

IN THE HIGH COURT OF THE UNITED REPUBLIC OF TANZANIA

MWANZA DISTRICT REGISTRY

AT MWANZA

PC CIVIL APPEAL NO. 52 OF 2021

(Arising from the decision of the District Court of Nyamagana in DC Civil Appeal No. 29/2018, originating from Civil Case No. 70 of Mkuyuni Primary Court)

FELIX LUGAKINGIRA..... APPELLANT

VERSUS

1. SUKAH SECURITY CO. (T) LTD.....1ST RESPONDENT

2. ATHANAS FELIX MBAGA.....2ND RESPONDENT

3. SUNGURA OMARY HAMIS.....3RD RESPONDENT

JUDGMENT

22/7/2022 & 2/9/2022

ROBERT, J:-

Having been aggrieved by the decision of the District Court of Nyamagana in Civil Appeal No. 29 of 2018, the above named appellant has approached this court in an attempt to challenge the said decision, raising one ground of appeal which is:

- 1. That, both the trial court and first appellate court erred in law and in fact by holding that the public auction conducted by the first respondent was proper whereas the same was illegal and unprocedural.*

The appellant prayed for this appeal to be allowed, the decision of the two lower courts to be set aside and the respondents herein to bear costs of the appeal and that of the trial court.

The appeal was argued by way of written submissions. However, both the first and second respondents neither entered appearance nor filed their respective submissions despite being served through Mwananchi Newspaper dated 31/03/2022.

On behalf of the appellant, Mr. Kevin Mutatina, learned counsel prepared submissions in support of the appeal whereas the 3rd respondent was represented by Ms Lydia Martine, learned counsel.

Highlighting on the sole ground of appeal, Mr. Mutatina submitted that, both the trial and first appellate courts erred in law and in fact by not holding that the public auction conducted by the 1st respondent was illegal and unprocedural as the notice to sell the disputed house through public auction did not indicate the date on which it was prepared, there was no report showing whether the local authority was notified and finally the date which appeared in the notice for auction was not the date the auction actually took place.

Further to that, he contended that the successful bidder was supposed to pay 25% on the date of the auction however the receipt on

record shows that the money came to be paid 14 days after the auction had taken place and that the said house was sold at a throw away price of 6 million instead of 22 million as no valuation was conducted to ascertain the actual value of the property.

It was his further complaint that the house was sold to the 3rd respondent who is the brother to the 1st respondent who was the court broker. Also, that the dispute that gave rise to the case at hand was the breach of a contract which never really existed and no one testified except the 2nd respondent who did not know how the house came to be involved in an auction at a throw away price.

In conclusion, he asked this court to allow this appeal as the auction was conducted illegally, the money obtained after the auction was never given to the appellant contrary to section 18 of the Auctioneers Act, Cap 227 and there was no court broker's report of the transaction.

In the reply submission, the learned counsel for the 3rd respondent stated that the public auction which was conducted by the 1st respondent pursuant to the court order was done legally and the procedure was fair.

With regards to the issue of absence of notice before the alleged sale, he submitted that the said requirement was fulfilled because even the 3rd respondent became aware of the auction through the notice

attached to the electric pole near plot No. 170, Block F, Buhongwa. He explained that, the said notice was also part of the evidence tendered during trial and admitted as Exhibit SO1. He also clarified that the said notice indicated the date of auction contrary to the argument made by the appellant.

On the issue that the Local Authorities were not involved, he replied that, they were involved that is why the Chairman of Shibayi Street, Buhongwa ward recognized the 3rd respondent as the true owner of the land in dispute which he bought through the auction conducted on 06/01/2017 as shown in the letter from the Street Chairman which was admitted as exhibit LA2.

With regard to the payment of 25% on the auction day and 75% after 14 days, the learned counsel admitted that it is a legal requirement, however, he claimed that, it could not bind the 3rd respondent who was the second highest bidder and managed to pay 11 days after the first bidder had defaulted thus the payment he made was well within time.

On the argument that there was no valuation conducted thus the property was sold below its estimated value of Tshs 22 million, it was the counsel's submission that, indeed there was no any valuation conducted after the order of the trial court and thus the property was sold to the

second bidder at the value of Tshs 6,500,000/= which was the market price at that time. He contended that the appellant did not bring proof of valuation from an authorized valuer to support a claim of the estimated value of 22 million and therefore his claim should not be considered.

Responding to the claim that the property was sold to the 3rd respondent who is related by blood to the 1st respondent, the court broker, he submitted that he has no any blood relationship with the 1st respondent and that there was no proof of that claim before the trial court.

Lastly, responding on the issue that the auction wrongly involved the property that was not placed as collateral, he submitted that, the court broker can attach any property as per the court's order as provided for under rule 23(1) of the Court Brokers and Process Servers (Appointment, Remuneration and Disciplinary) Rules 2017 and in this case the court ordered the attachment of the property in question in order to satisfy the debt as the value of the collateral was below the value of the debt so it was fair and reasonable to attach the said unfinished house so that the debt and execution expenses could be fully paid.

In conclusion, he called upon this court to dismiss the appeal and uphold the judgment of the District Court of Nyamagana.

In a brief rejoinder, the learned counsel for the appellant submitted that although the public auction notice to sell the appellant's house indicated that the auction would take place on 06/01/2017, the said notice did not indicate the date on which the appellant was served with it so as to compute if the 14 days period had lapsed before the auction took place.

With regards to the default by the highest bidder, she submitted that, the 1st respondent, the court broker, was supposed to conduct another public auction instead of selling the property to the second bidder at a price much lower than the one arrived at by the highest bidder.

Lastly, on the claim that the Local Authority was not notified of the public auction, the learned counsel reiterated her argument in her submissions in chief that there was no such notice to the authority as evidenced by the letter dated 23/02/2017 from the said Local Authority. He prayed that the appeal be allowed with costs.

That being the summary of submissions from the counsel for both parties, I will now pose here and make a determination on the merit of this appeal.

As already pointed out above, the appellant has raised a single ground of appeal in which he faults both the trial and first appellate courts for failure to hold that the public auction conducted by the 1st respondent

was illegal and unprocedural. Submitting on the said illegality and the failure by the 1st respondent to follow proper procedure, it was his argument that first the public auction notice did not indicate the date it was prepared, there was no evidence that the same was served to the Local Authority and that the date of the auction indicated on the notice was not the actual date the auction took place.

The answer to this issue is not farfetched as the records clearly show that the notice was served to the appellant and the same indicated the date of the auction and it was on that very date the 1st respondent held the public auction. That is reflected in the Court Broker's report showing the mode and manner in which he complied with the order for sale that was given by the trial Primary Court.

With regard to the complaint that the notice was not served to the local authority, I am convinced that the Local Authority was aware of the public auction to be conducted as among other places, the notice was affixed at the electric pole near the property subject of auction it was also stated by the 1st and 3rd respondent that apart from the written notice there were advertisements regarding the said auction. The complaint that the 1st respondent did not comply with the requirement of notice therefore cannot stand.

On the complaint that the house was sold to the 3rd respondent who is related by blood to the 1st respondent who is the court broker, it was the reply by the counsel for the 3rd respondent, to which I totally agree, that there was no any evidence to substantiate that allegation. The law under section 17 of the Auctioneers Act, Cap 227 provides for inter alia, who may bid at an auction. According to the section, even if it was proved that the 3rd respondent was related by blood to the 1st respondent who is the court broker, still that in itself would not have disqualified him or taken his right to bid in the auction as one is not precluded from bidding in an auction just by reason of being related to the court broker. Again, that complaint lacks merit.

With regards to the complaint that the dispute giving rise to the case at hand was the breach of a contract which never really existed and no one testified except the 2nd respondent and did not know how the house came to be involved in an auction at a throw away price; this Court finds that this complaint is an afterthought because the appellant waived his own right to be heard due to his failure to appear before the trial Primary Court to defend himself against the allegations that had been levelled against him. Further to that, the appellant, for reasons known to himself, decided not to apply to set aside the *ex parte* judgment even

after the case had been heard and decided hence, he cannot complain at this point that the trial court only received the evidence of the respondent.

The appellant also faulted the first respondent (court broker) for selling the disputed property to the 3rd respondent who was the second bidder at the public auction some days after the highest bidder had defaulted to pay 25% of the price on the auction day in violation of the proper procedure. He maintained that, the court broker was supposed to conduct another sale instead of selling the property to the 3rd respondent at a much lower price.

The respondent admitted that indeed the law requires that 25% should be paid on the auction day and the remaining 75% within 14 days after the public auction. He held a view however that the above requirement could not bind the 3rd respondent as he was the second highest bidder who paid after the 1st bidder had defaulted.

This Court is in agreement with both counsel regarding the legal requirement that, the highest bidder is required to pay 25% at the very day of the auction and 75% within 14 days. I further agree with the counsel for the appellant that once the highest bidder fails to pay the 25% promptly on the auction day or fails to pay the remaining balance of 75% within 14 days, he is taken to have defaulted. The question that arises is

what then must the court broker, who is the execution officer in this matter, do after the highest bidder defaults?

Section 25(5) of the Court Brokers and Process Servers (Appointment, Remuneration and Disciplinary) (Amendment) Rules, GN No.106 of 2019 provides for what the executing officer is supposed to do following the default by the purchaser. It states as follows;

(5) A person declared to be a winner at the auction-

(a) who fails to deposit into the court's account twenty five percent of the purchase price on the date of auction or on the following working day if the auction was conducted and concluded after bank closing hours or on a dies non; or

(b) who after having deposited the said twenty-five percent, fails or neglects to deposit the remaining balance into the court's account, by the fifteenth day from the date of auction,

shall be deemed to have defaulted and the executing officer shall conduct another auction in accordance with the law.

From the above quoted provision, it can be stated with certainty that the proper procedure in case of default by the purchaser/ highest bidder/ winner in an auction is for the execution officer to conduct another auction in accordance with the law, hence, what the 1st respondent ought to have

done in the circumstances was to conduct another sale of the property and not otherwise. Thus, this Court finds and holds that, it was illegal and unprocedural on the part of the 1st respondent to sell the disputed property to the 3rd respondent who was the second highest bidder after the first bidder had defaulted, without re-auctioning the said property.

Having ruled as above, this Court finds that since the 3rd respondent was a bona-fide purchaser who purchased the disputed property in good faith after the highest bidder had defaulted, his interest must be protected by allowing him to recover the purchase price. He cannot be held responsible for any misconduct by the executing officer.

That said, this Court finds and holds as follows:-

1. The sale of the suit property namely Plot No. 170 Block F Buhongwa by the first respondent to the third respondent at the instance of the 2nd respondent is hereby nullified and set aside.
2. The 2nd respondent and/or his agents are directed to comply with all legal formalities in respect of recovery of outstanding loan against the appellant including by conducting another auction in accordance with the law.
3. The 3rd Respondent to recover the purchase price paid for the disputed property from the first and second respondents.

4. Each party to bear its own costs.

5. Appeal is allowed.

It is so ordered.




K.N.ROBERT
JUDGE
2/9/2022