

IN THE HIGH COURT OF TANZANIA

(COMMERCIAL DIVISION)

AT MWANZA

MISCELLANEOUS COMMERCIAL APPLICATION NO. 04 OF 2020

*(Originating from Commercial Review No. 03 of 2019 and Miscellaneous
Commercial Application No. 17 of 2019)*

AMOS NJILE LILI.....APPELLANT

Versus

AMANA BANK LIMITED.....1st RESPONDENT

S. L. ISANGI AUCTION

MART & COURT BROKER.....2nd RESPONDENT

Last Order: 03rd Aug, 2020

Date of Ruling: 10th Aug, 2020

RULING

FIKIRINI, J.

The respondents have raised three points of preliminary objection on the following grounds:

1. That the application is hopelessly time barred.
2. That, suit is bad in law for non-joinder of a buyer who is a necessary party.
3. That, the application is an abuse of the Court process.

The preliminary points of objection were argued orally on 03rd August, 2020, with Ms. Dorothea Method assisted by Ms. Beatrice Paul learned counsels appearing for

the respondents and Mr. Mollohan Bernard Kabonde assisted by Ms. Gladness Lema learned counsels appearing for the appellant. It was Ms. Method's submission on the 1st point, that the application was filed out of time for almost three (3) months which was contrary to Item 7 of Part III of the Schedule to the Law of Limitation Act, Cap. 89 R.E. 2002 (the Law of Limitation), whereby such applications were required to be filed within thirty (30) days. More to her submission was that the present application was brought without any application for extension of time preceding it. She thus pressed this Court to dismiss the application pursuant to section 3 (1) of the Law of Limitation. Supporting her submission, she cited the case of **Stephen Massati Wasira v Joseph Sinde Warioba & Another [1999] T. L. R. 334.**

On the 2nd point, she submitted that pursuant to paragraph 11 of the affidavit in support it seemed auction had taken place and the property sold. It therefore meant that there was a bona fide purchaser, who was necessary to be joined in the application since any adverse decision against the applicant will have an impact on the said bona fide purchaser. The case of **Juma B. Kadala v Lauren Mnkande [1983] T. L. R. 103**, was cited in buttressing the submission. In that case the Court concluded that in a suit for recovery of land, the bona fide purchaser should be joined as a necessary party and non-joinder was fatal to the proceedings, as the purchaser will be condemned unheard and his rights unprotected. This stance has

been echoed in the case of **Abdulatif Mohamed Hamis v Mehboob Yusuf Othman & Others**, Civil Revision No. 6 of 2017, CAT, DSM (unreported) p. 25. In this case aside from the bona fide purchaser protection, but the Court decree or drawn order to be issued cannot be effected as the person to whom such decree or drawn order has been issued to act was not a party to the suit.

The 3rd point, was that the application was an abuse of the Court process, citing paragraph 17 of the affidavit in support, in which the applicant was requesting this Court to review its decision in Miscellaneous Commercial Application No. 08 of 2019, on the ground that prior to the auction there was money already paid and the Judge did not consider that, the assertion which Ms. Method controverted arguing that in the decision made at p. 17 that issue was dealt with and the Judge answered that. It was therefore improper for the applicant to come back wanting a review on the said already made decision. Fortifying her position, she invited this Court to tap from the case of **Mapalala v BBC [2002] E.A. Vol. 1 132**, where the Court discouraged the practice of a Court to be asked to quash its own decision.

From the three raised points of objection and since one of them was on limitation she prayed for the application be dismissed with costs.

Responding to the submission Mr. Mollohan, started by impressing the Court that the points of objections raised were devoid of merits and prayed for their dismissal

and hearing of the application to continue assigning the following reasons: that the decree and proclamation of sale filed in Court contravened Order XXI Rule 20 (1) (a) of the Civil Procedure Code Act, Cap. 33 R.E. 2002 (the CPC) as there was no notice issued to the applicant. Aside from notice, the sale conducted also contravened the dictates of Order XXI Rule 67 of the CPC, therefore the applicant cannot be said to be time barred, while neither the applicant nor his counsel were aware of the existence of Commercial Case No. 10 of 2016. Mr. Mollohan came to learn of the matter after coming back from the funeral upon being learning there was construction going on. He tasked his client to follow up in Court, only to be informed by the Court clerk Mr. Thobias that, his client could not be furnished with the documents unless his counsel was present. At the time the counsel was in Dar es Salaam taking care of his ill father. Immediately after learning that he preferred this application for setting aside of the sale which has taken place. On that premises, it therefore cannot be said the application was time barred, submitted the counsel. He thus prayed for the objection be overruled.

On the 2nd point it was his submission that non-joinder was impossible as there was no notice. The whole process was carried out without transparency and the applicant had no access to the auction report or certificate of sale to know who was the bona fide purchaser.

On the 3rd ground, Mr. Mollohan controverted the submission that the application was an abuse of the Court process as the applicant intends to challenge the sale of the property illegally conducted. He thus urged the Court to ignore the points of objection raised by the respondents' counsel.

Extending Mr. Mollohan's submission, Ms. Lema contended that the preliminary points of objection raised lacked merits as they failed to meet the criteria for the objection as stated in the case of **Mukisa Biscuits Manufacturing Co. Ltd v West End Distributors (1969) EA 701**. From the principle the 2nd and 3rd points of objection were not on pure point of law.

Rejoining the submission, Ms. Method submitted that most of what was submitted by Mr. Mollohan was not part of the affidavit. As a matter of law submissions were not evidence as stated in the case of **TUICO at Mbeya Cement Co. Ltd v Mbeya Cement Co. Ltd & Another [2005] T. L. R. 41**, and therefore misplaced, argued Ms. Method. She went on submitting that counsel spoke about himself and a Court clerk named Thobias, but there were no affidavits of neither of Thobias the Court clerk nor that of Mr. Mollohan that he was taking care of his ill father. Underscoring her submission, she contended that it was a legal requirement that matters deponed in affidavit if any on information should be corroborated by a supplementary affidavit. In the absence of an affidavit from Thobias, the

submission made in that regard is futile, referring this Court to the case of **John Chuwa v Anthony Ceaser [1992] T. L. R. 233.**

And reiterating her submission in chief she stated that the preliminary points of objection raised had merits and pray for the application be dismissed with costs.

Before I proceed to examine the preliminary points of objection raised, I would wish to point out one thing, that before this there should be Miscellaneous Commercial Application No. 04 of 2020, whereby the one moving the Court should appear as the applicant and not the appellant. These are two different statuses. Usually appeal is intended to the higher court which in this case would have been the Court of Appeal, and cannot be brought before this Court. So the proper title of the party is that of an applicant and not appellant.

Now turning to issues before this Court, what needs to be determined is whether the preliminary points of objection raised fall within the ambit of the principles stated in the **Mukisa Biscuits** (supra) as highlighted by Ms. Lema for the applicant, that the points raised are on pure point of law. Any issue requiring adducing of evidence or ascertaining facts, should fall short of being pure point of law as envisioned in the **Mukisa Biscuits** (supra) and other cases which cited the former with approval such as **Cotwo (T) Ottu Union & Another v Honourable**

Iddi Simba, Minister of Industries and Trade & Others, Civil Application No. 40 [2000] T.L.R. 88.

And in answering that I will start with the 1st issue, on whether this application is time barred. The applicant's application is premised basically on the sale/auction effected on 28th February, 2020 at 10.00 as averred in paragraph 11 of the affidavit in support of the application. Despite this information the applicant has failed to persuade the Court to overrule this point of objection. *First and foremost*, the counsel has not been able in neither the affidavit deponed in support of the application nor highlighted as to when he or his client learnt that the execution by way of an auction has been conducted on 28th February, 2020, rather he made statements which are not part of his affidavit. The statements made are simply statements from the bar which besides being discouraged by the Court cannot be afforded any weight. **See: Registered Trustees of the Archdiocese of DSM v The Chairman Bunju Village Government & Others, Civil Appeal No. 147 of 2006, CAT-DSM (unreported) p.7.** Also and as pointed out by Ms. Method, submissions made by the counsel were essentially supposed to elaborate what has been stated in the affidavit and not otherwise. For him to bring up matters not deponed in the affidavit the counsel, went contrary to the position and the cited case of **Tuico at Mbeya Cement Co. Ltd (supra)**, which, I entirely agree to, that

submission is not evidence but illustration of what has been deposed in the affidavit, counter-affidavit or reply thereto. Mr. Mollohan's submission on what transpired was therefore not helpful short of it being part of the affidavit.

Secondly, Mr. Mollohan in his submissions mentioned one Thobias a Court cler as to have denied his client copies of the documents unless his counsel was present to collect the same. The affidavit on what and when one Thobias's Court clerk informed the applicant is missing affidavit. The submissions as pointed out earlier on are therefore of no use. As clearly pointed out in the case of **John Chuwa** (supra), an affidavit of such material person to the case on what he stated was not only necessary but equally important.

Under the Law of Limitation, particularly Item 7 of Part III of the Schedule, an application to set aside a sale in execution of a decree under the CPC, has to be brought within thirty (30) days. Counting from 28th February, 2020 up to 14th July, 2020 when this application was filed, it is indeed almost four (4) or so months. The application ought to have been preceded with an application for an extension of time, which is not. Whereas, it could be true that neither the applicant nor his client were served with a notice pursuant to Order XXI Rule 20 (1) (a) of the CPC, but the fact it is not known when the applicant learnt of the information, this Court cannot be able to compute as to when the time started running. Instead this Court

is compelled to rely on the date of filing of this application 14th July, 2020, *vis a vis* the date stated the auction was carried which is 28th February, 2020.

This point in my considered view is a pure point of law as there is no evidence is required to ascertain any fact. The points raised in the submission by Mr. Mollohan should be the good point possibly in supporting the application for extension of time and not at this point. The 1st point of objection is sustained and consequently the application is dismissed under section 3 (1) of the Law of Limitation Act, Cap. 89 R.E. 2002, with costs.

The 1st point of objection is sufficient to dispose of the preliminary points of objection raised and do not find any need of dwelling on the two remaining points, as this one point calls for dismissal of the application entirely, which I proceed to do with costs. It is so ordered.




P. S. FIKIRINI

JUDGE

10th AUGUST, 2020