

TANZANIA / JUDGMENT

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The Judiciary of Tanzania IN THE HIGH COURT OF UNITED REPUBLIC OF TANZANIA AT SHINYANGA Miscellaneous Civil Appeal No. 000021042/2024 (Emanating from Miscellaneous Civil Application No. 9656/2024 of Kahama District Court) PETER MAGEREAPPELLANT Versus ROBERT MAGERE1ST RESPONDENT VITA MASANJA2ND RESPONDENT MABULA KULIMA.....3RD RESPONDENT SHASHINALE AUCTION MART AND COURT BROKER.....4TH RESPONDENT

JUDGMENT

24th Sept & 28th October 2024 F.H. MAHIMBALI, J: Following the judgment of Kahama District Court in Civil Case No. 2 of 2015, which was in favour of the first respondent, amongst others he was entitled for costs. The first respondent then applied for the bill of costs in 1 which it was eventually taxed that the 1st respondent to pay the appellant an amount equal to 490,000/=. It appears that the appellant herein neither settled the taxed amount nor challenged it by way of reference to this court. This then prompted the 1st respondent to apply for the execution of court's order on bill of costs where the same was fully executed by the 4th respondent. Consequently, his properties were put under auction for sale where the same was eventually sold. The appellant unsuccessfully registered his concern before the executing court objecting the attachment for sale of the alleged properties claiming amongst others that the said land is not his property. In the said application giving rise to the current appeal, the appellant had applied before the trial court for orders that the trial Court be pleased to set aside the sale of their family shamba measuring 2 acres containing unfinished house with three rooms and two sitting rooms and foundation of house with five rooms. In his affidavit in support of the application, the appellant had deposed that he was the defendant in Civil Case No.02/2015 before Kahama District Court whereby it ordered him to pay This 490,000/ as bill of costs emanating 2 from civil case No.02/2015. 3.That, after the delivery of the order, the said respondents applied for execution so as to implement the decree in bill of costs No.02/2015 for attaching and sale of their family shamba measuring 2 acres which also contains unfinished house with three rooms and two sitting rooms, foundation of house with five rooms, situated at Bulima Village "A", Mpunze Ward. That, on 20.03.2024, he got proclamation of sale of their family house which was affixed on the wall of pembejeo shop belonging to one Emmanuel Sidi within Bulima Village "A". In the said

proclamation the said unfinished house and foundation were not mentioned though all were sold to the 3rd respondent. That, after getting that proclamation he wrote a letter to Resident Magistrate In charge so as to get the warrant of attachment and sale of the disputed land where he got them. That, following the missing of information of the sale of family shamba, he went to the ward executive officer so as to ascertain if the said shamba had been already sold whereby he was assured that they had already sold it at Tshs .900,000/.That, the said shamba was sold together with unfinished house and foundation of house erected in the said shamba. Worse still, there is no valuation conducted before the sale of the said landed properties and thus the said landed properties were sold under value. That, the said shamba was sold at 3 auction mart without him being served by any notice but only demands me to pay Ths. 490,000. The executing court having heard the objection proceedings as registered by the appellant, dismissed the said application thus the basis of the current appeal founded on five grounds of appeal namely:

1. That it was an error by the learned senior resident Magistrate holding that the appellant applied before the trial court for an objection proceeding together with an application of setting aside the sale of his piece of land in execution civil case No. 02/2015.
2. That sale of the disputed land was improper as the appellant was not served with a 14 days' notice.
3. That the sale of the disputed land was done in the done in the absence of the valuation report which is contrary to the law.
4. That the sale of the disputed land was done below the market price which is contrary to the law.
5. That the appellant was denied with right to be heard as there was no any summons issued for that. 4 During the hearing of the appeal, the appellant appeared in person and so is for the 1st and 3rd respondent. The second and fourth respondents didn't appear, so the appeal proceeded exparte against them. In arguing for his appeal, the appellant first prayed that his grounds of appeal be adopted by the court to form part of his submission. In addition, he stated that the Court broker had conducted the said sale while with his own client. That land is not his but the family land. He is thus astonished as with the subsequent attachment and sale of his landed property. Thus, there was no justice done to him, in the circumstances, he prayed for his appeal be allowed. On his part, the first respondent, in his submission just pressed that this appeal be dismissed as being baseless. He was confident that the whole process of sale and execution of the said court's decree complied with all the relevant procedures. The appellant was dully notified, he also attended the said sale by auction. If he had any grievance against the process, he would have registered it accordingly. Thus, all his arguments in this appeal are devoid of any merit. 5 On his part, the third Respondent submitted that he is a bonafide purchaser of the suit land. He just bought it on auction sale after he had heard the proclamation of sale. After his inquiry on its legality, he was satisfied that it was a good property. I bought it at a price of 900,000/=. The certificate of sale dated 22nd day of April 2024 was dully issued to him. So, he concluded by saying that he is just a

bonafide purchaser and hopes that he had purchased a clean property on a due process of law. In winding up his submission, the appellant insisted in his submission in chief and added that he resisted the execution application but the trial court didn't consider his grounds of objection. Therefore, this appeal is meritorious, and it be allowed with costs. Upon a thorough digest to the appellant's grounds of appeal and submissions thereof – for and against, I have now to determine this appeal whether it is meritorious. A close reading of the appeal, has prompted me to revisit the law governing execution proceedings and its proper procedure in Tanzania. It is the interests of the law that when a decree is passed, the decree holder must enjoy the court's decree and it is the court's main duty and must be jealous of it that the court's decree is fully executed to the satisfaction. In reaching that end, the law recognizes the following modes of execution as provided for under section 42 of the CPC:

- (a) By delivery of any property specifically decreed; (b) By attachment and sale of the property or by sale without attachment of the property; (c) By arrest and detention; (d) By appointing a receiver; and (e) Such other manner as the nature of the relief granted may require. The main question to consider in this matter is whether there was a proper procedure followed in the said execution process. Reading the law – the CPC under Order XXI Rules 9, 10, 15, 21, 22, 23, 31, 42, 65, 66, 67, 90 et al depicts the following compliance for the execution to be lawful and effective: The Court, after an application is filed, shall do the following: Scrutinize the application with a view to ascertaining that the application correctly reflects the decree or order. When execution application is filed, a formal order is issued which shall specify the day on or before which it shall be executed; or if an application is made after one year, order a notice to show cause to issue. If all this is well, issue a warrant of attachment or a 7 notice to show cause, as the case may be, signed by the judge or magistrate or distinct officer. Then, the executing Court shall give an order of execution and assignment of an executing officer (Court Broker). After the Court Broker has been appointed, there must be issuance and service of 14 days' notice to the judgment debtor to settle the claim or comply with the order of the court. Upon failure by the judgment debtor to settle the decree as noticed to him, what follows is the attachment of movable or immovable property as the mode of application is concerned. If it is for the movable property, the property shall be attached by seizure and kept for 15 days. But if it is for the immovable property, the attached property is by an order prohibiting the judgment debtor from transferring or charging the property in any way for 30 days. Such order has to be affixed on a conspicuous part of the property and at the court house. When an attachment has been done, the executing officer has a duty to execute the warrant, endorse it the way he/she has executed or reasons for failure to execute and return it to the court within the time specified. Unless ordered by the court, the executing officer shall not attach property with a market value which exceeds the value of the decree plus the execution expenses permitted under the Rules by more than 5%. Where the executing officer fails to execute an order of execution, he shall notify the court on his failure to execute it after which the court shall, upon application by the decree holder, vacate the order and issue a fresh one in respect of the same or another property to

be pointed out by the decree holder. The attachment of the property to be sold by auction is not conclusive, there is a mandatory duty to be performed by the executing officer. The executing officer has to submit an inventory showing the items attached and their values (See Rule. 24 of the Court Brokers and Process Servers (Appointment, Remuneration and Disciplinary) GN. No. 363/2017. Therefore, just before the expiry of the period of attachment (movable property 15 days and immovable property 30 days - See Order XXI r. 65 (3) of the CPC), the inventory report and its value must be filed before the executing court. However, that is not all and final. Issuance by the executing court of a formal order for sale of the attached property by public auction (O. XXI r. 65(3) of the CPC) is very essential after the executing court has taken into cognizance of the market value of the attached decree for sale. This court's order is called proclamation of sale. 9 It is not conclusive that when a property is attached/seized, then it is sold. There must be a proclamation of sale. The court has to issue a proclamation of sale notifying the decree-holder and judgment debtor the time and place of sale. The proclamation of sale has to be published by affixation on the court's notice board and on the conspicuous part of the property. If the court orders it to be published in the local newspapers, in case of immovable assets it must be so published. See Order XXI r. 65(2) and 66 of the CPC. When sale has been done, the proceeds of sale must be deposited into court's execution account pursuant to Rule 25 of the Court Brokers and Process Servers (Appointment, Remuneration and Disciplinary) GN. No. 363/2017. Then the executing officer files an inventory for his bill of costs in the execution process of the said decree as per attached and sold property (see Rule 27(4) of the Court Brokers and Process Servers (Appointment, Remuneration and Disciplinary) GN. No. 363/2017. Distribution of proceeds of sale the sold/auctioned property shall be in the following order: Pay the court's commission (if any), pay the executing officer, pay the decree holder and if there is any balance, shall be paid to the judgment debtor. 10 When all this is perfectly done, then the executing court has to make an order confirming the sale of an immovable property pursuant to Order XXI r. 90 (1) of the CPC. Now back to the situation at hand. The decree to be executed is said to be payment of 490,000/= as bill of costs in respect of the Civil Case No. 02 of 2015. The property attached is said to be land – two acres in which there was a building. We are told it was sold at the price of 900,000/=. The simple question is, was it its market value pursuant to Rule. 24 of the Court Brokers and Process Servers (Appointment, Remuneration and Disciplinary) GN. No. 363/2017? The digital record of the execution file is silent on that. Reading grounds 3 and 4 of the appeal, the appellant is alleging that there was no valuation report and that the sale of the disputed land was done below the market price which is contrary to the law. I agree with him. If the digital court file (Court record does not show all this), then it is clear that there was none compliance of the law. The court record being a serious record, must speak by itself. If the attached property for sale is not known its value, then any sale of it (say below the market value) implies nothing but a strict violation of the law and rules governing sale for execution process. 11 In the absence of court's records exhibiting compliance to all this process, the impression one can get is this, there was no due process of the law but just gifting it. that is nothing but property grabbing by a unlawful process of law. In view of the above discussion, I have found myself constrained to

hold that the appellant's complaint is not wanting in merit. I, therefore, hold without demur, that the execution process was marred by material irregularities and patent illegality. The established illegality rendered the sale of the appellant's landed property to the 3rd respondent a nullity and no good title passed to him. For this reason, I set aside the sale of the said landed property. I further order and direct that the 3rd respondent be refunded his purchase price by whosoever is holding it. Parties shall bear their own costs. It is so ordered. DATED at SHINYANGA this 28th day of October, 2024. F.H. Mahimbali Judge. 12

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