

TANZANIA / JUDGMENT

KIRIBO FINAL

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30 January 2025

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IN THE HIGH COURT OF THE UNITED REPUBLIC OF TANZANIA GEITA SUB-REGISTRY AT
GEITA CIVIL REVISION NO. 31671 OF 2024 (Arising from the decision of the Resident Magistrate
Court of Geita in Miscellaneous Civil Application No. 27583 of 2024 before Hon. Waane-PRM.) M/
S KIRIBO LIMITED----- APPLICANT VERSUS THE BOARD OF TRUSTEES OF
THE NATIONAL SOCIAL SECURITY FUND-----1st RESPONDENT NG'WANDU JOSEPH TENGA
c/o SHASHINHALE AUCTION MART AND COURT BROKERS-----2nd
RESPONDENT

RULING

Date of the last order: 30 January 2025 Date of the Ruling: 10 March 2025. K. D. MHINA, J. In this application, the applicant has moved this court under a certificate of urgency by way of chamber summons under the provisions of Section 79(1)(c) and 95 of the Civil Procedure Code, Cap 33 R.E 2019, seeking for the following orders: 1

- i. This Honourable Court may be pleased to call for and examine the records of proceedings of the Resident Magistrates' Court of Geita at Geita in Miscellaneous Civil Application No. 27583 of 2024 and revise for the purpose of satisfying itself as to the correctness, legality or propriety of the ruling and/or order dated 06th December 2024. ii. That upon revision, this Honourable Court may be pleased to revise or set aside the ruling and order of the Resident Magistrates' Court of Geita at Geita in Geita in Miscellaneous. Civil Application No. 27583 of 2024 dated 06th December 2024 iii. Costs be provided for; and iv. Any other orders or reliefs as the court deems fit. The application is supported by the affidavit disposed of by Kibacho Monata, the applicant's Managing Director, which expounds the ground of the application. The grounds for the application, as canvassed in paragraph 18 of the affidavit, are as follows;
- i) The executing Court erred in law and fact by holding that the Second Respondent had no duty to disclose a property attached by the High Court as the same was not realized. 2 ii) The executing Court erred in fact and law by not holding that the 2nd Respondent's act of attachment of the same property subject to the lawful order of the Court is illegal. iii) The executing court has erred in law by holding that the vehicle attached and sold did not belong to the judgment debtor. iv) The executing Court erred in law and fact by holding that the Auction was conducted correctly and

- v) The executing court has erred in law and fact for holding that there was no need to rectify the consent decree of the Court in Civil Case No. 000007141 of 2024. In response to the application, the respondents countered it through the affidavit in reply sworn by Victor Wiliam Mhina, State Attorney for the 1st respondent. The 2nd respondent did not file a response. A brief background of this matter is necessary to understand the gist of the conflict between the parties. It goes as follows; At the Resident Magistrates' Court of Geita, on 25 April 2024, in Civil Case No. 7141 of 2024, the dispute between the applicant and the 1st respondent was concluded by a consent judgment. In that judgment, it was settled that the applicant should pay the decretal amount of TZS. 134, 827, 3 080.50 in full and at once. It was further agreed that the third party, Geita Gold Mining, the applicant's client, would pay that decretal amount. Following the failure of the applicant to satisfy the decree, on 20 June 2024, the 1st respondent applied for execution in Miscellaneous Civil Application No. 27583 of 2024. However, it was later amended. In the amended application, the 1st applicant opted for the mode of attachment and sale. The 1st applicant requested the attachment of the motor vehicle with registration no. T. 383 CDD MAN. The executing court appointed the 2nd respondent, the Court Broker, to carry on the execution process. In exercising his appointed execution duties, the 2nd respondent attached the property, and the sale processes commenced, and the sale was conducted on 18 October 2024. The applicant was aggrieved and decided to challenge the sale by applying to set aside the sale. After a hearing of the application on 6 December 2024, the execution court dismissed the application for being devoid of merit. 4 Aggrieved, the appellant preferred this application requesting this Court to examine the executing court's proceedings, ruling and orders to satisfy its correctness, legality or propriety. At the hearing, the applicant was represented by Mr. Michael P. Mahende, learned advocate, while the 1st respondent was represented by Ms. Aisha Salehe, State Attorney. The 2nd respondent by Mr. Ng'wandu Joseph Tenga-Court Broker. In supporting the application, Mr. Mahende started to submit on the 2nd ground. He stated that there was an order of the High Court to attach the property in dispute. That order was issued to the 2nd respondent to attach the property. However, before that order was vacated, the 2nd respondent attached a similar property in another subsequent execution proceeding and consequently sold that property. He argued that the executing (Resident Magistrate Court) ought to hold that the act conducted by the 2nd respondent was illegal and in disobedience of the valid lawful order of the High Court. Mr. Mahende explained that the 2nd respondent operates under the Court Brokers and Process Servers (Appointment, Remuneration and 5 Disciplinary Rules) 2007, in which under rule 10 (2) (a) binds the court broker to abide by the rules and orders of the executing courts and superior courts. Therefore, in this matter, the 2nd respondent disobeyed the orders of the High Court as indicated at page 8 of annexure TA8. Therefore, the executing court failed to hold that the execution was illegal. Submitting on the 1st ground, Mr. Mahende stated that the 2nd respondent had a duty to disclose that the property attached was subject to another attachment order of the High Court. He explained that Court Brokers are appointed by the Courts to execute the decree. Therefore, they hold a fiduciary duty to the court. In this matter, the Court Broker concealed the information in the subsequent proceedings at the

Resident Magistrate Court. Therefore, the executing Court erred in holding that the Court broker had no duty to disclose the order of the High Court. Regarding the 3rd ground, he submitted that the vehicle attached was not the property of the judgment debtor. The judgment debtor produced 6 the vehicle's registration card, which indicated that the owner was AUSDRILL TANZANIA LTD. In its decision, the executing court held that the vehicle belonged to the judgment debtor, while the registration card indicated otherwise. On this, he cited section 48 (1) of the CPC, which provides that the property liable for attachment and sale should be under the judgment debtor's name or that the judgment debtor has the power to dispose of it. He concluded by submitting that in the impugned ruling, there was no explanation as to why the executing court held that the property was the property of the judgment debtor. Faulting the executing court on the 4th ground, Mr. Mahende submitted that there were a lot of irregularities that tainted the entire auction. At page 3 of the Ruling, there was no list of bidders (participants) to the auction, and the Court Broker did not sign the notice of auction. Therefore, it was incorrect for the executing court to hold that the auction was conducted legally with these irregularities. To substantiate his submission, he cited *M/S Ilabila Industries Ltd and two others vs. Tanzania Investment Bank*, Commercial Review No. 5 of 2019 (Tanzlii), 7 where it was held that an auction tainted with irregularities should be nullified/ set aside. The same was also held in *Milcom (T) N.V vs. James Allan Russel and five others*, Civil Revision No. 3 of 2017, at page 58, where the Court of Appeal emphasized the need to adhere to execution procedures. On the last ground, he submitted that at the execution court, they pointed out that the consent decree was not executable. What was contained in the decree was not what was executed by the respondents. The attachment done by the respondents was not in the mode envisaged in the consent decree. He cited *Laura Lucas Chongo vs. International Commercial Bank Ltd*, Misc. Commercial Application No. 88 of 2020 (Tanzlii) at pages 5 and 6, where it was held that the executing court has no jurisdiction to modify the decree. In response, Ms. Salehe also started with the 2nd ground by submitting that the order was lawful because the property was also involved in the case of *Abdallah Laurent and 43 others vs. Kiribo Limited* in Labour Application No. 000017097 of 2024 per annexure TA5. That application was already withdrawn, but the applicant attached a few pages as an annexure to mislead the Court. 8 Further, she submitted that the law is clear: if the property is released, it can be attached to any other case. Also, under section 50 (1) (2) of the CPC, no law prohibits the court from attaching or reattaching the same property even if it is already attached in other proceedings. She explained that if there was an attachment by the High Court, the above provision allowed the executing court (Resident Magistrate Court) to proceed with the execution. Therefore, the executing court was proper, and the Court Broker acted legally. Furthermore, she stated that Order 21 of the CPC provides that execution should be carried out according to the law and what was contained in the decree, and also the Court Brokers Rules, specifically rule 10, binds the Court Broker to act according to the law. She informed this Court that during the execution proceedings, the court broker issued a 14-day notice as per rule 21 (1) to ensure that the judgment debtor became aware of the execution process and gave him the opportunity to respond. However, he failed to do so. After that, the sale was conducted after

issuing the proclamation of sale as per Order 21 Rule 66 of CPC, which included the property's details, 9 time and place of sale. Later, the sale was publicly conducted in accordance with the law as per annexures NSSF 3. She concluded by submitting that the 2nd respondent lawfully carried out the auction. Thus, there was no basis to declare it illegal. The attached property was successfully and legally sold to a 3rd party. Therefore, even if this court finds irregularity, the law prohibits the court from vitiating the sale due to irregularity. Only the injured party can sue, as per Order 21 Rule 76 of the CPC. On the 1st ground, she submitted that the duties of the Court Broker are strictly confined to executing orders of the court as per rule 7 of the Court Brokers Rules. The court broker has no duty to report or disclose the properties that have yet to be realized. Therefore, the existence of the High Court order did not prohibit the executing court from proceeding with execution as per section 50 of the CPC. Regarding the 3rd ground, she responded that the executing court rightly relied on the fact that the judgment debtor was in possession of the 10 vehicle attached. That property had even been previously used in the execution against the judgment debtor at the High Court. The applicant himself submitted that the property was attached in the labour execution case no. 17098 of 2024. This established strong evidence of ownership. That certificate of registration is not conclusive proof that the judgment debtor did not own the property. She explained that the law under sections 42, 48 and Order 21 Rule 10 (2), 45 of the CPC, allows the execution of the decree against the property of the judgment debtor whether he owns or possesses the property. In this application, the applicant failed to attach the evidence in his affidavit filed in this court. She cited NBC vs. Dar es Salaam Education Office, 182(TLR) 2001, where it was held that a party claiming an attached asset does not belong to them must provide credible evidence to rebut the presumption of ownership. Countering the 4th ground, Ms. Salehe submitted that the executing court was right to hold that the auction was carried out lawfully in accordance with the provisions of Order 21 of the CPC. 11 She explained that the records indicated that the 2nd respondent complied with all legal requirements for the auction as Rule 21 (1) and 22

- (1) of the Court Brokers Rule. The CB issued the 14-day notice, valuation was conducted by TEMESA and the auction was properly advertised. Further, the sale was conducted fairly and transparently, where the highest bidder was declared the winner as per annexure NSSF 3. The notice of auction was also signed as indicated in annexure NSSF 3. She further stated that the applicant had a duty to prove that the auction was not legally conducted, as held in MANTRAC (T) Ltd vs. Raymond Costa, 2006 TLR 245, but he failed to do so. Ms. Salehe commented on the cases of Ilagila and Milcom, cited by Mr. Mahende. She stated the cases are distinguishable because, in the instant matter, the auction was conducted properly. On the last ground, she submitted that the executing court rightly interpreted and executed the consent decree. The executing court cannot alter, vary or amend the decree. It can only interpret the decree based on the pleadings and judgment as per Matriza vs Choto, 1988 TLR 12 and Laura Lucas Chongo (Supra). 12 She explained that the decree remains binding upon the parties unless set aside by appropriate legal channels such as review or appeal. In the consent judgment, articles 3 and 4 clearly provided the parties' mandate and what should be

done in case of default. Therefore, the executing court made a proper decision. The 2nd respondent who was present at the Court had nothing to say. In a brief rejoinder, Mr. Mahende, on the last ground, agreed on the powers of the executing court. However, stated that it was not proper for the execution court to allow attachment and sale while the consent judgment provided for another mode of execution. Further, the applicant prayed for the decree to be rectified by the court that issued it, but the executing court declined it. On the 4th ground, he reiterated his earlier submission in chief. Further, regarding the valuation by TEMESA, he stated it was a letter from TEMESA with no valuation. Also, he faulted the auction by saying there was no bidders' list, so the auction was quickly conducted. It was within a day. 13 On the 3rd ground, Mr. Mahende stated that the counsel for the 1st respondent did not deny that the property belonged to another person and not the judgment debtor. At the execution court, he provided a registration card indicating that the property did not belong to him. Regarding the 2nd ground, he submitted that the court broker was not transparent by not disclosing the order of the superior court. Last, on the 1st ground, he submitted that the proceedings show that the auction was conducted before the order of the High Court was vacated. Having considered the chamber summons, its supporting affidavit, counter affidavit and the submissions made by parties, I will start by determining the 5th ground of the application, which shall not detain me long. The applicant complained in the 5th ground of appeal; that, one, the decree was not executable two, what was contained in the decree was not what was executed by the respondents. The attachment done by the respondents was not in the mode envisaged in the consent decree, and three, they were denied to rectify the decree. First of all, and as rightly submitted by Ms. Salehe, the executing court has no power to go beyond the terms of the decree. In an Indian case of 14 V. Ramswami vs. T.N.V.Kailash Theyar reported in AIR 1951 S.C,189(192), it was observed that, "The duty of an executing Court is to give effect to the terms of the decree. It has no power to go beyond its terms. Though it has the power to interpret the decree, it cannot make a new decree for the parties under the guise of interpretation..... The interpretation must be governed by pleadings and the judgment Under our Civil Procedure Code, Cap 33, the powers of the executing court to interpret the decree at the stage of execution are derived from Section 38 (1) of the CPC. The section reads; 38.-(1) All questions arising between the parties to the suit in which the decree was passed, or their representatives, and relating to the execution, discharge or satisfaction of the decree, shall be determined by the court executing the decree and not by a separate suit. However, as a trite principle, even under the CPC, the power to interpret cannot go behind the decree. It has no powers to rectify the decree. Therefore, in the instant application, the executing court had no powers to rectify the decree. 15 Further, the submission that the applicant prayed for the decree to be rectified by the court that issued it, but it was declined by the executing court. In my view, the complaint is meritless. If the applicant felt that he needed to request the trial court to review its consent decree, nothing prevented him. Shifting blame to the executing court while he had that opportunity is improper; he had that opportunity but never filed any application. On this, there was no law which prevented him from doing so. The consent judgment was delivered on 25 April 2024, and the application for execution

was filed on 20 June 2024. Even after the execution was filed, he could still pursue that right if he felt there were errors in the consent

judgment.

From above, the question is whether what was contained in the decree was not what was executed by the respondents in the sense that the attachment done by the respondents was not in the mode envisaged in the consent decree. 16 As previously alluded to, the consent decree was a monetary with a sum of TZS. TZS. 134, 827, 080.50 to be paid in full and at once by the applicant to the 1st respondent. Further, in the consent decree under article III, it was agreed as follows; “That, this Deed of Settlement shall, upon being filed in Court, have the same effect as a Decree duly made by the Court capable of being executed in the same manner as any other decree of the Court; that in the event of default of any term of this Deed of Settlement, then this Deed shall become enforceable as a Decree of the Court and the usual default clause shall apply”. [Emphasis provided] Therefore, the clause imposes a mandate to the decree holder to satisfy the decree in any manner as other decrees of the court, in case of default of payment the monetary decree. The modes of execution of the decree are provided under Order 21 Rule 10 (2) (j) of the CPC. The rule provides that; “.the mode in which the assistance of the court is required, whether- 17

- (i) by the delivery of any property specifically decreed;\ (ii) (ii) by the attachment and sale, or by the sale without attachment, of any property; (iii) (iii) by the arrest and detention in prison of any person; (iv) (iv) by the appointment of a receiver; or
- (v) (v) otherwise, as the nature of the relief granted may require. Therefore, the mode opted by the 1st respondent and granted by the court was proper according to the nature of the decree, and the decree was executable contrary to what was complained by the applicant. The issues of payment by the third party did not oust the applicant's duty to satisfy the decree and prohibited the 1st respondent from applying for execution against the applicant in case of non-satisfaction with a decree. Thus, the 5th ground of application is meritless and dismissed. Reverting to the 3rd ground, the applicant complained that the executing court had erred in law by holding that the vehicle attached and sold did not belong to the judgment debtor. This also should not detain me long, and I see no reason to differ with the executing court. 18 On this, the law is clear that where there is an order of attachment or sale, the order is made only on the properties of the judgment debtor. If the attached property belongs to another person, such a person may raise a claim or objection that such property is not liable for attachment or sale. This is per Order. 21 Rule 57(1) of the CPC. The order provides that; “Where any claim is preferred to, or any objection is made to the attachment of any property attached in execution of a decree on the ground that such property is not liable to such attachment, the court shall proceed to investigate the claim or objection with the like power as regards the examination of the claimant or objector and in all other respects, as if he was a party to the suit”. (Emphasis provided) In objection proceedings, the procedure is for the objector is required to adduce evidence showing interest over the property as elaborated under Rule 58 of the same Order. That Rule reads as

follows; “The claimant or objector must adduce evidence to show that at the date of the attachment he had some interest in, or was possessed of, the property attached”. 19 In *Nyanza Distributors Co. Ltd vs. Geita General Stores* (1977) LRT n.2. Order 21 rule 58, CPC was interpreted as follows; “the claimant or objector adduces evidence to show that at the time of attachment he had pre-existing interest or was possessed of the property attached” That means possession was construed to imply possession or ownership. From above, it means that the essence of requiring the person who alleged the property sought to be attached or sold is to make sure that he/she adduced evidence showing interest in the property. Therefore, at the execution court, no third party claimed or filed any objection proceedings claiming that the attached vehicle was his property, and there is no evidence that the vehicle did not belong to the applicant. In addition to the above discussion, the counsel for the applicant stated that he produced the registration card before the execution court. However, having gone through the records, I find that the card was not annexed to the affidavit, and nowhere can the card be traced or recorded as being 20 included in the proceedings. Likewise, in the instant application, the alleged registration card was not annexed to the applicant’s affidavit. What was submitted regarding the ownership of the vehicle were mere words without cogent proof of ownership. Also, even if we assume the applicant had that registration card, he still did not give any evidence on how that card “landed” into his hands while it belonged to another person. Thus, the 3rd ground of application is devoid of merit. For the 1st and 2nd grounds in the application, I will determine the same jointly. In the 1st ground, the complaint was the 2nd respondent did not disclose if the property attached by the executing court was also attached by this Court and in the 2nd ground, the complaint was the order of attachment by the executing court was illegal because of the lawful attachment order of this Court. On this I will start by citing sections 50 and 54 of the CPC. The sections read as follows; 50.-(1) Where property not in the custody of any court is under attachment in execution of decrees of more courts than one, the court which shall receive or realise such property and shall 21 determine any claim thereto and any objection to the attachment thereof shall be the court of the highest grade, or, where there is no difference in grade between such courts, the court under whose decree the property was first attached. 54.-(1) Where assets are held by a court and more persons than one have, before the receipt of such assets, made application to the court for the execution of decrees for the payment of money passed against the same judgment debtor and have not obtained satisfaction thereof, the assets, after deducting the costs of realisation, shall be rateably distributed among all such persons: Therefore, what can be gleaned from the above provisions of law; One, a property or properties can be attached to satisfy decrees or more than one court. Two, in case of any claim objections to the attachment, the court of the highest grade should determine the objection, or if the courts are of the same grade, the claim or objection should be determined by the court which ordered the attachment first. 22 Three, after the realization of the attached property, the proceeds should be rateably distributed to the decree holders after deducting the mandatory costs. Therefore, whether or not the court broker disclosed to the court regarding the attachment of a property in another court or not is immaterial because the law allows a

property to be attached in satisfaction of decrees of more than one court. Further, the attachment by the second court by law is not illegal because the law allows another court to attach the property already attached by another court but not yet realized. In addition, even if there was a duty to disclose to the execution court the presence of another attachment at this Court, still, under section 50 of the CPC, the party who was supposed to raise any claim was the applicant. The record indicated that as per the annexure attached to the counter affidavit, the applicant was duly served with a 14-day notice by the court broker. Still, he never raised any claim or the alleged concern he raised in this application. 23 Therefore, while the applicant “blamed” the court broker for not disclosing to the executing court the presence of another property, he also ought to remember the legal maxim in equity that; “One who comes to equity must come with clean hands” I hold this view because, as previously alluded to, the applicant was served with the notice of sale, but he did nothing, including raising a concern that a similar property was attached in a decree of another court. Therefore, the 1st and 2nd grounds in the application are dismissed for want of merit. On the 4th ground, the applicant complained that the auction was tainted with illegalities. He raised two illegalities. One, there was no list of bidders, and two, the Court broker did not sign the notice of auction. Starting with the issue of notice, as per the counter affidavit, the applicant was served with a 14-day notice informing him that the sale would take place after 14 days. That notice (attached to the counter affidavit) was received and signed. That notice was signed by the court broker. Further, 24 the auction was advertised in the Nipashe Newspaper as per the annexure to the counter affidavit. Therefore, it is quite clear that not only was the 14-day notice signed by the court broker, but it was also served and received by the applicant. From the above, the law is clear that under Section 12 (2) of the Auctioneers Act, the auction may take place after at least a lapse of fourteen days of notice. That section reads that “No sale by auction of land shall take place until after at least fourteen days public notice thereof has been given at the principal town...”. The evidence per the annexures indicated that the 14-day notice was issued on 11 September 2024, while the auction was conducted on 18 October 2024. Again, the law relating to the timing of the auction after a notice issued was complied with. Regarding the issue of the absence of the list of bidders, this should not detain me long because, according to the report of the auction dated 18 October 2024 (annexed to the counter affidavit), at the public auction, the 25 highest bidder was Nuru Said Bayashe for TZS. 60,000,000/=. Other bidders were Ismail Adam for TZS. 35,000,000/= and Mussa Pima for TZS. 39,000,000/=. Therefore, the report indicated the list of bidders. Further, it is generally that for an auction to be nullified, a party requesting for a nullification shall prove that the auction was characterized by foul play, corruption or collusion. In the absence of the mentioned factors, the court cannot interfere. See *M & M Processors Co. Ltd vs. CRDB and two others*, Civil Appeal No. 273 of 2020 (Tanzlii), *The National Bank of Commerce vs. Dar es Salaam Education and Stationery* [1995] T. L. R. 272 and *Juma Jaffer Juma vs. Manager of The Peoples' Bank of Zanzibar Ltd and others* [2004] TLR 332 In the instant application, there was no evidence that there was corruption, collusion or foul play (in general fraud) when the auction was conducted. The applicant never pleaded or submitted on fraud and particulars of fraud in the affidavit. Therefore, the

highest bidder who purchased the property was a bone purchaser, and he/she ought to be protected. This is because in an auction, after the fall of the hammer at the auction, where there is no evidence of 26 corruption or collusion, the bonafide purchaser must be protected. See J.M Hauliers Ltd vs. Access Microfinance Bank (T) Ltd (former Access Bank Tanzania), Civil Appeal No. 274 of 2021 (Tanzlii). Therefore, since the complaints raised by the applicant in relation to the auction are neither proved nor failed to pass the test to nullify the sale in the auction of the motor vehicle conducted on 18 October 2024, I find that the complaints at this stage are unwarranted, and this court cannot interfere with that sale. Therefore, the 4th ground in the application is also devoid of merit. Flowing from above, all grounds of the application raised in the affidavit are meritless. Thus, the application for revision is rejected, as there is nothing to revise. Consequently, it is dismissed with costs awarded to the 1st respondent. It is so ordered. 27 K. D. MHINA JUDGE 10/03/2025 Court: The right to appeal is fully explained to the parties. K. D. MHINA JUDGE 10/03/2025 28

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