

TANZANIA / JUDGMENT

19981201 TZHC Dar es Salaam

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TZHCDECIDED
1 December 1998

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IN THE HIGH COURT OF TANZANIA AT DAR ES SALAAM CIVIL CASE NO. 244 OF 1997
FARESELISA MARO PLAINTIFF VERSUS THE GENERAL MANAGER CRDB
(1996) LTD & 2 OTHERS DEFENDANT R U L I N G KALEGEYA. J. This ruling is in -respect of preliminary objections raised ~-~ by Mr. Rwiza, learned Counsel for CRDB (1996) Ltd and Goliondoi Auction Mart and Court Brokers (1st and 3rd Defendants respectively), and Mr. Chandoo, learned Counsel for the 2nd Defendant (Said Amin Bakhressa). This was in response to a suit filed against them by Fares Elisa ~aro, in which he claims for judgement and orders, (among others) that, "a) The sale of the property located at the corner of Sultan and Mindus Street, within Central Business area, near Kingo Mosque and Korogwe by the 1st and second Defendants to third Defendant be declared null and void for being unconcionable, fraudulent and against natural justice.

- b) A permanent injunction against all Defendants jointly and severally, their servants, agents and assigns restraining them from disposing of the property". What one gathers from the pleadings is that the plaintiff acting as a guarantor had mortgaged, among others, his property comprised in a house on Plot No. 1, Block K, Sultan\Morogoro Street (with certificate of title No. 183029\99) to the 1st Defendant who extended a loan to SIA Motors Ltd. Upon failure to repay the loan by the latter the 1st Defendant proceeded to foreclose on the property and ordered the 3rd Defendant to auction the mortgaged l ~ property. The 3rd Defendant advertised in a newspaper, regarding the intended sale by public auction of the disputed property. In response to this the plaintiff filed a suit at Kisumu RM's Court against same defendants (Civil Case No. 312 of 1996) in which he prayed among others, for judgement and decree as follows:- "a) a perpetual injunction restraining both the Defendants, their workmen, agents and or assigns from disposing off the suit premises.
- b) a declaration that the advertisement is not due notice to the plaintiff as a guarantor of debtor liability and as such insufficient and unprocedural.
- c) Defendants be required to file a suit for sale of mortgaged property under Order XXXII of the Civil Procedure Code_. 1966". The Plaintiff failed to appear before the Kisumu RMs Court on a date when the application for temporary injunction was to be heard prompting a dismissal order of the said application. The auctioning of the disputed premises was accordingly executed and that's how 2nd Defendant came to buy the same. Plaintiff then

jumped from the RM's Court and came to this court, filed the present suit, with the prayers already quoted above. This prompted the preliminary objections which are subject of this ruling. Mr. Rwiza for 1st and 3rd Defendants argued that the matter is Res subjudice as Civil Case No. 312 of 1996 in respect of the same subject matter, at Kisumu RMs Court is still pending, while Mr. Chandoo for 2nd Defendant insisted that his client should not be joined at all as there is no cause of action, for: he is a bona fide purchaser.- at a public auction, citing Pet.er. Adam Mboweto vs Abdallaha & Mwiki (1981) TLR 335 in the process. In response_. Mkoba for plaintiff argued that the subject matter in the two cases being different he is not barred from filing the 2 ~ present suit. Regarding Mr. Chandoo's objection Mr. Mkoba argued that the 2nd Defendant being now in possession of the disputed property as a result of an improper auction he is a necessary party. I will start with Mr. Chandoo's objection, which I hereby dismiss for one simple reason that the pleadings by plaintiff do not paint the 2nd Defendant as a bona fide purchaser as claimed but as someone who colluded with the 1st and 3rd Defendants to dispose off the property in question. I must clarify here. I am not saying that it has so been proved that he colluded with others or that there was any collusion at all. What I am saying is what I gather from the plaint. The falsity or otherwise can only be established after evidence has been adduced. In para 8 of the plaint the plaintiff clearly alleges " the second Defendant connived with the third Defendant to transfer the property at Shs. 21,000,000/= only". In the circumstances, Mr. Chandoo cannot be heard to say that his client can not be joined as a party to this controversy, and if it were't for the other objections this alone would not have affected the present case. Now turning to Mr. Rwiza's objection, upon full consideration of the subject matter in both cases, I am satisfied that indeed, they are the same save for one prayer in the case which is before the RM's Court which has been overtaken by events

- that is, a prayer to restrain defendants from carrying out the auction, for, it has now been completed. Apart from that the gist of the suit in both cases is that though the plaintiff was a guarantor his property was not supposed to be auctioned. He is challenging the 1st Defendants alleged right to proceed against the mortgaged property to recover the loan. His inclusion, in the High Court case as a new factor~ the allegation that there was / connivance to under value the relevant property does not make any difference. I have asked myself as to what should this court do in the circumstances. I have reached a conclusion that parties cannot be allowed to play about with the court process. As the law requires that suits should be instituted in the Court of lowest grade competent to try it; and as Civil Case No. 312 of 1966 is already before a competent court, the present case cannot stand. It is accordingly struck out with costs. (L. B. Kalegeya) ,JUDGE Ruling delivered in the presence of Mr. Mkoba, Mr. Rwiza and Mr. Chandoo Learned Counsel. AT DAR ES SALAAM (r. B. Kalegeya) 1ST DECEMBER, 1998 ,JUDGE 4

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Prepared on 24 October 2026 · Esheria