *ex parte* order and nullification of sale to the plaintiff. The ground for nullification was that the property was not a matrimonial property worth selling at the time of sale. Dr. Ringo's and Ms. Kapange's opinion is

based on the argument that, for being not a matrimonial property, the sale was tainted with illegality. I beg to differ with such line of argument based on the following elaborations;

For one to be a *bonafide* purchaser, he has to purchase in good faith and with no knowledge of any encumbers. Plaintiff has shown how she came across the advertisements concerning auction of the disputed property in exhibit P1. How she made a follow ups on the authenticity of the adverts. That, after seeing the advert, she visited Kinondoni Primary Court for verification and the information was verified to be true. She confirmed after been availed with a court order to that effect. She also explained how the auction was to take place on the 12/2/2011, but the same was postponed to 21/2/2011 for what she came to learn it was to pave way for settlement of debt that was still outstanding with the third defendant, as she was told. The pay in slip to the CRDB Bank account of the third defendant was also availed to her for further proof of debt clearance (exhibit P6 Collectively). After the sale, she was availed with both contract of sale and certificate of sale. She explained how it was later discovered that the dates on the original certificate of sale was mistaken for still stating that the sale took place on 12/2/2011 instead of 21/2/2011, leading to issuance of corrected certificate of sale reflecting the correct date of sale (exhibits P6 collectively). Dr. Ringo strongly disputed this move of correcting certificate of sale as insinuating forgery to cover up for an auction that never took place. With due respect to him, without additional evidence pointing towards that, mistaking dates can just be a human error as stated by the plaintiff in her testimony. I am also convinced it was a mere human error due the fact that, the impugned

certificate of sale contains two different dates on it. It is indicated in the text that, it was signifying sale that took place on 12/2/2011, but again at the bottom it was signed and stamped by the Magistrate on 21/2/2011. I believe, Dr. Ringo intentionally turned a blind eye to this other date in the same document as the date of signing, to make it look that the inserting of the original date of sale constituted fraud. With indication of two dates on the face of the same document, one regarding the expected date of sale (original date) and the other, the actual date of sale and issuance of the certificate of sale in issue, it will not be wise to bank on the date that was earlier on noted to have been mistaken and a corrected document issued (new certificate of sale dated 19th May 2011) to fault the document. All the corrections were done in absence of the second defendant, therefore, his insinuations of fraud without bringing those who effected the changes to prove authenticity is unfounded. The changes were also not made by plaintiff to bind her knowledge of the defects, if any. In my considered view, after corrected document is issued, the incorrect one ceases to exists and ceases to be discrepancy worth blaming someone for.

In the case of **Mohamed Said Matula v. Republic [1995] TLR 3** CAT, the court is entrusted with a duty to address the inconsistencies and try to resolve where possible or else the Court has to decide whether the inconsistencies and contractions are only minor or whether they go to the roots of the matter. The inconsistencies on the dates noted above does not go to the root of the matter, they are therefore minor that could not affect the plaintiff's purchase status. I would not wish to bank on overemphasizing them to pin down an innocent party. After all she is not

a maker of any document complained about, to take the blames for any of the mistakes therein. The only document he can made reflecting a wrong date exhibit D6, an affidavit in in Civil Revision No. 4b of 2014 which again could have been made innocently reflecting the previous mistake that was already corrected. I believe, in the circumstances of this case, the mistaken dates alone do not prove non-existent or irregularity of the auction leading to plaintiff's purchase.

Based on the above, in my view, as long as the two documents were brought to the attention of the court by the plaintiff herself, itself prove her elevated level of honest in the whole process. In the case of **Royal Insurance Tanzania Limited v Kiwenga Strand Hotel Limited Civil Application No.111 Of 2009 (Unreported)** it was held that one discovering the defect himself and attempting to cure it before anyone else is sign of absence of *malafide*. It shows diligence on his or her part. In our case, it is the plaintiff who voluntarily submitted the two certificates of sale and explained how the mistake in dates were discovered and application for correction made. If she was *malafide* she could have opted to hide the one with mistaken date and only put forward the corrected one.

Above all, it is on record that, the sale to her was not nullified due to the alleged irregularities the 2nd defendant, but merely on the fact that, on the fact that the property was not yet a matrimonial property capable of being transferred based of clause 16 of the sale agreement between the second and the third defendants.

As correctly argued by Lisso, there is no dispute that, the auction was carried out legally. And if the 2nd defendant was aggrieved by the said sale, he could have objected the auction by filling a suit for nullification thereof on the ground of fraud joining the auctioneer who conducted the same, but he did not do that, meaning thereby, he was satisfied with the way the auction was conducted by the auctioneer, Nsombo and Company Limited through her employee, one Jummanne Msafiri. Indeed, I also share the view that 2nd defendant raising fraud in challenging plaintiff's now amounts to mere afterthought. He had a chance to challenge the proceedings leading to the sale all along. He had taken this chance and successfully challenged the same, leading to nullification of sale on a different ground. However, throughout his challenge to the proceedings he had never doubted validity of the auction. Raising it now, no doubt is an afterthought. The reasons for nullification of sale by the court runs from 18-20 of exhibit D3 as follows:-

> *"Katika sheira ya mikataba mkataba unaundwa kwa vipengele, kuna vipengele vikubwa (condition) na vipengele vidogo (warrant) vipengele vikubwa ni vile vipengele ambavyo ni muhimu katika mkataba vinabeba wajibu mkuu katika mkataba na kutofuata vipengele hivyo hupelekea kuvunjika kwa mkataba na mwana mkataba mwathirika huacha kuendelea na mkataba na kudai fidia.*
>
> *Katika shauri hili kipengele cha 16 cha mkataba ni kipengele kikubwa (condition). Ili nyumba tajwa iweze kutajwa imeuzwa kwa mdaiwa ni lazima kifungu 16 kiheshimiwe kwa kutimiza masharti yake ya kutohamisha umiliki au haki zake katika nyumba hiyo kwa*

mtu wa nje ya mkataba huo kwa kuuza au uhamisho wa haki yake kwa njia yoyote kwa mtu wa nje ya mkataba hadi baada ya miaka 25.

Kwa mujibu wa mkataba tajwa, vielelezo na sharia tajwa nyumba No. M 70/20 iliyopo mtaa wa chole masaki haijauzwa kwa mdaiwa bali ipo katika makubaliano ya kuuzwa na makubaliano haya ya kuuzwa yatakuwa mauzo pale tu wana mkataba watakapoheshimu na kutimiza masharti makuu na vipengele muhimu vilivyopo ndani ya mkataba kwani taratibu za mauzo hazijakamilika, bado makubaliano yanaendelea kutekelezwa na taratibu za makubaliano bado zinaendelea kufuatwa hazijavunjwa kisheria.

Ili mdai aweze kupata mgao wa mali ya ndoa ni lazima kuwe na mauzo ya nyumba tajwa kati ya mdaiwa na serikali, maadamu hakuna mauzo ya nyumba tajwa hivyo hakuna mali ya mdaiwa ambayo ingepelekea kuitwa mali ya ndoa ambayo mdai angekuwa ana haki nayo kwa mgao ambao mahakama ingeona amestahili kupewa kutokana na mchango wake hata kama ni mama wa nyumbani kama alivyosema mdaiwa, kwani kazi za mama wa nyumbani ni sehemu ya mchango katika kupata mali za ndoa kanuni ambayo imewekwa na mahakama ya juu ya Tanzania Mahakama ya Rufaa katika shauri la Bi Hawa Mohamed dhidi ya ally Sefu (1983) TLR 32 wakati ikitafsiri fungu la 114 sheria ya ndoa CAP 29 R.E. 2002... hakuna mali ya ndoa ya kugawanya."

That constituted the sole reason for nullification. There is no proceeding which declared specifically that the sale was a nullity on the grounds of

irregularities or fraud. Therefore, all the above finding makes her the *bonafide* purchaser for value at the time of sale. Whatever mistakes not caused by her does not take away this quality from her. She is therefore declared a *bonafide* purchaser for value with abundance of proof that, she parted with the total of Tshs. 350,000,000/= for the property.

The next issue is on the reliefs the parties are entitled to. Now that I have just reached a finding that the plaintiff as a *bonafide* purchaser for value at the time of purchase, on 21/2/2011 when property was auctioned as a result of a lawful court order, I without hesitation hold that she is entitled to a refund of the purchase price as prayed from those who appropriated the same. Plaintiff has established through exhibits P2 collectively and P3 that, she parted with 350,000,000/- as a purchase price for the disputed property. This was supported by the direct admission of the 1st Defendant through her testimony as DW2 and her Written Statement of Defence. First defendant confirmed the plaintiff paid that amount of money by admitting that, she as a beneficiary, the plaintiff's deposits left her with about 141,000,000/- Tshs. constituting her 50% share she was awarded in division of matrimonial Property in Matrimonial Cause No 51/2010. In exhibit P4, the auctioneer Nsombo and Company Ltd admitted receiving 45,500,000 as their commission for the sale of the disputed property. This alone proves appropriation of the amount plaintiff paid as purchase price entitling her to refund of the amount in question. The question is the whereabout of the balance of half share that was left in court for the 2nd defendant. According to exhibit D1 collectively the balance was to be kept in court until collected by the 2nd defendant. This was as per 1st defendant's prayer on 21st January, 2011 when the hearing during the

hearing of the execution proceedings. She was recorded to have prayed that:-

> "... Ninaomba kukaza hukumu ili nipate yangu ya mgao wa mali ya nyumba ya ndoa ... tathmini ilifanywa na mthamini wa serikali na hukumu ni kila mwanandoa anapate nusu ya mali. Naomba nyumba iuzwe na iuzwe na dalali wa Mahamama kwa mnada wa Kisheria ili haki itendeke kwa usawa na uwazi kwa sababu mdaiwa hakuudhuria kwenye kesi .... Naiomba Mahamama iuze na kunigawia haki yangu ya asilimia 50% na asilimia ya mdaiwa itunzwe na Mahakama mpaka atakapokuja kuichukua.
>
> ... Nathibitisha mimi sitaki kuuza bila dalali wa Mahakama itaniletea lawama baadaye sitaki matatatizo."

Her prayer was granted as prayed and the court held that:

> "Kwa sababu tangu awali shauri hili limesikilizwa upande mmoja na hukumu kutolewa na tathmini ya serikali imefanyika imo ndani ya jalada hili. Mdai mhukumiwa anayo haki ya kupata mgao wake na mali ya nyumba ya ndoa ilivyohukumiwa ... nyumba iuzwe na dalali wa Mahakama apatiwe mgao wake na mgao wa mdaiwa utunzwe Mahakamani mpaka atakapokuja kuchua ... Barua kwenda kwa Hakimu mkazi Mfawidhi, Mahakama ya wilaya kuomba kibali cha dalali wa kufanya kazi hii iandaliwe"

With the above decision, it was expected that, the said half share that remained for the 2nd defendant were kept in court until when he would come to collect it. However, this expectation seems to have been shuttled down with the facts at the second page of exhibit D7 – judgment by SR. Ding'ohi RM on 8/10/2015 Tabitha MNN Magoti V. Leonia Kajala Sengo and Johnson Izengo at second page where it is stated that:-

> *"It is not irrelevant to state here that after the sale of the house 1st Respondent appeared before the trial court and received her half share of the purchase price of the house after deductory the Court Brokers Commission. To be specific she received the sum of Tshs. 142,657,500/- on 21/2/2011.*
>
> *Later on another person who introduced himself to be JOHNSON M. IZENGO but who later turned to be not, appeared before the trial Court and received half share of the purchase price of the house after deductory the Court Broker's Commission, which were ordered to be given to the 2nd Respondent herein.*
>
> *After he arrived from South Africa and noted that his house was sold in execution of the decree by the trial Court, the 2nd Respondent successfully applied for setting aside the ex parte decision/Judgement by the trial Court. The Matrimonial cause was then heard inter parties between the 1st Respondent cause and the 2nd Respondent."*

According to the quotation from exhibit D7 above, there is insinuation that the 50% balance left for Izengo was appropriated by unknown person impersonating to be Izengo. Thus, Johnson Izengo did not collect his share from the court. It is surprising how that could happen. How could someone else impersonate as Johnson Izengo in Leonia's presence. Leonia knew her ex-husband very well. As the matter proceeded *ex-parte*, it is she who was expected to introduce her ex-husband to the court. I believe this money was not kept in cash with the court, to be gotten so easily as the parties intend this court to believe. It must have been kept in some account as per the normal practice of the court. Getting such money from the court usually involves a well-set procedure until the money is released. I bet application for its release is not orally made. There must be a chain of documentation involved involve.

This insinuation is also gotten from second defendant's pleadings where he imputed elements of fraud between the 1st defendant and the plaintiff in collecting the money in his written statement of defence. However, apart from the insinuation gotten from that exhibit and Izengo's pleadings no concrete evidence was put forward before me to prove that. No one bothered to bring the documentations to the attention of this court between 1st and 2nd defendants as the respective persons who were entitled to appropriate the funds received as purchase price from the plaintiff. It is noted above that, in his pleadings, second defendant insinuates plaintiff's involvement in alleged impersonation in collusion with the first defendant. This is also surprising because, as per his averment, the alleged forgery and impersonation occurred on 18th May 2011, virtually 3 months after plaintiff purchased and fully paid for the house in question

and long gone struggling with transfer of property in her name. and 1st defendant long gone with her child after receiving her share. And if at all, why wait for all that long to do it in Izengo's presence in the country as he said he arrived on 11th/5/2011?.

It is further noted from the records that, apart from pleading the above conspiracy about alleged disappearance of the money, the second defendant did not lead any cogent evidence to prove the same, thereby proving that he did not collect the money and instead it was fraudulently collected by the 1st defendant and the plaintiff. In this case Hon. Masamalo, Magistrate, at Kinondoni Primary court who handled the disbursement of the funds stood a key witness to have been called to prove these allegations. But, second defendant avoided doing that and he never disclosed any reason for such failure. In the case **Hemed Said v. Mohamed Mbilu (1984) TLR 113**. In that case the court stated that:-

> *"Where for undisclosed reasons a party failed to call a material witness on his side, the court is entitled to draw inference that, if the witnesses were called they would have given evidence contrary to the party's case"*

Indeed, decision to remain indifferent without categorically denying with proof his innocence in appropriation of the funds or being vocal in proving the alleged fraud against plaintiff and 1st defendant raises a lot of doubts, that may justify negative inference on his involvement in the disbursement process. From the records the second defendant all along had wanted the court to lightly believe that he never collected the balance that was left for him. The reasons he has been putting forward as his

defence since Hon. Mwingiras error is that, he was not in the country when the money was appropriated.

Based on the same suspicious facts, Mr. Yuda Thadei expressed his doubt on the above scenario by stating that, the records of the passport of the 2nd defendant shows that, he was in Dar Es Salaam in the month of May 2011 and on the 18th May, 2011 applied to the Primary Court to be paid his money from sale proceeds which he collected from the court. He cannot further claim anything in respect of the property. Therefore, since he never applied to set aside the sale as position of the law requires him to-do and he has collected his proceeds of sale from the court, obviously he agreed with transaction of the sale. To him, the 2nd defendant is the one who collected the balance that was left for him in court.

The question is, did he appropriate his share left in court? as have already been noted above that, the second defendant's defence all along had been his absence from the country when all those impersonations issues took place. However, in relation to that issue I have noted that, there have been a lot of discrepancies on when the second defendant came in Tanzania after the sale of the disputed property. In exhibit D3 at page 9, the second defendant intimated making final payment for the disputed property on 14/2/2011. He was recorded to have said;

> *'...aliomba kuinunua nyumba tajwa akakopeshwa kwa Tshs 20,300,000/- na kutakiwa kulipa ndani ya miaka 10, aliendelea kulipa kwa awamu hadi tarehe 14/2/2011 deni likaisha. ...alisema mdai alisema yeye ndiye alilipia hiyo nyumba sio kweli kwani mdai*

ni mama wa nyumbani...aliendelea kusema yeye ndiye aliyelipia mkopo huo sio mdai'

The indication from that is that he was in the country to effect payments for the house on 14/2/2011. That was few days before the auction took place on 21/2/2011 and just 2 days after the date (12/2/2011) the auction was to take place before it was postponed to 21st February. What that means is that, he involved himself with the property few days before it was sold. So, was he in the country then? May be not, because he changed that story when he was testifying before me by stating that, when he came back from South Africa in 2011 he found the payments were already paid by the 1st defendant. He bragged that, he did not ask the second defendant to make payments on his behalf though. He even sued 1st defendant for forgery and offence of altering documents in relation to acquiring property. the alleged forged document was a letter to TBA requesting for release of the title to the property after full payment of the balance. It bears the same date, 14/2/2011 which the date the 2nd defendant had said he made final payments for the property. His story on this does not add up, as his current statement is diametrically opposite of his own previous statement equally made under oath.

Yet in proceedings before Hon. Mwingira- Magistrate, he stated and even produced a copy of passport no AB 223947 proving that he was not in Tanzania from 26/6/2008 until 26/6/2011. That was after the money was appropriated on 18 May 2011. He is recorded to have stated as follows:-

"Mwombaji, (mdaiwa) amesema hakupata nafasi ya kusikilizwa hivyo anaomba apewe nafasi ya kusikilizwa kwani wakati shauri linasikilizwa yeye hakuwa na taarifa, hakuwahi kupata wito wa mahakama, hakuwahi kuelezwa uwepo wa shauri hili na mdai ili hali walikuwa wanawasiliana kwa simu. Alikuwa anaishi Africa ya kusini akatoa passport yenye namba AB 223947 yenye jina lake ikionyesha aliondoka Tanzania tarehe 26/6/2008 na kurudi tarehe 26/6/2011..."

Another version of the same story is gotten from his testimony in examination as per his testimony summerised above, he stated that he came back in Tanzania briefly on 11th May 2011. In his own words he said at page 63 of the hand-written proceeding:

'I went to South Africa for work not studies. I came back on 11th May 2011. I came by road as I was very sick. I spent a day here and on the next day Mwanza'

My take from the above quotation is that, he was in the country about six days before the on 18th may 2011 when the said impersonation occurred. This is because, the court was not told, how brief was that brief visit. The duration of 6 days between 11th and 18th May 2011 could still be brief. Thus, he possibly was in the country when the impersonation occurred. This raises suspicion to the higher level of his involvement in the scheme. If not, the court is wondering, in joining hands with Thadei's argument, on the suspicious coincidence of the first defendant's sickness and presence in the country with the mysterious disappearance of the money

that was safely within the court confers since 21st February 2011, almost three months before the alleged theft.

Another spot of inconsistence is noted when he changed the story that he came to Tanzania toward the end of 2011 in his further examination in chief. See page 68 of the hand-written proceedings. In the case of **Jeremiah Shemeta Vs Republic in 1985 TLR 228** it was held that discrepancies give rise to some reasonable doubt. Therefore, it was incumbent on the second defendant that, he actively dissociate himself from the suspicious circumstances by being certain on his return to Tanzania, if he wished to avoid complicity, and that since he did not do so, he rendered himself to be a suspect.

Apart from the above big event of the alleged mysterious disappearance of those funds gathered from exhibit D7 as quoted above, the court was not told of any subsequent actions by the duo (Leonia and Izengo) after the alleged disappearance of money came to their knowledge. Izengo, especially, has surprisingly impassively remained calm towards the culprit who allegedly swindled his share, six days after his coming back to Tanzania from south Africa. If it is true that someone impersonated to be 2nd defendant and managed to take what was supposed to be his share that was kept within the confers of the court, it is least expected, with that degree of offence that 2nd respondent would have comfortably and inadvertently remained silent to date without reporting that grand and organized theft to the relevant authorities for proper inquiry over the matter. It is on record that he took a criminal charge against his ex-wife, the 1st defendant for forgery of documents.

He seems to have been so aggressive in wanting Leonia behind bars, before she was acquitted as per exhibit D2, for alleged alteration of documents, but, completely impassive with this worst culprit. He never took any legal steps to unveil the person who had allegedly swindled the money that was supposedly left for him with the court impersonating his identity. He said he had reported the matter to the police but decided to put it aside after being told that, they would not interfere with this matter still pending in court. No proof like RB No or things of the sort was produced for that. This matter was filed in court in 2015 almost five years after the incident. When then did he report the incident to the police. This was as well muted about by him. And this is noted to be not like him as he made sure Leonia's criminal charges went hand in with other civil proceedings over the matter. He cannot therefore, successfully plead ignorance of that practice only when his indifference towards the real culprit comes to question.

This blame is not one sided. First defendant also failed to put forward evidence as to whether the second defendant did collect his balance. In her testimony, she stated that, she was not sure whether her ex-husband collected the money or not. The facts that second defendant had taken the funds just emerged in her advocate's final submissions who submitted about copy passport of the 2nd defendant showing his presence in the country during the time alleged theft. No attempt was made to bring alleged copy of passport or any other documents used to collect the funds from court referred to in the final submissions. She as well never shown any effort trying to bring the alleged culprit to task in time if she is not sure her ex-husband collected the money. Thus, in all it is surprising how

supposedly more dangerous criminal had been left free to date almost a decade later while the parties are on a fierce battle trying to regain title to the disputed property without pointing out to the where about of the funds that passed hands to them from the plaintiff.

Yet another set of doubtful incoherencies is seen in the 2nd defendant's testimony about his knowledge about the sale of the property. While before Hon. Mwingira Magistrate in setting aside ex parte judgment and decree that resulted to the impugned sale, he shown that, he was completely unaware of the matrimonial cause proceedings and subsequent sale of the property as he was in South Africa. That although he was communicating with the 1st respondent through phone, she never told him about it. In the hearing of this suit at page 67 and 68 of the hand writted proceedings, he stated that

> *"Before I came from south Africa in 2010 Leonia called me in South Africa telling me the house was already sold. When I inquired she told me that it was sold by the court. I told her that we had no house to sell as he property was still in the hands of the Government ... later, in 2011 at the beginning she called me again telling me that she had collected her share already. That, my share was in court. when came back towards the end of 2011 is when I came back home to verify her information. I went to Masaki where the house is situated I found one woman by the name of Jane Miso... I reported it to the Oysterbay Police. It in her statement I got to know that the one who purchased the house was Tabitha not Jane. In December*

2011 I filed a case at the High Court praying to vacate her as a trespasser"

What that means is that, Izengo concealed his knowledge of the matter at time to enable him get the *ex parte* hearing set aside while he was all along aware of the what was going on, as he came to reveal in his testimony before me. Had it been known of his knowledge of the matter as he came to reveal before me, the decision of the Kinondoni Primary court would have possibly been different. My wonder is if he knew the issue since 2010, why did he wait until the end of 2011 to take legal actions over something he had a power to stop before happening. He waited for the sale to take place and plaintiff to have initiated the process of transfer of title in her name and reaches final stages and coincidentally the money she paid had mysteriously disappeared. He noted to have visited the country earlier than the end of 2011, (in May 2011, before the money allegedly disappeared, why he did not take legal, that could have prevented the disappearance of the funds on the six days later, if at all) All these questions remain unanswered and raises doubts even further over the credibility of 2nd defendant's evidence.

In all, the above highlighted discrepancies on timing of his return to Tanzania, his knowledge about the sale of property plus their impassiveness towards the person who impersonated to be second defendant and allegedly parted with that huge amount of money brings a lot of doubt on and calls a lot to question on the second defendant's involvement in the whole process of alleged impersonation as noted above, that required deeper looking into as argued by Mr. Yuda. However,

as each side failed to bring cogent evidence to prove this issue, especially tendering of documentation involved, which I believe were plenty, for this court's scrutiny, or calling the custodian of the documents to testify, I hesitate to hold with certainty that, the second defendant is the one who collected the funds constituting his share. For, if it was certainly proved he collected the money, the whole scenario of our suit would change as the law of equity has never availed unfair benefit to anyone. It usually, estopes the unfair beneficiary from circumventing justice line. This is what brings the establishment of the whereabouts of the 2nd defendants balance up front during execution for refund the plaintiff's purchase price, I have just ordered.

The point I desire driven home is that, the way the 1st and 2nd defendant dealt with the impersonation leading to the alleged theft of the balance that was left for 2nd defendant is far from being impressive and convincing. It requires further inquiries by both 1st and the second the defendant before refund to the plaintiff is done. In my view, deeper digging in this matter less concerns the plaintiff who proved to have deposited the whole amount discharging her obligation under the sale wholly and is now tired getting involved in the endless drama over the property she *bonafidely* purchased. That was expected as no body would be happy being swindled with impunity.

I now turn to the amount appropriated by the auctioneer. According to exhibit P3 collectively (payment receipt) the auctioneer confirmed to have received 45,500,000 (Say, Forty Five Million, Five Hundred Thousand only) as commission for the I am aware that, Nsombo and Co. Ltd who were

the auctioneers in the sale transaction are not parties to this suit. She would not therefore, as a matter of general rule be bound by any decisions and orders emanating there from. It is settled that someone who is not a party to the proceedings is not bound by the orders made therein and could not claim rights therefrom. I have much respect to this principle as it cures the mischief of not condemning one unheard. However, for what I am about to elaborate below constructively forces me to explore what shall stand as an exception to the celebrated general rule above.

The exploration is towards holding the auctioneer who auctioned the disputed property responsible in refunding the plaintiff. This necessity has been supported by fortunate reality that, although Nsombo and Company Ltd was not joined as party in this matter, but, one of its principal officers, the managing Director, one, Hamisi Shabani Nsombo, appeared and testified as DW3 in this suit, giving the court glimpse of what they have on part of their story regarding the sale transaction that brought the plaintiff interest in the disputed property. In His testimony he denied involvement of his Company's in any way in the auction transaction relating to the disputed property. This testimony completely brought a turn around to the perspective of the whole proceedings before this court and those held before relating to the disputed property.

According to the pleadings that are before me, there was a sale by auction of the property to the plaintiff that was nullified, leading to the fierce battle between the 2nd defendant and plaintiff over the title to the property. Although the second defendant brought in his pleadings, a different theory regarding conduct of the sale, 'sale by private treaty' attributing conspiracy

between auctioneer, 1st defendant and plaintiff with the aid of presiding Magistrate, Hon. Masamalo to defraud him of his rights over the property, but this did not mean they ruled out existence of sale and particularly involvement of Nsombo as auctioneer in the process. That is why, in his conspiracy theory reflected in his written statement of defence, he touches the auctioneer complicit. That means involvement of Nsombo and Company Ltd in the sale of the disputed property is acknowledged by all parties in this suit, including the second defendant who only challenges the validity of the auction. Therefore, one individual, Hamisi Shabani Nsombo, claiming to be a Managing Director, of Nsombo and Company, with a totally different story denying any involvement in a transaction forming the basis of this suit, in my view is a faint attempt to confuse the court. This is because, his testimony has no bearing to this matter at all. He testimony is hostile to every pleading available in this court including that of the person who called him as his witness, the second defendant. second defendant by coming with a story contrary to their pleadings. He brought in a new theory that was not pleaded by any party. Parties are bound by their pleadings. Imputing private treaty instead of auction did not necessarily remove the auctioneer out of the picture as the alleged Director tried to do. That is the reason, the second defendant, who called him have equally accused his company of conspiracy to defraud him. It was expected that his coming was to state the validity or otherwise of the auction as pointed out by the parties in their pleadings and testimonies, not to be completely evasive as he did.

My take of the scenario is that his evasiveness brought in a new version of suspicious and putting his credibility to scrutiny. His testimony was

discredited right from the examination in chief by the counsel of the party who called him. This is because, his testimony did not support his pleadings. Being a trial court, I believe I am better placed to assess his credibility than an appellate court which merely reads the transcript of the record see **ALI ABDALLAH RAJAB vs. SAADA ABDALLAH RAJAB AND OTHERS [1994] T.L.R 132.** His demeanour was so questionable putting his credibility to question. He was incoherent, indifferent and uninterested in what he was stating, giving impression of someone who is not believed in what he was speaking, but just giving throwing words for the sake of it. This left every individual present shocked save for the second defendant. I believe, legally his demeanor has an explanation.

It has to be remembered that the second defendant had imputed the same auctioneer for conspiracy to defraud him together with the plaintiffs, first defendant and the presiding Magistrate. it was expected that all those against whom he leveled claim would be brought in by way of counter claim in his written statement of defence or a criminal case be filed against them for fraud as the second defendant did to the first defendant. In the circumstances, it was unlikely that, the same complaint/claimant, second defendant, could call the same person he had serious allegation and or claim against to testify on his behalf without the issue of witness having interest to save arising. His conduct seemed to have been caused by the promise by the second defendant not taking any legal actions against him by bringing him to answer conspiracy to defraud he levelled against him, he thus had interest to save by circumventing the facts about his involvement. Therefore, although he was not a party, but he was touched by the facts, to the extent of proving payments that was made to him. I

think it is only fair that, he be called upon to give back the amount that was proved he received, for he received the amount without working for it, in his own words denying involvement in the sale. Nsombo and Company Ltd is therefore called upon to refund the plaintiff for the amount that wrongly passed hands to her 45,500,000/= Ths.

The records show that, the one who took active role in execution of the auction of the disputed property on behalf of Nsombo and Company Ltd was one, Jumanne Msafiri, as he was introduced by a letter that was admitted as exhibit P4. DW3 did not dispute this practice of assigning one individual to act on behalf of their company. Bringing the said Msafiri who had acted on their behalf to testify in denying their involvement in the transaction would have sounded better than hiding him and opted to come himself while he was not actively involve in the transaction. He had not shown to have taken any legal action against the persons who allegedly acted on their behalf allegedly without authority. That amounts to acquiesce to the transaction, to the extent of no turning back.

The next issue for determination is plaintiff's entitlement to compensation for unexhausted improvement he made to the property. It is on record that the nullification of her title was after almost 4 years. She testified to have done a number of unexhausted improvement to make the property habitable when her title was not yet disturbed, for no fault on her part. Being a *bonafide* purchaser for all that long, she is also entitled to the compensation for unexhausted improvement she made to the property to the time when her title was nullified. But, what is the amount of compensation is she entitled to? In a situation such as this, where, the

actual value of the improvement by the plaintiff remains unascertained, it is thought important to lay the basis of the award. Otherwise, the award may well be seen to be arbitrary and non-executable. In that situation, in order to ascertain the actual value of improvements an evaluation of the same would be ideal. What the court has on the ground is the value of as of 2016 as per valuation report exhibit P13. Almost five years have passed since the valuation was conducted. The court was told that the property was in a very dilapidated state when it was sold. This was anyhow, obviously expected given some of the conditions attached to the agreement of sale between the second defendant and the Government in terms of clause 9 of the sale agreement (exhibit D 16 which prohibited major improvements of property without approval of the vendor. The clause reads as follows:-

> *"Until the purchase price is fully executed, the purchaser shall not without prior consent of the seller, make any structural alterations, undertake major structural developments including construction of boundary walls, re ruffing or demolition of any part of the main structure of the building..."*

Together with the clause above, there was no any proof of major improvements claimed to have been made by 1st or 2nd defendants to the disputed property before sale to the plaintiff in 2011. The 2nd defendant testified to have stayed in the property for over twenty years, to the time of sale, to be specific, from 1987 to 2011. As no proof of major improvements in compliance with clause above, dilapidation claimed by the plaintiff was eminent. The house was sold just 10 days after full

payment of purchase price. And after, the payment, no proof of any development was made to it before it was disposed to the plaintiff. Thus, whatever the better condition the property is in now, is owed to the plaintiff for all the time she held the same as a *bonafide* purchaser. Therefore, prayer for compensation for the value of developments is understandable and deserving. What should be the criteria for awarding the appellant's claim for compensation in the circumstances was a next task for this court.

As I hinted above, my thoughts are that, the amount reflected in the previous valuation report in exhibit P13 is obsolete to reflect the today's reality. Therefore, plaintiff shall make fresh evaluation to be conducted for as stated under paragraph 10.0 of exhibit P13, 'value is never static; it is all the time floating in response to change and prevailing condition at a particular time.'

On the possession of the property, as the 2nd defendant remains technically and conditionally owner of the disputed property for the time being based on terms of Hon Mwingiras judgement, as explained earlier, he is entitled to vacant possession. But, the law of equity dictates protecting all innocent interests. The plaintiff has been the one in valid occupation of the property, until today when vacant possession is ordered. Her occupation is a relevant fact that is given priority consideration in ordering vacant possession to the second defendant. It is therefore ordered that, vacant possession should be availed to the second defendant upon plaintiff being refunded a total value of her purchase price and compensated fully the current value for the unexhausted

improvement she made to the property before her ownership was nullified to be ascertained through the ordered evaluation ascertainment of the whereabout of the amount that was left in court for second defendant.

Before I pen off, I would like to comment on the disrespect to the court shown by 4th Defendant. All along, after plaintiff purchased the property *bonafidely*, she managed to procure title deed in her name since 2012. That was about two years before the order decreeing sale to her was nullified without determining her other vested interest that still remained in the property as a *bonafide* purchaser who purchased from a valid order of the competent court. After the nullification 2nd defendant had been persistently attempting to revert the title in his name and forceful eviction to the plaintiff. This obviously prevented peaceful enjoyment of the property use by those under whose possession it was. In this case the plaintiff. Courts at different level had been called to interfere by issuing injunctive order pending determination of the issues between the parties over the property pending in court at the respective time. These include injunction orders by my learned brother, Mgeta J. and Kente J previous determinations in this suit, prohibiting the defendants from tempering with plaintiff's title and possession of the property under dispute in one way or the other during dependency of this suit.

It is evident from plaintiff's evidence that, all that did not stop the 2nd defendant from persisting on the title change. It seems both the 2nd defendant and the 4th defendant silently continued with processes of title change irrespective of the binding court orders on them at different times. I am saying so because, after the plaintiff was served with notice of intention

to effect the change, the court issued an order to stop them waiting finalisation of the matter pending before it. Astonishingly, the court was stormed with new title deed in the name of the second defendant bearing a different title number, 1005249 (exhibit D13) from the one held by plaintiff no 92715 (exhibit P9). All these were done in existence of a valid court order prohibiting the same thing. Having the same property having two title deeds with different title number, without any plausible explanation for the discrepancy, itself brought a lot of confusion to the court as commented by advocate Yuda in his final submissions.

He noted with concern that the disputed property has two titles. The plaintiff tendered in court title No. 92715 Plot No. 18276/2 Msasani Peninsula while the 2nd defendant also tendered the title No. DSM 1005249 plot No. 18276/2. He expressed his astonishment on how the same plot has different title numbers. He intimated that, it is not a normal thing. He suspects there must be something wrong at the Land Registry. He urged the court to look into that in reaching a correct conclusion.

Advocate Lisso, also commented on the 4th defendant's act stating that, the act of the Registrar (4th defendant) to rectify and change the ownership of the suit property while the suit is pending is clearly unjustified and nullity *ab initio* for being preferred prematurely and in disrespect of the court. Insisting on the importance of awaiting final determination of ownership before effecting change, he referred this court to the case of **Melchiades John Mwenda versus Gizelle Mbaga (as Administratix of the Estate of John Japhet Mbaga), Appeal No. 57 of 2018, CAT, DSM** where it was held that:-

"We have subjected the evidence adduced at the trial in respect of both appellant and second respondent to the scrutiny it deserves. Having so done, we are of the considered view that, the Registrar of Tittles acted prematurely in invoking the provisions of section 99 (d) and (f) of the Land Registration Act. That course of action, we think would have been appropriate if ownership of the disputed land was finally determined by a civil court."

Indeed, as argued by the two learned advocates, patience and wisdom on part of the 4th defendant in changing title to the property should be highly advocated for, in matters that are pending before the court. Imagine of the circumstances, in which the court decides in favour of the party whose title was transferred to the other just few months or days before the decision, worse still in cold disrespect of valid court order.

The 4th defendant could not impute lack of knowledge about the prohibitions being party to this suit, the same were made in his presence. And their officer who came to testify readily admitted knowing the subsistence of the orders. Therefore, whatever 4th defendant did, constituted intentional total disrespect of the court's orders, capable legally holding them accountable for the bypass. Worse still, all seemed to have been done on their own motion, rather than pressure from plaintiff as insinuated by DW 4. Plaintiff categorically disassociated with being the one who initiated the change. Hand written proceedings at page 101-102 he stated;-

"The second notice to Tabitha was issued in 2020. By that time of the notice, current suit was subsisting in court. I am not the one who issued notice, so you better ask them. I was also just copied. On how I got a title deed, it is better to ask those who issued the same. When I inquired after that notice, it is when I was told that they realised a mistake and they were rectifying it by making a tittle deed in my name. I was then called to collect the title deed"

'or the reasons, I thought I should pause to step up to send a stern varning for such acts, for if they are silently noticed and passed by or ondoned, no doubt courts are risking being rendered toothless.

M. P. OPIYO,

JUDGE

4/5/2021