IN THE HIGH COURT OF TANZANIA
(COMMERCIAL DIVISION)
AT DAR ES SALAAM

COMMERCIAL CASE NO. 27 OF 2002

M/S ILABILA INDUSTRIES LTD.....1ST APPLICANT
JOHN MOMOSE CHEYO.....2ND APPLICANT
NGULA VITALIS CHEYO.....3RD APPLICANT
VERSUS
TANZANIA INVESTMENT BANK.....1ST RESPONDENT
PHILEMON N. MGAYA t/a
ERICK AUCTION MART & COURT BROKER.....2ND RESPONDENT

RULING

KALEGEYA, J:

The Applicants represented by Mr. Maira, Advocate, are before this Court armed with a Chamber Summons supported by an affidavit of the 2nd Applicant, praying for orders as follows:-

> *"1. That this Honourable Court set aside the sale of Landed Property on Plot No. 1472 Msasani Peninsular comprised in CT. No. 32132 conducted on the 5th day of September 2004.*
>
> *2. That the sale be declared null and void.*
>
> *3. Cost of this application.*
>
> *4. Any other and further orders this honourable Court may deem fit and just to grant."*

The 1st Respondents represented by Mr. Mwandambo, Advocate, resist the application with the support of a Counter – affidavit of Martha J.J. Maenda while the 2nd Respondent represented by Mr. Chipeta, Advocate, does the same with the support of Philip N. Mgaya's Counter - affidavit.

To cement their stand, the Applicants put in two more affidavits in reply to the Counter – affidavits – one by Moses Maira and another, by Leonard Venon Longway.

The application is premised on five contentions as reflected in paragraphs 3 – 10 of Cheyo's affidavit and which are as follows:-

"3. That the said sale is purported to be a resultant of the decree of this Honourable Court in this case issued in November 2002.

4. That the sale was taunted with fraud as the said decree is being contested against by the 3rd Applicant in the Court of Appeal of Tanzania to wit he did not consent to the settlement agreement which gave birth to the decree of the Court……
……

5. That the settlement agreement filed in this Court on the 21st of November 2002 has never become effective as all parties have not signed the same as provided under Article 7.3 of the Settlement agreement hence no decree could have been extracted out of it……
……

6. That the property sold is a subject matter in a Land Suit No. 166 of 2004 in the High Court of Tanzania Land Division and is set for mention on the 4th of October, 2004……
……

7. That the landed property was undervalued and sold at a very low price of only Tshs.143,000,000/= while the property is worth more than 450 Million as the Valuation of the property that was done in year 2000 valued it at more than 300 Million.

8. That I am advised by my lawyer, Mr. Moses Maira, the advice which I verily believe to be true that since the sale price is more

than 25% percent below the value of the property then the property which the lender is under legal duty to sell at a reasonable best price of the property is breached.

9. *That the sale which was under auction was made under the supervision of the police Force and FFU units which made it scary for other people to participate in the auction even if they wanted to.*

10. *That if the orders sought in the Chambers Summons are not granted the applicants shall suffer an irreparable loss."*

Adopting his own affidavit and those of Cheyo and Longway, the Applicants' Counsel vigorously argued along what is contained in para.4 – 10 of Mr. Cheyo's affidavit. He argued that the sale violated the law as it did not consider the existence of an intended appeal to the Court of Appeal by 3rd Applicant who has an arguable appeal, and Land case No. 166/2004 in the Land Division; that the sale should have awaited the decisions therein which would otherwise be rendered nugatory; that the sale price of shs.143 million is a throw away as the valuation report of 2001 reflected a value of shs.391 million and the real Estate Consultant put its current value at shs.500 million while inflationary factors have to be considered as well; that the 2nd Respondent's estimation of such property in the prime area of Dar es Salaam at shs.150 million tantamounts to fraud; that selling the property at less than 25% its value is violative of s. 132 of The Land Act which was introduced to protect borrowers; that the Lender should have instructed 2nd Respondent to put a reserve price and that use of FFU scared potential bidders and concluded that the accumulation of all these factors establish fraud and irregularity in the whole sale exercise.

In response, equally vigorously, the Respondents' Counsel, adopting the Counter – affidavits of Maeda and Mgaya, argued as follows:-

Mr. Mwandambo insisted that the applicants have not satisfied the conditions for setting aside a sale in terms of O. 21, Rule 88 (1) CPC as Maeda's Counter – affidavit has adequately answered Cheyo's affidavit; that the sale was made pursuant to a valid decree of the Court executed within the one year period having excluded the numerous applications by Applicants which caused the delay; that there is no fraud established; that this Court cannot decide on an intended appeal; making reference to **Sarkar on Law of Civil Procedure, 8th Edition, page 1094,** insisted that low price alone cannot be a ground for setting aside a sale with a qualification that in this situation the price secured at a public auction was in accordance with market forces, inflation, devaluation and related having not been proved; that s. 132 of The Land Act does not apply on the matter as it was not the Lender who was selling but a Court appointed officer, and, on reserved price, that the 2nd Applicant should have applied to the Court to have the same fixed.

Mr. Mwandambo was fully supported by Mr. Chipeta, who submitted that no irregularity or fraud has been established by Applicants as the sale resulted from a proper order of the Court and proper advertisement and sale; that the police were brought in to keep peace and these were ordinary police and not FFU; that 2nd Applicant should blame himself for having locked the gate hence forcing the auction to be conducted from outside; that valuation reports do not exist for ever as they stand for the obtaining period; that devaluation and instability of prices have not been sufficiently established;

that orders for matters which are in the Court of Appeal and Land Division should be sought from those Courts.

In rejoinder, Mr. Maira reiterated his earlier submissions insisting that not following the law is an irregularity; that Cheyo's affidavit on the presence of FFU is not challenged, and responding to the question by the Court, argued that the 1st and 3rd Applicants have interest in the property because the low price secured will force them to look for other sources of funds apart from the fact that 3rd Applicant would wish to see his father with a roof on his head.

Before I delve into the arguments let me first give reasons for my order made at the start of the hearing of the application. Before arguments could be made by the Counsel, Mr. Mwandambo, Advocate, raised a serious concern over the affidavits of Longway and Maira, charging that they should not have been admitted on record as these were made in reply and respondents had no chance of responding thereto. Mr. Maira responded by arguing that there is no law which bars such affidavits adding that him as an agent of the client can legally swear an affidavit while Longway's affidavit is in answer to paragraph 7 of Mgaya's Counter – affidavit.

Having heard the Counsel, I dismissed the objection, ordering that reasons would be given in this ruling.

While indeed the Applicants were given a right of reply as is procedurally allowed they were not given a particular mode/style or limits within to so act. Legally, the Court could not have prescribed such limits. I

know of no law which says that in effecting a reply to a Counter – affidavit only one affidavit should be filed or indeed that the affidavits should only be those of the applicants. An affidavit is evidence thus, in responding to a Counter – affidavit or otherwise a party is unlimitedly allowed to bring in affidavit evidence in challenge. A replying party can file any number of affidavits provided they are drawn up in accordance with the law and are relevant. Mr. Maira and Mr. Longway's affidavits are properly on record. Mr. Mwandambo's attack launched against them is legally unjustified.

Also, for clarity, let me briefly give the background to this controversy.

On 16/1/2002 the 1st Respondent filed a suit against the Applicants claiming, among others, shs.221,983,824.68, being an outstanding amount on a credit facility they granted to 1st Applicants and secured, among others, by the 2nd and 3rd Applicants' personal guarantee as well as a legal mortgage of the property in dispute. On 21/11/2002 when the matter came up for hearing, Mr. Mwandambo, Advocate, for 1st Respondent and Mr. Makani, Advocate, for the Applicants presented to the Court (Dr. Bwana, J i/c) a settlement Agreement and prayed to have it recorded, which prayer was effectively granted. Article 3 of the said Agreement provided

> *"3.0 MODE OF PAYMENT OF THE AGREED AMOUNT*
>
> *3.1 Upon the signing of this Agreement, the Defendants shall, within six months counted from* ***1st December 2002****, pay part of the agreed amount in two instalments of* ***Tshs.23,000,000/=*** *on*

1st March 2003 and ***Tshs.16,757,961/78*** *on 1st* ***May 2003*** *making a total of* ***Tshs.39,757,961/78***

3.2 *The balance of* ***Tshs.200,000,000.00*** *shall be paid in twenty equal monthly instalments of* ***Tshs.10,000,000.00*** *each payable on the last working day of each month commencing from 1st* ***June 2003."***

The said Agreement was signed by M.J.J. Maeda on behalf of the 1st Respondent and John Momose Cheyo on behalf of 1st Applicant and on his own behalf as the 2nd Defendant. The former was attested by Elisa A. Msuya, Advocate, while Twaha Issa Taslima, Advocate, attested the latter. The document shows that the 3rd Applicant was also intended to be another signatory but the relevant space is blank.

As no payment was made as per the said Agreement, on 9/5/2003, the 1st Respondent applied and secured an order for attachment and sale of the same property now being contested. On 2nd July, 2003 the 2nd Applicant filed a Chamber Summons praying, for, among others, stay of execution. The application was dismissed on 3/11/2003 and sale ordered to proceed.

On 3/12/2003 yet another application was filed. This time the Applicant was Mrs Elizabeth Ngeleja Cheyo as an objector. The objection was dismissed on 13/1/2004, the Court holding, among others, that Elizabeth, the 2nd Applicant's wife, had consented to the Mortgage process.

This was followed by a fresh proclamation for sale dated 16/1/2004.

On 26/1/2004, the 3rd Applicant filed a Chamber Summons praying for stay of execution and setting aside of the consent settlement order entered on 12/11/2002 allegedly because he never signed the document and was not involved in what transpired. The application was dismissed on 2/4/2004. On 13/4/2004 the 3rd Applicant filed a notice of Appeal to the Court of Appeal and on same date filed a Chamber Summons praying for leave to appeal and stay of execution. On 7/6/2004 the application for stay of execution was dismissed and on same day the decree holder made a fresh application for execution (for a decretal sum of shs.258,638,901.27) which, after due process, culminated into the sale which is being challenged.

Meanwhile, in (CAT) Civil Application No. 90 of 2004, the 3rd Applicant applied unsuccessfully to the Court of Appeal for stay of execution.

With that background let us revert to the application before us. Now, for the merits of the arguments.

The application was brought under Rule 88 (1) of O. 21 of The Civil Procedure Code which in part provides:-

> *"Where any immovable property has been sold in execution of a decree ...any person...whose interests are affected by the sale, may apply to the Court to set aside the sale on the ground of a material irregularity or fraud in publishing or conducting it:*

Provided that no sale shall be set aside on the ground of irregularity or fraud unless upon the facts proved the Court is satisfied that the applicants has sustained substantial injury by reason of such irregularity or fraud."

The Chamber Summons also makes reference to s. 132 (2) of The Land Act, Act No. 4 of 1999. I shall deal with the wording of that provision when tackling the Applicants' complaint on the alleged low price fetched.

I will start with the complaint that the sale was taunted with fraud as the 3rd Applicant did not sign the settlement Agreement leading to the decree that formed the basis of the order for sale, and which is being challenged before the Court of Appeal.

With greatest respect to Mr. Maira this ground cannot legally support the application. O. 21 Rule 88 (1) quoted above is very clear on this. Here, there is no spec of irregularity or fraud as regards the decree that led to the sale. Yes, the Applicants may have a quarrel with the decree but that in itself does not establish fraud. The decree and subsequent orders of the Court remain as they are until otherwise overturned by the Court of Appeal. A mere existence of a notice of Appeal, and for sake of argument, even an appeal, cannot suffice to secure the order sought. In any case, it should be noted that the intended Appellant is only the 3rd Applicant. In fact, in the circumstances of this case, calling upon this Court to hold that the decree resulting in the sale of the property is tainted with fraud tantamounts to calling upon this Court to disown its own decision and more serious of them all, tantamounts to turning this Court into an appellate Court on its own

decision. It will have stepped into the shoes of the Court of Appeal, where Applicants allege are taking their complaints.

Next we move to the argument that there is a pending case, Land case No. 166/2004, before the Land Division concerning same property. Indeed, it is not disputed that such a case does exist. It was filed by one Mrs Elizabeth Ngeleja Cheyo against the 1st and 2nd Applicants and 1st Respondent seeking, among others, a declaration that she never consented to the mortgaging of the matrimonial home and permanent restraint on its disposal. Again, with respect to Mr. Maira, I have failed to comprehend the basis of this argument. Mrs. Elizabeth Cheyo is not an applicant in this cause. How then are the present applicants purporting to advance her cause? Without prejudice to the matter which is sub – judice, I can only observe, as rightly impressed by the 1st Respondents in Maeda's affidavit, that similar prayers were fronted and argued before this Court by the said Elizabeth in December, 2003 but were dismissed in January 2004. As rightly submitted by Mr. Mwandambo and Mr. Chipeta, matters in that case, though involving same property, cannot legally be grounds of setting aside the sale in this Court in terms of O. 21, Rule 88 (1) CPC as much as this Court cannot tell the Land Division *"don't proceed with the matter as it has already been decided by this Court"*.

What about the presence of the police at the auction?

In my considered view, this should not waste our breath a bit. While para.10 of Cheyo's affidavit allege that their presence *"made it scary for other people to participate in the auction even if they wanted"* and is fully

and strongly supported by Mr. Maira in his submissions, and Maeda in para.14 of her Counter affidavit insists,

> *"...I was personally present at the auction whereby the 2nd Applicant organized a mob of youths to disrupt the auction an act which prompted the 2nd Respondent as an officer of the Court to seek the assistance of the police for the purposes of maintaining peace and order during the auction...",*

and is supported by that of Mgaya's para.9 wherein he states:-

> *"(i)* ……
> *(ii)* *That while we were preparing to start the auction, emerged a youth gang throwing stones and empty glass bottles to the people who have attended the auction and shouting that no auction will take place. The gang intended to disrupt the auction.*
>
> *(iii)* *That as a remedial measure and in order to maintain peace and order, I sought the assistance of the police. The youth gang dispersed upon arrival of the police",*

as well as Mr. Mwandambo's and Mr. Chipeta's submissions, on my side, whatever reason that led to their presence, I consider it a very healthy element not only for this auction but for all public auctions, especially those involving valuable properties. This is so because in most cases bidders would be loaded with cash in terms of millions. With the current wind of armed robberies at public places/gatherings, public Auctions are potential targets for these crooks. What would instil more confidence and elements of safety to the bidders than the presence of police officers. I am satisfied, contrary to what Applicants urge, that if anything, the police presence

stabilized the situation and gave potential bidders confidence contrary to what is alleged by the Applicants. In my view, whether the said police were the ordinary police or FFU is irrelevant. It would have been different if the said police had acted in a manner which discouraged bidders from turning up or intimidated those present by either causing them to run away or have reservations in speaking out their minds in terms of offers. The 2nd Applicant does not suggest anything of the sort. I am not convinced that mere presence of police officers would bar or deter potential bidders. It is not an irregularity let alone one envisaged under the law (O. 21, Rule 88 (1) CPC).

Finally, we turn to the arguments pegged on s. 132 (2) of The Land Act. To appreciate the arguments better, let us look at the wording of the section.

It provides:-

"132 (1) A lender who exercises a power to sell the mortgaged land, including the exercise of the power to sell in pursuance of an order of a Court, ***owes a duty of care to the borrower.....to obtain the best price reasonably obtainable at the time of sale.***

(2) Where the price at which the mortgaged land is sold is twenty per centum or more below the average price at which comparable interests in land of the same character and quality are being sold in the open market, ***there shall***

> ***be a reputable (?) presumption that the lender is in breach of the duty*** *imposed by subsection (1)* ***and the borrower whose mortgaged land is being sold for that price may apply to a Court for an order that the sale be declared void,*** *but the fact that a plot of mortgaged land is sold by the lender at an undervalue being less that twenty – five per centum below the market price shall not be taken to mean that the lender has complied with the duty imposed by subsection (1).* (emphasis mine)

I should start with Mr. Mwandambo's argument that the Land Act does not apply. On this, I am on all fours with Mr. Maira. With respect to Mr. Mwandambo, the words *"in pursuance of an order of a Court"* are wide enough to cover any relevant Court order including the various orders issued by this Court and which led to the sale of the disputed property. The said provision of the law is applicable here.

Now, the property secured shs.143 million on sale. The 2nd Respondent had valued it at shs.150 million. Mr. Longway, a consultant in real estate, as per his affidavit, urges that he could have sold it at shs.500 million. Mr. Maira charges that empty land in the area fetches between Tshs.100 and 200 million, adding that this is cemented further by the fact that the valuation report made in February, 2001, reflected a value of shs.391 million thereof.

While I am on all fours with Mr. Maira that s. 132 was introduced by the legislature to protect borrowers, I don't go with him to the extent of the

interpretation he attaches to it nor do I agree with what he paints to be the factual situation on the purported value of the property in question.

Starting with the factual situation, as a seasoned advocate, he quite well knows that his bear assertions and those of Longway in their affidavits do not establish the true value of the property. While Mr. Maira, is a layman in real property valuation, Mr. Longway, introduced as a consultant in real estate agency did not assist us much as he did not professionally indicate how he arrived at shs.500 million. On the style of assertions they employed there is nothing which could have stopped them from stating the figure of shs.1 billion or even less than hundred million. The same defect also befalls the figure of shs.150 million recorded by the 2nd Respondent. When it comes to value of a property, bear assertions by parties or their witnesses cannot determine the same but rather professionally arrived at analysis. And whoever wishes to invoke s. 132 of the Land Act, in my view, should start by equipping himself with such proof and not otherwise.

I do appreciate that the valuation report of 2001 indicated the estimated value of shs.391 million then. However, if the applicants wanted to establish that the value has now appreciated or otherwise they were bound to repeat the same exercise of valuation. In other words, they had to come up with the current valuation report. As rightly submitted by Mr. Chipeta, valuation reports are not static. They would reflect the value of the property as at the time of valuation. The Consultants, University College of Lands and Architectural Studies (UCLAS) who compiled the 2001 valuation report were explicit on this. Under clause 14.0 they stated,

"The date of the valuation is February, 2001 and the value expressed herein are those current on the said date."

It cannot be proved by mere assertions. Mr. Maira's mere vigorous submissions on the alleged devaluation, inflation and related, as rightly submitted by Mr. Mwandambo and Mr. Chipeta, are not enough.

Thus, there is no evidence that shs.143 million is less than 25% of the value of the property sold. That apart, even if we were to hold that the value of the property is shs.500 million or shs.391 million, Mr. Maira's argument would still stand unsupported because 25% of the former would be shs.125 million while it would be shs.97,750,000/= for the latter. Here, what was secured is much higher – shs.143 million which is 28.6% of shs.500 million and 36.5% of shs.391 million.

Now, turning to the legal aspect, even if the factual aspect had been established, the way I understand s. 132 of Act 4 of 1999, is that where the price secured is less than 25% of the value, there is **a rebutable presumption** that the lender did not exercise the duty of care imposed on him to obtain the best price reasonably obtainable at the time of sale. It is not an irrebutable presumption as Mr. Maira would want us to believe. And in determining this, the Court would obviously look at various factors including the mode of sale used and the obtaining circumstances. More care and scrutiny would be required in sales done under private treaty/negotiations than in public auction. And where the sale is done through public auction as is the case here, once it is established that the same was properly conducted, by a Court Broker, armed with a proper Court

order; having passed through requisite legal procedure and that there is no fraud or irregularity, the lender would have discharged the rebutable presumption of breach of duty imposed on him, and the usual burden of proof in civil matters would swing to the party launching the challenge to establish otherwise. The Applicants have not established otherwise.

In our case, apart from what I have already said, that there is no proof that shs.143 million is less than 25% of the value of the auctioned property, even if it had been so established, the auction having properly been conducted and in the circumstances, the Respondents cannot be said not to have acted to obtain the best price reasonably obtainable at the time of sale as that is the price obtained at the public auction as per market forces existing at the scene. The Applicants' argument on this also fails.

This bring us to another limb of the argument that the 2nd Respondent should have put up reserve price. I can only say that legally, the Respondents were not enjoined to do that.

Lastly, for the sake of completeness, Mr. Chipeta urged that by locking the gate, the 2nd Applicant may have blocked offers.

In para.9 (i) of his Counter – affidavit, Mr. Mgaya stated unchallengedly:

"That when we reached at Plot No. 1472 to conduct the auction on 5th September 2004, the 2nd Applicant refused to open the gate and

thereby preventing the intended buyers to inspect the property. The auction was conducted outside the gate."

If indeed this had some effect on the bids, the 2nd Applicant cannot be heard to complain as he would clearly be the causant.

For reasons fully discussed above, the application stands dismissed with costs.

L.B. KALEGEYA

JUDGE

Delivered

L.B. KALEGEYA

JUDGE

14/9/2004

4,273 words