

TANZANIA / JUDGMENT

a sd company and albert malangalila vs crdb bank ltd ambassador hassan omary gumbo kibelloh 2010 tzhccomd 5 20 october 2010

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20 October 2010

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IN THE HIGH COURT OF TANZANIA (COMMERCIAL DIVISION) AT DAR ES SALAAM
COMMERCIAL CASE NO.57 OF 2001 A&SD COMPANY..... 1st
APPLICANT ALBERT MALANGALILA..... 2nd APPLICANT VERSUS
CRDB BANK LIMITED..... 1st RESPONDENT AMBASSADOR HASSAN
OMARY GUMBO KIBELLOH..... 2nd RESPONDENT Date of last
orders: 14/06/2010 Date of oral submissions: 14/06/2010 Date of ruling: 20/10/2010

RULING

MA KARAM BA, J.; This is a ruling on the Notice of Preliminary Objection the 1st Respondent lodged in this Court. i The preliminary objection arose out of the Application, the Applicants filed in this Court on the 23rd day of March 2010 by way of a Chamber Summons under section 14(1) of the Law of Limitation Act [Cap.89 R.E. 2002], Order XXI Rule 87(1) and Section 95 both of the Civil Procedure Code [Cap.33 R.E. 2002]. The application was supported by the affidavit of ALBERT MALANGALILA, the 2nd Applicant, and sought to be heard on the application for the following orders: EXPARTE

- (a) That the mandatory notice to the respondents in determining prayer (b) herein below be dispensed with.
- (b) That this Honourable Court may be pleased to grant an interim order restraining the Respondents by themselves or through their agents, workmen assignees or any other person working on that behalf from effecting a transfer of ownership of landed property in plots numbers 682 & 683, Block "F" Tegeta Area, Kinondoni District in Dar es Salaam and comprised in the Right of Occupancy Title No.43780 from the 1st Respondent to any other person pending hearing of this Application inter- partes. INTER-PARTES (c) That this Honourable Court may be pleased to extend the time within which the Applicant may file an Application for setting aside a sale of landed property in plots numbers 682 & 683, Block "F" Tegeta Area, Kinondoni District in Dar es Salaam and comprised in the Right of Occupancy Title No.43780 made by the 1st Respondent on 14th February, 2009 in execution of a Decree of this Honourable Court

- (d) That this Honourable Court may be pleased to grant an order for setting aside the sale of landed property in plots numbers 682 & 683, Block "F" Tegeta Area, Kinondoni District 2 in Dar es Salaam and comprised in the Right of Occupancy Title NoA3780 made by 1st Respondent on 14th February, 2009 in execution of a Decree of this Honourable Court.
- (e) Costs of this application be provided for
- (f) Any other and/or relief that this Honourable Court may deem just and fit to grant. On the 6th day of April 2010 the 1st Respondent lodged a three point preliminary objection to the effect that:
1. That the application is incompetent as it has been brought under a wrong provision of law
 2. Application is incompetent for combining two distinct and irreconcilable applications
 3. The application is incompetent for having been filed before fulfilling the condition precedent of depositing to the 2nd Respondent 5% of purchase price and depositing the decretal sum due to decree holder as provided under Order XXI Rule 87(1) of the Civil Procedure Code, 1966 [Cap. 33 R.E. 2002]. On the date set for the oral hearing of the preliminary objection, on the 14th day of June 2010, Mr. Daimu, learned Counsel for the 1st Respondent sought leave to abandon grounds (1) and (2) of the preliminary objection and remained with ground (3), which leave this Court readily granted. The preliminary objection was disposed of orally. Mr. Rutashoborwa, learned Counsel argued for the Applicants. Mr. Daimu learned Counsel argued for the 1st Respondent and Mr. Byamungu, learned Counsel submitted for the 2nd Respondent. 3 The nature of this Application is such that a brief background is apposite. Briefly, the 2nd Respondent purchased a landed property through a public auction which was conducted on 14th February 2009 by Comrade Auction Mart & Court Broker by bidding to purchase the property located at Plot No.682 & 683 Block "F" Tegeta area Dar es Salaam comprised in the Certificate of Title No.43780 at a total price of Tshs. 130,000,000/-. In compliance with the terms of the auction, JR Estate Dealers Limited, the company contracted by the 2nd Respondent to be his agent and by Power of Attorney to act for him at the public auction, paid immediately on fall of the hammer, 25% of the purchase price (i.e Tshs.32,500,000/-) and the balance Tshs.97,500,000/- (i.e 75%) of the purchase price) was paid on 24th February 2009 within 14 days from the date of sale. The 2nd Applicant claims to be the owner of the property the subject of the public auction. The 1st Respondent is contesting the application to set aside the sale which the Applicants filed in this Court on the 23rd day of March 2010, by insisting that the application is not proper in court because before instituting it the Applicants were supposed to deposit to the 2nd Respondent 5% of Tshs. 130,000,000/- of the purchase price and deposit all the money owed to the 1st Respondent under the decree plus interests accruing from the date of the proclamation of sale. The Application has been preferred under among other provisions of the law, section 14(1) of the Law of Limitation Act and Section 95 and Rule 87(1) of Order XXI of the Civil Procedure Code. The Applications is an omnibus one as it seeks for two separate and distinct orders namely, 4 extension of time to set aside a sale and an order for setting

aside the sale. The learned Counsel for the parties seem to have locked horns over the side issue whether these two applications may be taken in one session or should be taken in two separate hearings, the first one to be taken on board being that for extension of time. The other issue which is the gist of the preliminary objection is whether this Court has jurisdiction to determine the application to set aside the sale before the conditions stipulated under Rule 87(1) of Order XXI of the Civil Procedure Code have been fulfilled by the Applicant. I shall first determine the submissions on the omnibus nature of the application. Mr. Rutashoborwa learned Counsel for the Applicants is of the view that the Applicants envisage two hearings and that unless extension of time has been granted it cannot be comfortably be stated that the application to set aside can be assailed. According to Mr. Rutashoborwa, both applications are matters which involve the discretion of the court and in the event this Court has not granted extension of time, the issue of deposit of money could not arise. Mr. Rutashoborwa submitted further that the matter of extension of time is governed by law of limitation which equally determines the jurisdiction of this Court to allow the prayer. I should point out here that Rule 87(1) of Order XXI of the Civil Procedure Code does not specify the time limit within which application to set aside a sale is to be made. Mr. Rutashoborwa insisted that there will be no need for one to deposit anything in Court in respect of which the limitation does 5 not allow since that will be an exercise in futility which cannot be entertained by the Court. Mr. Daimu, learned Counsel for the 1st Respondent is of a different view since according to him the two applications were supposed to be taken in the same session. It was not meant that one application will be taken first in one occasion and then the other to be taken in another occasion given that omnibus applications are allowed under the law as shown in the decision of the Court of Appeal in MIC TANZANIA LIMITED VS MINISTER FOR LABOUR AND YOUTH DEVELOPMENT AND ATTORNEY GENERAL Civil Appeal No.103 of 2004. Mr. Daimu surmised that in the event this Court does not have jurisdiction to entertain the application for setting aside the sale then even the application for extension of time cannot be entertained. Mr. Byamungu learned Counsel for the 2nd Respondent on his part insisted that consolidating the two prayers in one application serves a convenience purpose only and the two payers are to be determined together and therefore it is not expected to have two separate hearings. Mr. Rutashoborwa insisted that the jurisdiction of this Court in so far as setting aside the sale can only be called into question when this Court has granted extension of time. Mr. Rutashoborwa resisted the suggestion by Mr. Byamungu that the two prayers contained in one application are for convenience and insisted that this Court has jurisdiction in respect of the application to set aside the sale and determination of whether the conditions in terms of Rule 87(1) have been complied with can only be determined after extension of time has been 6 granted. The gist of the argument by Mr. Rutashoborwa is that each prayer in the application is a separate one and is governed by its own law and for each prayer the exercise of the discretion of this Court is central. Mr. Rutashoborwa has relied on section 14(1) of the Law of Limitation which provides as follows: "14(1) Notwithstanding the provisions of this Act, the court may, for any reasonable or sufficient cause, extend the period of limitation for the institution of an appeal or an application, other than an application for the execution of a decree, and an

application for such extension may be made either before or after the expiry of the period of limitation prescribed for such appeal or application." The provision of section 14(1) of the Law of Limitation Act provides very clearly that the extension of time relates to period of limitation for institution of an appeal or an application "other than an application for the execution of a decree." Matters relating to setting aside sale of a property resort relate to execution of a decree under the Civil Procedure Code, Rule 87(1) of which does not specify the specific form in which application to set aside a sale is to take and resort to section 14(1) of the Law of Limitation, which brings into the fore the issue of omnibus application. I should point out here that the practice of omnibus prayers, that is of combining in a single application two or more prayers has gained firm ground in this country. In an appropriate case more than one prayer can be taken in one application in one sitting. In such circumstances it is not envisaged that there will be two separate hearings. This practice is borne out of the decision of the Court of Appeal of Tanzania in MIC TANZANIA LIMITED 7 VS MINISTER FOR LABOUR AND YOUTH DEVELOPMENT AND ATTORNEY GENERAL Civil Appeal No.103 of 2004. In that case one of the grounds of appeal was that the trial court had erred in law in essentially holding that the application was incompetent in so far as it combined three distinct prayers in one Chamber Summons, namely prayer for extension of time, for leave and for stay of execution. In another case, TANZANIA KNITWEAR LTD VS SHAMSHU ESMAIL [1989] T.L.R.48, which was cited in MIC TANZANIA LIMITED VS MINISTER FOR LABOUR AND YOUTH DEVELOPMENT AND ATTORNEY GENERAL (supra), the application had united two distinct applications, namely one for setting aside a temporary injunction and another for issuance of a temporary injunction and objection was taken against such a combination on the grounds that it was bad in law and Mapigano J. held that combination of the two applications is not bad at law and that there was no law which forbids such a course since courts of law abhor multiplicity of proceedings, which ruling the Court of Appeal upheld. In MIC TANZANIA LIMITED VS. MINISTER FOR LABOUR AND YOUTH DEVELOPMENT AND ATTORNEY GENERAL (supra), Rutakangwa, JA of the Court of Appeal while upholding the practice of combining the three prayers in one chamber summons stated as follows at pages 9-10 of the typed unreported

judgment:

"Having perused the Chamber Summons and its supporting affidavit as well as the respondent's Counter Affidavit in the High Court, we are satisfied that the three prayers were properly combined in one Chamber Summons. They were not diametrically opposed to each other, but one easily follows the other. Once extension of time is granted then an application for leave follows. As the respondents appear to concede, once leave is granted then the court may, in its discretion, grant or refuse to grant an order for stay of execution of the challenged decision." In the present application the Applicants have combined two prayers in one Chamber Application. With due respect to Mr. Rutashoborwa, I find it difficult to follow his argument that the Applicants envisaged that there will be two hearings. Indeed if that was the case this Court is left wondering why the Applicants have opted to combine the two prayers in one Chamber Summons

instead of bringing two separate applications, one for each prayer. In the circumstances, the fact that the Applicants have opted to adopt the practice of combining two prayers in one Chamber Summons they cannot know but to say that the jurisdiction of this Court should not be united in considering the two prayers since in the event this Court grants the prayer for extension of time then an application to set aside follows. This brings me now to a consideration of the submissions on the preliminary objection that the application is not proper in court because before instituting it the Applicants were supposed to deposit to the 2nd Respondent 5% of Tshs. 130,000,000/- of the purchase price and deposit all the money owed to the 1st Respondent under the decree plus interests accruing from the date of the proclamation of sale. But first let us examine the provisions of Rule 87(1) of Order XXI of the Civil Procedure Code, under which the application has been preferred, which deal specifically with application to set aside sale on deposit and is couched as follows: "87(1) Where immovable property has been sold in execution of a decree any person, either owning such property or holding an interest therein by virtue of a title acquired before such sale, may apply to have the sale set aside on his depositing in court-

- (a) for payment to the purchaser, a sum equal to five percent of the purchase money; and
- (b) for payment to the decree-holder, the amount specified in the proclamation of sale as that for the recovery of which the sale was ordered, less any amount which may, since the date of such proclamation of sale, have been received by the decree-holder." Mr. Rutashoborwa, the Applicants' Counsel was quick to remark that the Applicants do not intend to bring any application under Rule 88(1) of Order XXI of the Civil Procedure Code as proposed by the 1st Respondent's Counsel, which Rule is *pari materia* with Rule 90 of the Indian Code of Civil Procedure. According to Mulla on the Code of Civil Procedure 15th Edition Vol. II (1996) at page 1865, Rule 89(1) [*in pari materia* with our Rule 87(1)], provides the only means by which "a judgment-debtor can get rid of a sale which has been duly carried out" as against a sale which suffers from a material irregularity or fraud as envisaged by Rule 90 [our Rule 88(1) of Order XXI]. In the circumstances resort to Rule 88(1) of Order XXI in my view is uncalled for. In the Application before this Court, the subject of the preliminary objection is for extension of time to bring application to set aside a sale and for setting aside the sale of the property the 2nd Applicant claims to be its owner, which sale was conducted in a public auction. The sale was completed and the purchase money has already been paid to the bonafide purchaser under the public auction sale. According to Mulla on the Code of Civil Procedure 15th Edition Vol. II (1996) at page 1866 once the sale to the auction-purchaser is confirmed the judgment-debtor, whose property has been sold, ceases to be entitled to get back the property under Rule 89 (our Rule 87) even if he succeeds in having the decree against him reversed, which is why the Rule provides the only means by which a judgment-debtor can get rid of a sale which has duly been carried out. Mr. Daimu, learned Counsel for 1st Respondent insisted that the requirement under Rule 87(1) of Order XXI of the Civil Procedure Code that before filing application to set aside such sale the Applicant has to deposit a sum equal to 5% of the purchase price and to pay to the decree holder the amount specified in the proclamation of sale as that for which the sale was ordered must be fulfilled first before the Applicants can bring their application to set aside the sale. Mr. Daimu

confronted with the problem of lack of any local case authority on the subject resorted to Muia on Code of Civil Procedure, 16th Edition Vol.3, where he states that the deposit of 5% must be made to court and in addition interest can also be paid. The 1st Respondent's Counsel also summoned to his aid SARKAR on Civil ii Procedure Code, 8th Edition Vol. II, at page 1081 discussing Rule 89 of the Indian Civil Procedure Code which is in pari materia with our Rule 87 on the two conditions precedent to making of an application to set aside a sale of immovable property, which are primary conditions which must be fulfilled and as such not doing so renders the application incompetent. Mr. Daimu availed to this Court a copy of the page he cited in SARKAR on Civil Procedure Code, 8th Edition Vol. II to assist this Court ascertain and establish the veracity of his submissions on this particular point. I wish to point out here that an application is necessary before the Court can act under this Rule. The issue is whether the two primary conditions relating to deposit of five percent of the purchase money to be paid to the auction- purchaser and of the amount specified in the proclamation of sale less any amount received by the decree-holder since the date of such proclamation should be deposited in Court before the Court assumes jurisdiction to consider the application to set aside the sale. Mr. Daimu is of the view that the deposit has to be the entire amount specified in the proclamation for sale and if it falls short, the Court has no jurisdiction to entertain the application. In the present application there is no evidence that Applicant has deposited the purchase price and has deposited the whole amount shown in the proclamation for sale before bringing the application, Mr. Daimu surmised and prayed that the application be dismissed with costs for non compliance with the requirement of the law which is condition precedent. 12 Mr. Rutashoborwa, learned Counsel for the Applicant in reply submitted that the preliminary objection is misconceived and it is no point of law worth the name of a preliminary objection a la MUKISA BISCUITS case since it brings in matters of fact which need to be either verified or not verified and therefore need to be ascertained. Mr. Rutashoborwa submitted further that whether the amount was deposited or whether the Applicant did not comply with the provision of the law needs to be ascertained and that cannot be taken as a preliminary objection in light of MUKISA BISCUITS case and prayed that the so-called preliminary objection be overruled with costs, and in the event this Court sustains it, the application should be struck out but not dismissed. Mr. Daimu in rejoinder insisted that this is not a matter of fact but a requirement of the law and upon complying with the requirement then evidence is to be adduced at the time of filing. Mr. Byamungu, learned Counsel for the 2nd Respondent seems to be in agreement with Mr. Daimu by also reiterating that this is a requirement of the law which has to be fulfilled before an application can be properly admitted in court and entertained, which is to be ascertained before anything relating to the application. Mr. Byamungu insisted that even the preliminary objection raised could not validly be entertained unless the court has been satisfied that Order XXI Rule 87(1) has been complied with, since it gives this Court jurisdiction to entertain any application under that Rule. It is without much controversy that the provisions of Rule 87(1) of Order XXI come into play only where immovable property has been sold in 13 execution of a decree. Essentially, Rule 87(1) of Order XXI confers a right on any person "owning such property or holding an interest

therein!', even after the property is sold, to satisfy the claim of the decree-holder and to compensate the auction-purchaser by paying him five percent of the purchase money. Muia on Code of Civil Procedure, 15th Edition Vol. II at page 1874 observes that: "The deposit has to be of the entire amount specified in the proclamation of sale less any amount received by the decree-holder since the day of the proclamation and not the amount equivalent to the price realised at the sale." Failure by the judgment-debtor to deposit in Court such amount, the Court will refuse to set aside the sale. The property the subject of the application to set aside the sale was that of the judgment-debtor who is now seeking to set aside the sale before it is confirmed by this Court, otherwise he would lose his right to get rid of the sale once the sale to the auction-purchaser is confirmed by this Court. There is no evidence that the judgment-debtor has not deposited in Court the amount the entire amount specified in the proclamation of sale less any amount received by the decree-holder since the day of the proclamation. Much as the Rule 87(1) does not provide expressly that payment of the said amount has to be deposited in Court before it assumes jurisdiction to entertain the application to set aside the sale, the rendering of Rule 87(1) to the effect that "on depositing in court' the two primary conditions stipulated under that Rule are conditions precedent which have to be fulfilled before this Court can entertain the application. 14 In the absence of such deposit, this Court would not have been properly moved and the application will be incompetent and liable to be dismissed. As correctly submitted by Mr. Daimu and Mr. Byamungu this is a legal requirement and the conditions are precedent. With due respect to Mr. Rutashoborwa, there is no evidence which needs to be examined to establish whether the deposit has been made so as to render the preliminary objection invalid. The ascertainment of the deposit in court of the 5% of the purchase price and the whole amount shown in the proclamation for sale is akin to what is required when ascertaining payment of appropriate fees for lodging a matter in court which is by the Exchequer Receipt issued in respect thereto. As correctly submitted by Mr. Daimu the deposit has to be the 5% of the purchase price to the purchaser and the entire amount specified in the proclamation for sale to the decree holder and if it falls short of this, then the court has no jurisdiction to entertain the application. In the present application, as correctly submitted by Mr. Daimu, learned Counsel for the 1st Respondent, there is no evidence that Applicants have deposited in court the 5% of the purchase price and the whole amount shown in the proclamation for sale before bringing this application. The property the subject of this application was attached and sold by public auction at the instance of the decree-holder to a third-party, the 2nd Respondent, the auction-purchaser. In so far as the auction-purchaser is concerned, Rule 87(1) is beneficent and should therefore be liberally construed, for the simple reason that the object of that Rule not only is to 15 preserve the property of the judgment-debtor but also not to put him to a pecuniary loss which would occur to him if after the Court sale, was not competent to apply for setting aside the Court sale, on deposit by the judgment-debtor of the decree amount and five percent compensation for the auction-purchaser. According to Mulla on Code of Civil Procedure, 15th Edition Vol.II at page 1873, the five percent is intended as compensation to the auction-purchaser for his trouble and disappointment for the loss of that which was perhaps, a good bargain. No sale will be set aside under Rule 87

unless the whole amount specified in sub-rule (1) of that Rule is deposited by the Applicant in Court. In the upshot and for the foregoing reasons the preliminary objection is hereby upheld. The Applications is hereby dismissed with costs. It is accordingly ordered. R.V. MAKARAMBA JUDGE 20/10/2010 16 Ruling delivered this 20th day of October 2010 in the presence of Mr. Luguwa, Advocate for Mr. Rutashoborwa for the Applicants and in the presence of Daimu, Advocate for the 1st Respondent and in the prsesence of M/s Malekano Advocate for Mr. Byamungu Advocate for the 2nd Respondent. R.V. MAKARAMBA JUDGE 20/10/2010 Word count: 4,185 17

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