

IN THE HIGH COURT OF TANZANIA  
(COMMERCIAL DIVISION)

AT DAR ES SALAAM

MISCELLANEOUS COMMERCIAL APPLICATION NO. 67 OF 2020

*(Arising from Commercial Case No. 27 of 2002)*

VICTORIA REAL ESTATE DEVELOPMENT

LIMITED.....APPLICANT

Versus

TANZANIA INVESTMENT BANK.....1<sup>st</sup> RESPONDENT

M/S. ILIBILA INDUSTRIES LTD.....2<sup>nd</sup> RESPONDENT

JOHN MOMOSE CHEYO.....3<sup>rd</sup> RESPONDENT

NGULA VIATALIS CHEYO.....4<sup>th</sup> RESPONDENT

ERCK AUCTION MART &

COURT BROKERS.....5<sup>th</sup> RESPONDENT

Last Order: 28<sup>th</sup> Aug, 2020

Date of Ruling: 02<sup>nd</sup> Sept, 2020

**RULING**

**FIKIRINI, J.**

The applicant, Victoria Real Estate Development Ltd, pursuant to Article 13 (6) (a) of the Constitution of the United Republic of Tanzania, 1977 (the CURT) as

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amended from time to time and section 95 of the Civil Procedure Code, Cap. 33 R.E. 2019 (the CPC), was praying to be joined in the application for review as an interested party and be heard. The application was supported by the affidavit and reply to the counter-affidavit of one Hafidh Salum Mana-the Operation Manager of the applicant's company. In his affidavit and reply to the counter-affidavit, Mr. Mana, gave account of how the applicant came by the property. He accounted that the property was purchased at the auction through Azim Hooda and a certificate of sale marked as annexure "A" was issued in that regard. The 3<sup>rd</sup> respondent attempted to set aside the sale unsuccessfully both in this Court and the Court of Appeal. Undeterred, the 2<sup>nd</sup>, 3<sup>rd</sup> and 4<sup>th</sup> respondents have now filed application for review without joining the applicant as purchaser of the property subject of the application and hence this application from the applicant praying to be joined as an interested party.

The 3<sup>rd</sup> respondent, John Momose Cheyo, contesting the application filed a counter-affidavit on behalf of the 2<sup>nd</sup> and 4<sup>th</sup> respondents, averring that the applicant never attended the auction of the property on Plot. No. 1472 Msasani Peninsula with certificate of title number 32132. The above observation was also averred in the counter-affidavits filed by Suleiman N. Alhilal one of the director in the applicant's company and Philemon N. Mgaya-Managing Director of

the 5<sup>th</sup> respondent sworn on 01<sup>st</sup> October, 2004, which were annexed and marked as JMC-1. And that the 2<sup>nd</sup>, 3<sup>rd</sup> and 4<sup>th</sup> respondents acknowledged one Twaha Yakubu as the successful bidder and not Azim Hooda who approached the deponent and the applicant company as depicted in the affidavit deposed on 1<sup>st</sup> October, 2004- a copy which was annexed as annexure JMC-2. From the affidavit neither the applicant company nor its directors were present at the auction but it was Azim Hooda who approached the deponent and the applicant company to borrow money as per annexure JMC-3. The fact that the applicant company was neither the recognized purchaser nor attended the public auction that is why could not be joined in the application for review.

The application was argued by filing written submissions in the following order: the applicant to file her written submission by or on 09<sup>th</sup> July, 2020; reply written submission by or on 16<sup>th</sup> July, 2020 and rejoinder by or on 23<sup>rd</sup> July, 2020 if any. Delivering of ruling was rescheduled twice due to trial Judge's tight schedule.

Mr. Juma Nassoro, Mr. Seni S. Malimi and Ms. Rita Odunga Chihoma learned counsels represented their respective clients. In the applicant's short submission, Mr. Nassoro contended that the applicant was not part of the previous review application which was allowed in which the applicant's rights over suit property was nullified through a deed of settlement between the respondents. The applicant

successfully vide **Victoria Real Estate Development Ltd v Tanzania Investment Bank & 3 Others, Civil Revision No. 175 of 2015**, challenged the settlement and order thereof on the recognition of the applicant's interest over the suit property and right to be heard, and this is the gist of this application which he prayed be granted with costs.

Reacting to the submission, Mr. Malimi and Ms. Chihoma, for the respondents contested grant of the application giving the reason that the applicant was not a party in the previous proceedings before Kalegeya, J (as he then was), which is the subject matter of the present application for review. They argued that a person who was not a party to the decree or order cannot apply for review or be joined in an application for review. Adducing the reason that the decree or order will usually not be binding upon such party, referring to **Mulla on the Code of Civil Procedure Act V of 1908, 14<sup>th</sup> Edition, Volume III at p. 2331**, that review cannot be preferred by the third party or third party be joined. Bolstering the submission, the case of **Magu District Council and Another v Mhande Nkwabi [1997] 286** was cited, in which the Court held that there was no law which allowed the joining of a party as appellant who was not a party to the original proceedings, the subject of appeal. Meaning there was no judgment or decree or anything against him to legitimize his joinder. Since the applicant was not a party to the

decision which review was being sought, naturally cannot be joined as the parties to review should be the same as parties in the decision sought to be reviewed, argued the Counsels. The present application was misconceived submitted the respondents' counsels.

Disputing the Court of Appeal decision in the **Victoria Real Estate** case (supra), it was the counsels submission that the Court of Appeal decision was only to the effect that the settlement which affected the applicant's interest without giving the applicant right to be heard contravened right to be heard provided under the CURT, before her interest on the property was adversely affected and not that the applicant was made part of the present application for review. It was further the respondents' counsels' contention that the applicant has failed to demonstrate from where she derived her interest in the disputed property so as to be eligible to be included in the application for review as portrayed in the chamber summons.

Appreciating the complexity arising from the Court of Appeal decision in **Victoria Real Estate** (supra), the respondents' counsels' still maintained that the applicant cannot join the present application for review. Instead she can have her own independent application seeking to enforce her alleged interest in the disputed property and in which she can join the respondents. The counsels had an opinion that the application can then be joined with the present application for ease of

adjudication. And that they were making such considering the averment in the 3<sup>rd</sup> respondent's counter-affidavit which strongly countered the assertion by Hafidh Mana that he attended the auction whereby the applicant through Azim Hooda purchased the property subject of the present application for review. According to the respondents the applicant neither attended the public auction nor purchased the property, as deponed in the counter-affidavit by John Momose Cheyo. The respondents' counsels indicated their intention to want to cross-examine the deponent on this fact. After all there was no affidavit disclosing in which auction Azim Hooda emerged as the highest bidder and who paid the purchase price, but it was through Azim Hooda who informed the applicant through one of its director Suleiman Alhilal. As per paragraph 5 of the counter-affidavit the successful bidder was Twaha Yakubu who failed to deposit the 25% of the bid price.

Based on their submission they urged this Court to dismiss the application.

Rejoining, Mr. Nassoro reiterated his earlier submission which was based on the Court of Appeal decision, referencing from various excerpts of its decision, particularly to page 15 where the Court observed that the auction and sale of the house was set aside, and page 24 concluded that by not joining the applicant in the review application preferred while she was the owner, the High court was denied opportunity to hear both parties and determine the issues at stake. Again at page 31

of the Court of Appeal decision, the Court pointed out that the applicant's interest clearly unfolded in the application for review in which the applicant's purchase of the suit property was considered as among new fact warranting review.

Examining the cited case of **Magu District Council** (supra) cited by the respondents' counsels, Mr. Nassoro argued that the case was distinguishable as the facts in the two cases were different. Responding to the suggestion that the applicant has failed to demonstrate its interest over the suit property, Mr. Nassoro pointed at paragraphs 2 and 4 of the affidavit and annexure "A" the certificate of sale and an account that through cheque No. 002041 payment of Tzs. 143,000.000.00 was made as purchase price, in support of the application as sufficient demonstration of the applicant's interest over the suit property. He thus maintained his prayer that the application be granted and the applicant be joined in the review proceedings with costs.

In determining whether this application by the applicant that she be joined in the review application preferred by the 2<sup>nd</sup>, 3<sup>rd</sup> and 4<sup>th</sup> respondents, is meritorious or not, I will examine the affidavits and rivalry submissions. It was the applicant's position that as the rightful owner of the suit property, the subject matter of the review application before this Court she must be joined so as to be heard. Her

position is strengthened by the Court of Appeal decision in her favour in **Victoria Real Estate** (supra), which stated:

*“.....On the authority above, recording of the settlement which affected the applicant’s interest without according it an opportunity to be heard contravened the constitutional right of being heard before its interest on the property was adversely affected. That was the breach of the principles of natural justice.....”*

On the other hand, the 2<sup>nd</sup>, 3<sup>rd</sup> and 4<sup>th</sup> objections to the applicant’s application that she be joined in the application for review arguing a number of things: (i) that the applicant neither attended the public auction nor was a purchaser of the suit property; that the interpretation of the Court of Appeal decision made by the applicant on the right to be heard was never that the applicant be made a party in the pending application for review, or by commenting that it was violation of the right not to be heard for the applicant and not to be a party in review application; (iii) that the relevancy of the Court of Appeal decision was with respect to the recorded settlement, which nullified the sale of the suit property. Therefore, the Court of Appeal recognized the applicant’s interest to the extent of settlement recorded only which was the issue at the material time; (iv) that the respondents



were of the view that the applicant has not sufficiently demonstrated how she derived interest in the present application for review.

Furthermore, it was the respondents' stance and in reference to Mulla on Civil Code, that a review cannot be preferred by a third party or a third party cannot be joined in an application for review as envisioned by the applicant. The same reasoning featured in the case of **Magu District Council** (supra), which the respondents are pegging their argument that there was no judgment or decree or anything against the applicant to legalize her joinder.

In the present application which its genesis is the Commercial Review No. 5 of 2020, the respondents under item (b) and (c) of the memorandum of review disputing the purchase claim made by the applicant as the company was not present at the auction and was not among the bidders at the said auction nor its representative, this two items squarely touch the applicant under whose ownership the suit property is. Yes, the applicant was not part of the proceedings which germinated the recorded settlement, and therefore not a party to the original proceedings, the subject of the present review and indeed there is no judgment or decree against her. Nonetheless, it is an undisputed fact that the applicant and according to paragraph 2 of the affidavit deposed in support of the application, up to this juncture the applicant is the one recognized as owner of the suit property

which she claimed to have purchased from a public auction, the purchase which is being challenged.

Despite the respondents disputing the alleged purchase but the fact as it stands is that the applicant is currently considered the *bonafide* purchaser. With this undisputed scenario, any hearing related to the contested public auction carried out resulting into the applicant being in possession of the suit property cannot take place without the applicant being afforded a hearing.

The submission by the respondents' counsels and the reference to **Mulla on Civil Procedure Code** and the case of **Magu District Council** are undoubtedly good law but in the circumstances surrounding this application, the be right to be heard provided under the CURT cannot be completely ignored.

This application has been brought under Article 13 (6) (a) of the CURT and section 95 of the CPC. Article 13 (6) (a) of CURT, emphasizes on right to be heard something which is what the applicant's desire. For ease of reference the provision is reproduced below:

*(6) "To ensure equality before the law, the state authority shall make procedures which are appropriate or which take into account the following principles, namely:*

*(a) when the rights and duties of any person are being determined by the court or any other agency, that person shall be entitled to a fair hearing and to the right of appeal or other legal remedy against the decision of the court or of the other agency concerned;”*[Emphasis mine]

And the principle has been well illustrated in the case of **Rukwa Auto Parts and Transport Ltd v Jestina George Mwakyoma** [2003] T. L. R. 25, underscoring the importance and necessity of applying the principles of natural justice, by affording right to be heard, had this to say:

*“In this country, natural justice is not merely a principal of Common Law; it has become a fundamental Constitutional right. Article 13 (6) (a) includes the right to be heard amongst the attributes of equality before the law”* [Emphasis mine]

Therefore, the applicant being the owner of the suit property purchased from the contested auction has to have a right of audience. This is more so when there might be an adverse action or decision to be taken against that party. Advancing and reinforcing this principle in the case of **Abbas Sherally & Another v Abdul Fazalboy, Civil Application No. 33 of 2002**, the Court of Appeal held that:

*“The right of a party to be heard before adverse action or decision is taken against such party has been stated and emphasized by the courts in numerous decisions. That right is so basic that a decision which is arrived at in violation of it will be nullified, even if the same decision would have been reached had the party been heard, because the violation is considered to be a breach of natural justice” [Emphasis mine]*

In this instance equally, I find the applicant deserves to be heard before any adverse action or decision assuming is going to be made against her.

Furthermore, my understanding of the Court of Appeal decision is quite different from the one understood by the respondents’ counsels, that the Court of Appeal decision pertained to the settlement order only. I am saying so because the settlement order was in reference to the suit property. The Court of Appeal was thus not amused to find out the applicant was left out when at page 24 of its decision pointed out this:

*“By recording that settlement and by not joining the applicant in that application (review), the respondents denied the High Court an opportunity to hear the parties in that application and determine that issue.....”*

The scenario which was being discussed and decided upon before the Court of Appeal is not different from the one in the present application for review. Since the grounds for review touched on the applicant's status in relation to the purchase of the property and the manner she purchased it. To proceed without joining her will *first and foremost*, being denying her right to be heard, and *secondly*, this Court will be interpreting the Court of Appeal decision narrowly, which I do not think will be appropriate. In actual fact the applicant was supposed to be joined long ago, but for the reasons not shared to this Court that did not occur. It will be absurd to proceed with the review without joining the applicant while she has interest which needs being protected and the proper way to do that is to give her opportunity to present her case and from there the Court can make an informed decision after hearing all the parties involved.

In addition, under section 95 of the CPC, this Court has been vested with inherent powers. In the **Transport Equipment Ltd v D.P. Valambhia, Civil Application No. 18 of 1993**, the Court had this to say in enhancing Court's exercise of inherent powers when need be by stating:

*“Inherent powers of the court, is that which is necessary for the proper and complete administration of justice and.....”*

Relying on both Article 13 (6) (a) of the CURT and section 95 of the CPC, I find this Court has a duty of seeing the end of justice are met.

The respondents' counsels suggested that the applicant's best option was to file its own independent application and not to be joined in the application for review between the 2<sup>nd</sup>, 3<sup>rd</sup> and 4<sup>th</sup> respondents and the 1<sup>st</sup> and 5<sup>th</sup> respondents as a party. After the exercise of filing an independent application then for easy of adjudication at the hearing the applications can be consolidated with the present application for review before the Court. The respondents have not assigned any reason as to why the joinder cannot or should not happen. I take a different stance to that of the respondents and their counsels on this for the following reasons: *one*, it will be unnecessary multiplicity of applications on the same subject matter involving the same parties. *Two*, the main subject matter is the suit property purchased by the applicant, joining her is in my view not only significant but imperative, since it is her rights over the property which are at stake. Not joining her will keep on vitiating any proceedings initiated touching the contested auction and ownership of the alleged purchased property. *Three*, it is important litigations to come to an end, one way of doing that is having all the necessary and proper parties including an interested party to be properly joined when the situation calls for that exercise or else there will be endless applications, which aside from creating chaos, can for

one reason or the other cause confusion and might end up leading to causing injustice.

In light of the above, I find the application by the applicant that she be joined in the application for review deserves granting and consequently proceed to grant the application. It is so ordered.



A handwritten signature in black ink, appearing to read "P. S. FIKIRINI".

P. S. FIKIRINI

JUDGE

02<sup>nd</sup> SEPTEMBER, 2020