

TANZANIA / JUDGMENT

19760705 TZHC Mwanza

COURT
TZHCDECIDED
5 July 1976

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IN THE HIGH COURT OF TANZANIA. AT Mwanza (sc) CIVIL APPEAL NO. 55 OF 1975 (on the decision of the court of appeal at Mwanza in Civil Appeal No. 205 of 1973 - Before: I.K. I; I Lsq D.L1. & .Oxinc1 Civil Case No 228 of 1965 of Ruhindo Pmoxy Court). i'0 IoLill:a • IS BI) SiUDENTS 0 0 • • 0 • . KERIDTI TbOLSI) • • . J U D C E. ir U IT T Su.ct: Setting aside oc sale In Ebcecut±on TrrnTnT .T U-o -. • These .proceedings arise f:~ ori çnold.case. fii,o1Ly disposed-of in 19686 It u.emonstrats, io the rellent has been endowed vih a special iolity - S -tXC) '166rn p er sistence The appellant had been successfully sued by oae Di Nukcxuboroga in Civil Case No.. 228 of. 1965 on a boundery question. Althou8h the a ppellant lost in the Primary Couxt he elfcd not to appea, Executin pr000inc 'cc tedby respc.adent No 1, the appellant1 s land w attachedd a J finally rcsponcont fo. 2 bought the land at public auction At th at stnge I ancl. after one and half years, the appellant unsuccessfully sought icave to a ppeoa out of iame. The District Court rejectei k'u applicion and the Pgh Court in (cc) aplidation No 17/1968 did the some;h w en the appellant .appealed- against that rejection by tle District Court.. After a iod of slumber y the appellant flied 1 aflappliotion supported by affidcavit. with o view to sccttinE, aside the auction sle. He eloiieci, that the s1 Was done in his absnce and without his luiowledge. I:e leo cl.no, that he went to py back the purch'se £aofey — 3()/..•; before thirty days e1esed but he waS unceremoniously. put off by the court0 The District Court c1 isnissod, the application as devoia of substance, Arieveci, he has no ppc acu to this court s repeating the scne grouxia.s ho wielded in the District Jourt. As it can be gathered, -thc appellant wants the sale to be set aside and according to the icv applicable, this can only be done under ertain conditions, provided by rule 05 of the istrate Court (Civil Procedure in . rinary Court.) rules 1964. It provides titus:- `35 (1) Oh application ma(llewithin thirty days by any person affected or of its own motiox, the court. nay sot asidc'a SOLO of inaovable opert lilt is satisfied:- that there has been fraud or naterial irregularity in the proceedings leading up or in -the conduct of 4-1- sale or that the judgeant C1.6btor had no saleable interest in the property sold; Provided that nO sale shell be set aside, unees tile judpaenG aeditor, the purchaser,

- ... 2 any other person acted, have been given an opportunity a be heard and prclue evidenoe 11 It Is desconiole thdrforo, that before the court can set aside the scJ.o, it must b satified, tiat there wan either fraud s material irregularity in the process up to the salc, or that there was no saleable interest in the land so sold. It the setting aside of the sale is sought by the party through an appl±áation, the onus is upon him to cllegcd end substantiate his

grounds, to the satisfaction of the court. My examination of this record reveals no irregularity, nor material irregularity. The appellant urged that he did not renew of the sale like the courts below, I am of the view that this submission is unsustainable. The record is withholding about the facts that the attachment warrant issued by the court was fixed on the outer door of the appellant's house, in the presence of neighbours, in addition to necessary publication. How can he say he did not know. The record also shows that the sale took place on 10/6/67, thirty days after the order in compliance with rule 75 of the Primary Court Civil Procedure rules 1964 that provides:.... : Subject to the provisions of rule 66 (not applicable here) the sale of immovable property shall not take place until after the expiration of thirty days from the date of the order of sale. Thus, as I detect no fraud nor irregularity I consider the court below, was right. It is found in favour of the appellant. The appellant did not allege, that he took the purchase money to court before 30 days had elapsed but he was partly off. Although it is found that this could not have stopped the sale as this was a past - auction sale. The sale can only be set aside as provided by rule 73 (i) of the Primary Court Civil Procedure rules, if the amount of the award plus costs, and expenses of sale were paid by the judgment debtor to the person conducting the sale or by a person who has been paid at or before the sale. On the record we have there is nothing to show, that he did not pay the amount of the award, plus costs and expenses to the court broker on the day of the auction. Of course, it may well be, that the appellant got the money on day subsequent to the sale. If I have to find the appellant liable further, and believe him as he meant, what he wanted to pay, after thirty days of the sale then he should have made a necessary application to set aside the sale before delivery of property sold in execution, to the purchaser. In the event of the appellant's application although it is shown that the auction took place on 10/6/1967, the appellant ought to have taken steps in 1973. In the circumstances -taxes and costs of the District Court was right, in dismissing the application, and it is hereby also dismissed by this court and with costs. I hereby order that the appellant pay the costs of the District Court. E. W. KIJITI DGE 5TH JULY, 1976. k %

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