IN THE COURT OF APPEAL OF TANZANIA
AT DAR ES SALAAM

(CORAM: RUTAKANGWA, J, A., MBAROUK, J.A., And LUANDA, J.A.)

CIVIL REVISION NO. 6 OF 2015

1. BALOZI ABUBAKARI IBRAHIM ..... 1ST APPLICANT
2. BIBI SOPHIA IBRAHIM ..... 2ND APPLICANT

VERSUS

1. MS BENANDYS LIMITED ..... 1ST RESPONDENT
2. JOSHUA E. MWAITUKA t/a RHINO AUCTION MART.....2ND RESPONDENT
3. JEHANGIR AZIZ ABDULRASUL .....3RD RESPONDENT

(Revision from the proceedings, Judgment, Decree, Rulings and Orders of the High Court of Tanzania at Moshi)

Dated 1st day of July, 2011
In
Land Case No. 4 of 2010 through
Misc. Land Application No. 82 of 2015 and 83 of 2014
(Munisi, J.) 28/5/2015

RULING OF THE COURT

Date 29th September,& 18th November, 2015

RUTAKANGWA, J.A.:

The aim of these *suo motu* revision proceedings is to establish whether there were irregularities, illegalities, improprieties and/or errors worth correction by this Court in order to avert a miscarriage of justice, committed by the trial and executing High Court, Land Division in Land Case No. 4 of 2010 of Moshi sub-registry. It's strictly essential background is as follows:-

In the year 2005, M/S Benandys Limited, styled the 1st Respondent in these proceedings, instituted a suit against Balozi Abubakar Ibrahim and Bibi Sophia Ibrahim, identified hereafter as the 1st and 2nd applicant respectively. The suit was initially instituted in the High Court, Land Division at Dar es Salaam and assigned Case No. 184 of 2005. Subsequently, the suit was transferred for trial to the Moshi High Court registry, where it was registered as Civil Case No. 4 of 2010.

On 1st July, 2011, the High Court delivered its judgment which was in favour of the plaintiff/1st respondent. The applicants were aggrieved by the decree against them. They preferred an appeal to this Court by lodging a notice of appeal. Simultaneously, they lodged an application for leave to appeal under section 47(1) of the Land Disputes Courts Act, Cap 216 R.E. 2002. And following the lodging of the notice of appeal, the applicants through Mr. Francis Stolla, learned advocate, applied under Rule 11(2) of the Tanzania Court of Appeal Rules, 2009 ("the Rules") for stay of execution of the decree pending the hearing and determination of the appeal ("the application for stay").

The 1st respondent challenged the competence of the application for stay on the ground that it was predicated on an invalid notice of appeal. The said notice of appeal had cited the initial Dar es salaam "Land Case No. 184 of 2005" instead of the registration number the suit had acquired after being transferred to Moshi i.e. "Land Case NO. 4 of 2010 (CF Transfer File from Dar es salaam Land Case No. 184 of 2005)". The application for stay as well as the notice of appeal were accordingly struck out on 27th November, 2013 and 19th December, 2013 respectively.

The applicants, still desirous of pursuing their intended appeal, went back to the High Court, Moshi, to commence the appellate process afresh. They accordingly lodged Misc. Civil Application No. 3 of 2014 on 27th January, 2014, seeking extension of time within which to lodge a fresh notice of appeal and apply for leave to appeal. Following these fresh proceedings, the applicants sought to withdraw the prior application for leave (Misc. Civil Application No. 31 of 2011) which for obvious reasons had become unmaintainable. It is claimed by the applicants, but denied by the 1st respondent, that *"inexplicably"* and unknown to the applicants, *"Misc. Civil Application No. 3 of 2014 was marked as withdrawn"* instead of Misc. Civil Application No. 31 of 2011.

It is the applicants' contention that when they became aware of this fact through the Moshi High Court District Registrar they, on 4th December, 2014, filed Misc. Land Application No. 82 of 2014 seeking afresh orders of stay of execution of the decree pending the hearing and determination of an application for extension of time within which to apply for review of the order marking withdrawn Misc. Civil Application No. 3 of 2014. On the same day, they filed Misc. Land Application No. 83 of 2014, seeking orders extending the time within which to apply for review, lodging a notice of appeal and leave to appeal. The two applications were scheduled for hearing before Munisi, J. on 28th May, 2015. On that day the applications were struck out with costs on account of being incompetent as we shall elaborate later.

Before the above mentioned proceedings were struck out, the 1st respondent, desirous of enjoying the fruits of the decree in its favour, lodged an application for execution of the decree, on 11th September, 2014 at Moshi. It sought for the attachment and sale of the judgment debtors' landed properties situated in Dar es Salaam.

On 18th November, 2014, counsel for both sides appeared before the Deputy Registrar. Counsel for the judgment debtors/applicants prayed for

stay of the execution proceedings. The prayer was not granted but the decree-holder was ordered to present a valuation report in respect of the properties sought to be attached.

On 16th February, 2015, the Deputy Registrar sent the decree to the High Court Land Division, Dar es Salaam, for execution, under section 34(1) and Order XX1, rule 8 of the Civil Procedure Code, Cap. 33 R.E. 2002 ("the C.P.C"). The parties were subsequently summoned to appear before the Deputy Registrar, Dar es Salaam, for necessary orders on 8th May, 2015.

On the above mentioned date, Mr. Stolla appeared on behalf of the judgment debtors, while Mrs. Crescensia Rwechungura appeared for the decree holder. Mr. Stolla applied for stay of the execution proceedings, "*as there was a stay of execution application pending in the High Court in Moshi Registry*". The application was strongly resisted by Mrs. Rwechungura. She successfully argued that since it was the High Court at Moshi which had transferred the decree to Dar es Salaam for execution and had not subsequently ordered otherwise, it would not be prundent to accede to Mr. Stolla's prayer. The learned Deputy Registrar, agreed with her and ordered, presumably under 0.XX1, rule 15(4) of the C.P.C and

0.XLIII(1) (m) of the C.P.C. execution to proceed. Also, presumably under rule 3 of the Court Brokers and Process Servers (Appointments, Remuneration and Discipline) Rules, 1997, Ms. Rhino Auction Mart was appointed to carry out the execution process. We have used the word "presumably" deliberately. It is because it is not shown in the proceedings, as is required (for appeal or revision purposes) under which legal provisions those orders were given.

On the same day, the Deputy Registrar issued a warrant of attachment of the applicants' landed properties situated at Msasani, Mikocheni and Regent Estate within Dar es salaam city.

On 22nd May, 2015, by his letter Ref. No. RAM JEM/LAND CASE 9/2015/1, the Court Broker informed the Registrar of his full compliance with the instructions contained in the *"Attachment Orders."* The Deputy Registrar ordered the attached houses to be sold. After an advertisement in a NIPASHE newspaper, the sale took place on 4th June, 2015.

The applicants believed that the trial High Court had frustrated their earnest efforts to appeal against its judgment. They also convinced themselves that the executing court had conducted execution proceedings

with material irregularities and illegalities and was on the verge of auctioning their landed properties as a result. They accordingly, by their letter dated 1st June, 2015, to the Chief Justice, sought the intervention of this Court to ensure that justice was done, hence these revision proceedings. The same are predicated on s. 4(3) of the Appellate Jurisdiction Act, Cap 141 ("the A.J.A.").

It is common knowledge that the procedure in conducting revision proceedings in this Court are governed by Rule 65 of the Rules. Nonetheless, it will not be labour lost to point out here that under Rule 65(6), in an application of this nature, the Court shall **have discretion** to summon the parties and grant them a hearing. We did exercise this discretion in favour of the parties and they addressed us at length by way of written and oral submissions. We genuinely appreciate their efforts as they gave the case a great deal of thought and attention. However, we cannot hope to do full justice to them by taking on board all that they submitted on. This is simply because not everything they said is immediately relevant in these proceedings.

We said at the outset that we are being implored by the applicants to call for and examine the record of proceedings in the trial and executing High Court to satisfy ourselves as to the *"correctness, legality, propriety,"* etc., of the decisions, orders and/or regularity of the proceedings in the suit between the parties herein. As already indicated, these are *suo motu* revision proceedings in which the parties were given a hearing. That being the case both logic and established practice, dictate that anyone who believed that the Court lacked the necessary competence to entertain the matter, to raise objection before it was heard on merit. This was not done at all.

On the contrary, counsel for the 1st respondent, Mrs. Crescencia Rwechungura and Mr. Johnson Jamhuri, with whom Mr. Mohamedi Mkali, learned advocate for the 2nd and 3rd respondents, was in agreement, purported to challenge the Court's competence in their written submissions in reply to counsel for the applicants' written submissions. To say the least, out of deference to the two learned advocates of long standing, this was highly irregular. We hope it will never be repeated. That said, since the submissions raised a point of law touching on the Court's jurisdiction, we are enjoined by law to determine it first before proceeding further.

It was counsel for the 1st respondent's submission that *"the powers granted to this court by section 4(3)"* of the A.J.A. *"read together with Rule 65(6)"* of the Rules, *"were improperly exercised by this court* in initiating *revision no. 6/2015 based on the applicants complaint letter to the Chief Justice".* In elaboration, they strongly contended that the Court of Appeal:

> *"can only initiate revision **'suo motu'** when the applicant has **no right of appeal**, where **the right of appeal has been blocked** or whether, despite the right of appeal, **there exist good and sufficient reason to justify recourse."***
>
> [Emphasis supplied].

They continued to argue, without any elucidation on what to them constitutes "good and sufficient reason" or the right of appeal being blocked, that on the evidence available the applicants *"still have a right to appeal in the sense that the fact that the applicants' notice of appeal was strike (sic) off by the court... and the applicants withdrawn (sic) their application for extension of time to file notice of appeal and leave to appeal out of time".*

Convinced of the infallibility of that argument, they confidently concluded thus:

> *"Those circumstances obviously have not blocked the applicant's right of appeal to the court of appeal(sic) nor has the judicial system been block (sic) for the applicant to appeal. The applicant have not exhausted their right of appeal to the fullest and based on section 4(3) of the Appellate Jurisdiction Act supra (sic) the Court of Appeal had no jurisdiction to initiate revision* ***suo motu*** *based on the applicants complaint letter".*

To buttress their position, they referred us to the decision of this Court in the case of **OLMESHUKI KISAMBU v. CHRISTOPHER NAINGOLA** [2002] T.L.R 280. They concluded their submission on this crucial objection, all the same, without telling us what we should do in the event we upheld them. Counsel for the applicants did not seek leave to file a reply submission on this point, as they did not find it useful to address their minds to it in their oral submissions. This unfortunate remiss, however, does not relieve us of our duty to canvass it fully and answer it either way.

We shall begin our discourse on this issue by reverting to what the Court held in the **OLMESHUKI** case (supra). It partly held that:-

> *"The subsection has been considered by this Court on a number of occasions and various principles have been formulated to guide the exercise of discretion under the provision. For instance in* ***Halais Pro-Chemie Industries Ltd v. Wella AG,*** *the Court reverted to and consolidated its earlier pronouncement in* ***Mwakibete v. Editor of Uhuru, Transport Equipment v. D.P. Valumbhia,*** *and said that the revisional powers conferred by subsection (3) were not meant to be used as an alternative to the court's appellate jurisdiction. Hence, the court will not proceed* ***suo moto*** *(sic) in cases where the applicant has the right of appeal, with or without leave, and has not exercised that right. However, the court will proceed under the subsection where there is no right of appeal; where the right of appeal has been blocked by judicial process or where despite the right of appeal there exists good and sufficient reason to justify recourse to the subsection."*

It is true that section 4(3) of the A.J.A. first came under scrutiny by this Court in its decision in **MOSES J. MWAKIBETE V. THE EDITOR – UHURU, SHIRIKA LA MAGAZETI YA CHAMA AND NATIONAL PRINTING CO. LTD** [1995] TLR 134. The Court held:-

> *"Before proceeding to hear such an application on merits, this court must satisfy itself whether it is being properly moved to exercise its revisional jurisdiction. The revisional powers conferred by ss (3) were not meant to be used as an alternative to the appellate jurisdiction of this court. In the circumstances, this court,* ***unless it is acting on its own motion, cannot properly be moved to use its revisional powers*** *in ss (3) in cases where the applicant has the right of appeal with or without leave and has not exercised that option."*
> [Emphasis is ours].

That was on 22nd March, 1995.

A few months later, that is on 24th May, 1995, the Court, without referring to the **MWAKIBETE** case (supra), similarly held as follows:-

> *"The appellate jurisdiction and the revisional jurisdiction of this court are, in most cases, mutually exclusive. If there is a right of appeal then that has*

to be pursued and, except for sufficient reason amounting to exceptional circumstances, there cannot be resort to the revisional jurisdiction of this court. The fact that a person through his own fault has forfeited that right cannot, in our view, be an exceptional circumstance. If a party does not have an automatic right of appeal then he can use the revisional jurisdiction after he has sought leave but has been refused. ***However, the court may, suo motu, embark on revision whether or not the right of appeal exists or whether or not it has been exercised in the first instance.":*** **TRANSPORT EQUIPMENT LTD V. DEVRAM P. VALAMBHIA** [1995] T.L.R. 161 at pg 167. [Emphasis is ours].

Slightly a year later, the Court conclusively held thus in **HALAIS PRO –CHEMIE V. WELLA A.G.** [1996] TLR 269 at page 272:

"We think that ***MWAKIBETE's*** *case read together with the case of* ***Transport Equipment Ltd*** *are authority for the following legal propositions concerning the revisional jurisdiction of the Court under ss (3) of s. 4 of the Appellate Jurisdiction Act, 1979:*

(i) ***The Court may, on its own motion and at any time, invoke its revisional***

jurisdiction *in respect of proceedings in the High Court;*

(ii) Except under exceptional circumstances, a party to proceedings in the High Court cannot invoke the revisional jurisdiction of the Court as an alternative to the appellate jurisdiction of the Court;

(iii) A party to proceedings in the High Court may invoke the revisional jurisdiction of the Court in matters which are not appealable with or without leave;

(iv) A party to proceedings in the High Court may invoke the revisional jurisdiction of the Court where the appellate process has been blocked by judicial process."

[Emphasis is ours.]

It is clear from all these cases that this Court can exercise its revisional jurisdiction ***suo motu,*** at any time whether or not a right of appeal exists. Further, we discerned that in none of these three cases did the Court hold that it *"will not proceed suo motu in cases where the applicant has a right of appeal ... and has not exercised that right."*

The propositions propounded in the above cases have been consistently followed and applied by this Court without any detraction, save for the sole convenient deviation in the **OLMESHUKI** case (supra), to date. Indeed, they have crystallized into salutary principles of law guiding the Court in its exercise of ***suo motu* revisional jurisdiction**. We have found this to be in accord with the manifest intention of Parliament in deciding to vest this Court with supervisory powers over the High Court through the Appellate Jurisdiction (Amendment) Act, 1993 (No. 17) enabling it to, inter alia, ***suo motu*** *"inspect and correct errors on the decisions of the High Court which are not subject of appeal"* (see the Bill of this Act for Objects and Reasons, as well as the Court's recent decision in **ATTORNEY GENERAL & TWO OTHERS V. OPULENT LTD** , Civil Revision No. 1 of 2015) (unreported). Had Parliament a contrary intention it could have stated so explicitly.

In the light of the above discussion, we find no grain of merit in the objection to the Court's competence to entertain and determine these revision proceedings.

Even if we had been of the view that the Court would not proceed *suo motu* where an applicant /complainant has a right of appeal which has not been exercised, we would have found ourselves, in this case, vested

with the necessary competence under the second proposition, that is, where the right of appeal has been blocked by judicial process.

We find ourselves here compelled to give the words *"process"* and *"block"* their ordinary meanings as comprehended by an ordinary person. In the Concise Oxford English Dictionary, 11th Edition, at page 1144, the word *"process"* is defined to mean, *inter alia*:

> *"a series of actions or steps towards achieving a particular end".*

And the word *"block"* is defined at page 146 as: *"to impede or prevent (an action, movement)".*

One of the meanings given to the word *"process"* by the Chambers Dictionary, 1994 ed. at page 1366 is:

> *"a series of actions or events."*

There is no gainsaying here that the applicants exhibited their intention to challenge the High Court's decision on appeal by lodging a notice of appeal. They had also applied for leave to appeal. As already shown in this ruling, the notice of appeal was struck out on 19th December,

2013. Undeterred, the applicants started the appellate process afresh, the end result in their contemplation being to have the judgment against them overturned by this Court on appeal. They lodged Misc. Civil Application No. 3 of 2014 seeking orders of extension of time within which to lodge a notice of appeal and apply for leave to appeal. This was on 27th January, 2014. By this date the earlier application for leave was still pending.

We have, when giving the background of these proceedings, recounted in detail what happened thereafter. For the applicants, it appears all would have been well for them but for the rejection of their application for extension of time to apply for review of the ruling or order marking withdrawn Misc. Civil Application No. 3 of 2014. It was their contention, which is disputed by the 1st respondent, that the learned High Court judge erroneously recorded the proceedings in a wrong court record. As a result, they are contending, instead of withdrawing the earlier redundant application for leave to appeal i.e. Misc. Civil Application No. 31 of 2011, "*he withdrew the application for extension of time within which to file a notice of appeal*". To them that was a fatal error, which virtually sealed their fate unless the withdrawal order was vacated. The respondents think otherwise.

The applicants' apparent plight cannot be fully appreciated if one does not understand what happened in the High Court on 28th May, 2015, when Misc. Land Application No. 83 of 2014 was called on for hearing. The learned Judge raised, *suo motu,* the issue of its competence. We shall take the liberty of reproducing what transpired thereafter. It was as follows:-

> *"Date: 28/5/2015*
> *Coram: Hon. A.A. Munisi, Judge*
> *1st Applicant:*
> *2nd Applicant*
> *For Applicant: Mr. Stolla*
> *Respondent:*
> *For Respondent } Rwechungura assisted by Johnson*
> *c.c. Rehema*
> ***Court:*** *The order intended to be reviewed has not been annexed to the application.*
> ***Stolla:*** *Madam Judge our view is that we do not need to attach such order at this stage the same will be annexed in an application for review if an extension of time is granted.*
> ***Jamhuri:*** *Madam Judge, it is our view that annexing the order is essential. Our reasons are that the Court has to ascertain the existence of such orders and when it was issued.*
> *That is all.*

Order: *Ruling in 3 hours*

Sgd A.A. MUNISI

JUDGE

28/5/2015."

The ruling was indeed, delivered on the same day. It was a short ruling. The learned judge fell for Mr. Jamhuri hook, line and sinker. She accordingly reasoned as follows:-

> *"Having given due consideration to the arguments by both counsel I have no flicker no (sic) of doubt that the annexing of the order intended to be reviewed is critical,* ***mere assertions in an affidavit will not suffice*** *where the order in question is available and the applicant has not expressed any difficulty in obtaining it. The Court of Appeal in the case of* ***Citibank Tanzania Limited versus Tanzania Telecommunications Company Ltd and Five Others,*** *Civil Application No. 112 of 2003* ***adjudicating on an application for revision, insisted on the importance of annexing in application the decisions intended to be revised. In that regards reviews will fall in that category.*** *I do not see the reason why the said order was not annexed, as in my considered view it supports the averments in*

the affidavit that indeed such an order was issued on the said dates. For the above stated reasons the application is incompetent on account of lacking proper documents and it is struck out with costs.

A.A. Munisi

Judge

28/5/2015".

[Emphasis is ours].

It was the submission of counsel for the applicants before us, that in striking out Misc. Civil Application No. 83 of 2014, the Court *"fettered its jurisdiction".* In an apparent elucidation of this, counsel argued that:-

> *"the facts of the application were sufficient to empower the court to act* ***suo moto*** *(sic) in rectifying the error of entering orders into a wrong file. That did not happen here. This was a good case where the court ought to have acted* ***suo moto*** *(sic) to correct that error upon being aware of the circumstances rather striking the application (sic) seeking to rectify the court records".*

That was their full argument on this critical issue.

For the 1st respondent, its counsel presented a counter argument to the effect that the Court had under s. 14 (1) of the Law of Limitation Act,

Cap 88 R.E. 2002, discretion to grant extension of time. In the premise, they continued:-

> *"as extension of time was based on the order which marked no. 3/2014 withdrawn as correctly held by Munisi, J. the application was required to be supported by the order intended to be reviewed allowing the court to ascertain if there were any errors which require ratification (sic) by the court".*

We must respectfully confess more in sorrow than in fear that we have found the two submissions unconvincing although counsel for the respondent had directed their minds to the pertinent issue.

The issue before us arising from the applicants' complaint is not whether the learned High Court judge had wrongly entered the withdrawal order in "a wrong file". That would have been decided or will be decided by the High Court in the substantive application for review. Rather, the issue here is whether the learned High Court judge refused to exercise her jurisdiction to determine the matter before her on the basis of the ground raised *suo motu* by her. While counsel for the respondents have attempted to supply a negative answer as alluded to above, we have, with

due respect, found their reasoning unconvincing in law. We shall elaborate.

First of all, we have found the learned judge's holding that *"mere assertions in an affidavit will not suffice where the order in question is available,"* a dangerous precedent. This is because in law, affidavits contain statements of fact made under affirmation or oath. They are on the same plane as affirmed or sworn evidence subject to being contradicted either by way of a counter –affidavit or affidavit in reply and/or through cross examination of the affiant. In this particular case, the averment that the relevant application had been marked withdrawn by the High Court was admitted even by Mr. Jamhuri Johnson in his counter-affidavit sworn on 10th May, 2015. In paragraph 7, he partly deponed as follows:-

> *"... I deny the averments in paragraph 7 of the affidavit which purports to show that the application was erroneously withdrawn, the deponent is put to strict proof of the* ***alleged facts taking into account that the withdrawal was made out of the advocate's own free will."*** [Emphasis is ours].

The above admission by Mr. Johnson on oath, robbed his argument from the bar that *"the Court has to ascertain the existence of such orders and when it was made",* of its validity leave alone its cogency. We are increasingly convinced that had the learned judge perused Mr. Johnson's affidavit, she would not have been readily tempted to raise the issue of competency *suo motu,* and presumably we would not have been where we are today.

Secondly, we have found the grand reason relied on by the learned judge in holding the application incompetent completely untenable in law. The case of **CITIBANK TANZANIA LTD** (supra) she cited as authority for her decision is clearly distinguishable. As she correctly pointed out, the proceeding in that case was an application for revision. That decision is only authority for the settled principle of law that when a party formally moves the Court under s. 4(3) of the A.J.A., he/she must attach not only a copy of the decision sought to be revised, but also a copy of the extracted impugned decree or order. That principle has never been extended to applications for extension of time to appeal or reviews as Mr. Stolla correctly argued. The reason is simple and not far to find.

It is trite law, first propounded in ***SHANTI V. HINDOCHE & OTHERS*** [1973] E.A. 207, that in applications for extension of time, the more persuasive reason an applicant can show is that the delay has not been caused or contributed by dilatory conduct on his part. That erstwhile East African Court of Appeal went on to hold that:-

> *"... there may be other reasons and these are all matters of degree. He does not necessarily have to show that his appeal has a reasonable prospect of success or even that he has an arguable case".*

See also **PROPERTY & REVISIONARY INVESTMENT CORPORATION LTD v. TEMPER & ANOTHER** [1978] 2 ALL E.R. 433, **PRINCIPAL SECRETARY, MINISTRY OF DEFENCE v. D.P. VALAMBIA** [1992] T.L.R 387, **JOSEPHINA KALALU v. ISAAC M. MALLYA, CITIBANK (TANZANIA) LTD v. T.T.C.L. & OTHERS**, CIVIL APPLICAITON NO. 97 OF 2003, Civil Reference No. 1 of 2010, (both unreported), etc.

It is obvious to us that the fact that an applicant does not *"have to show that his appeal has a reasonable prospect of success or even an arguable case,"* reinforces the position that attaching a copy of the decision

or order intended to be a subject of review in the event an extension order is granted, to an application of this kind, is not a legal requirement at all at that stage. It goes without saying, therefore, that the learned High Court judge misdirected herself in law when she struck out the applicants' application for extension of time to apply for review. As that decision is erroneous in law and caused a grave injustice to the applicants, it cannot be left intact. It blocked the applicants' right of appeal. As a precedent it may lead many astray and occasion further injustices in subsequent similar proceedings. These are the types of glaring and dangerous errors which were intended to be corrected immediately by this Court through the exercise of its revisional jurisdiction on its own motion under s. 4(3) of the A.J.A., as soon as they are detected.

In view of the above, we find ourselves constrained to invoke our revisional powers under s. 4(3) of the A.J.A., to quash and set aside the High Court ruling in Misc. Civil Application No. 83 of 2014. The said application is accordingly restored. We direct the High Court, Land Division, Moshi, to promptly hear and determine the application on merit but by another judge of competent jurisdiction. Thereafter, regardless of

the outcome, the applicants will be free to continue with their appellate processes.

As we have already shown in this ruling, after Misc. Civil Application No. 83 of 2014 had been thrown out, the High Court immediately called for hearing Misc. Civil Application No. 82 of 2014. In that application, the applicants were seeking an interim order of stay of execution of the decree pending the hearing and determination of:

(a) Misc. Civil Application No. 3 of 2014, and

(b) An intended appeal to this Court.

The application was based on Order **XXXIX, rule 5 (1) and (4) of the C.P.C.**

Again, before proceeding to the merits of the application, the learned trial judge raised *suo motu the* issue of whether the court:

> *"Had jurisdiction to entertain the matter considering that the order sought to be stayed related to a decree issued by the High Court which is intended to be challenged before the Court of Appeal."*

Mr. Stolla thought the High Court had jurisdiction because:

"If there is no notice of appeal lodged, the Court of Appeal cannot assume jurisdiction."

He went further to assert that 0.XXXIX, *"rule (5) R 5 (4) (sic) since there is no Notice of Appeal empowers the High Court to grant a stay of execution."*

The response by Mrs. Rwechungura was short and focused. She submitted that the application was misconceived as Order XXXIX, rule 5 (1) and (4) relate to stay of execution of orders issued by courts or tribunals subordinate to the High Court.

In disposing of the application the learned High Court judge, apart from saying that *"Mrs. Rwechungura agreed that I have no jurisdiction,"* did not consider the reasons advanced by Mrs. Rwechungura. She held that she had no jurisdiction to grant the order sought because before her, there was *"no pending application for extension of time to file a notice of appeal or an application for leave to appeal."* She went on thus:

"...therefore as a matter of fact there is nothing pending before this registry to give the court the requisite jurisdiction to entertain this application taking account of the fact that Application No. 83

of 2014 has been struck out. I am persuaded that the requisite jurisdiction lies only with the Court of appeal."

She accordingly struck it out with costs.

The order striking out the application is of one of those which irked and still irks the applicants. We think this particular issue should not detain us unnecessarily. That application was patently incompetent basing on the grounds correctly articulated by Mrs. Rwechungura and not for the reasons advanced by the learned judge. The High Court having been wrongly moved, the application was incompetent and she ought to have struck it out on that basis only. We accordingly invoke our revisional powers to revise and set aside those incompetent proceedings and ruling. We make no order as to costs as the issue was raised by the court on its own motion, though wrongly decided.

Having disposed of the crucial issue relating to the appellate process in the High Court at Moshi, it behoves us now to canvass the germane complaints touching on the processes of executing the decree.

After going through the letter of complaint and the submissions of counsel for both sides, we have distilled therefrom, two key issues, which were well captured by counsel for the respondents. These are:

(a) Whether it was proper for the Deputy Registrar, High Court, Land Division, Dar es Salaam, to refuse to stay execution of the decree pending the determination of Misc. Civil Application No. 82 of 2014 at the High Court Land Division, Moshi.

(b) Whether it was ***proper and lawful*** for the applicants' property on Plot No. 62 Msasani area to be sold in satisfaction of the decree.

As the two complaints are patently interrelated, we shall discuss them together, after adequately addressing ourselves on the law governing execution of court decrees.

Let us begin our discourse with these unavoidable observations. Execution of court decrees and orders is an inherent component of the administration of civil justice. It is, indeed, the culmination of the entire process and cannot escape public scrutiny and comment, leave alone judicial interventions where the interests of justice so demand.

As was aptly observed by Lord Denning, M.R. in **Re OVERSEAS AVIATION ENGINEERING (GB) LTD** [1962] 3 All E.R.12 at page 16:

> *"Execution means, quite simply, the process for enforcing or giving effect to the judgment of the court: and it is completed when the judgment creditor gets the money or other thing awarded to him by the judgment."*

Execution of decrees, therefore, is a judicial function and ought to be carried out transparently, efficiently and judiciously. That being the case, a high degree of discipline and care is expected from all concerned court officers in carrying out this duty. Non compliance with the mandatory legal provisions relating to execution of decrees occasioning material irregularities may lead to vitiations of the entire processes, the same way such irregularities lead to nullification of trials of suits: see, for instance, **MS SYKES INSURANCE CONSULTANTS CO. LTD V MS SAM CONSTRUCTION CO. LTD,** Civil Revision No. 8 of 2010 (unreported).

In our search for the relevant law(s), we have found the most convenient starting point to be Rule 9 of O.XX1 of the C.P.C. This rule reads as follows:-

"9 -When the holder of a decree desires to execute it, he shall apply to the court which passed the decree or to the officer (if any) appointed on his behalf, or if the decree has been sent under the provisions hereinbefore contained to another court then to such court or to the proper officer thereof."

The above provision notwithstanding, it is trite law that a decree-holder need not invoke the assistance of the court to satisfy the decree in his favour if he can manage to do so peaceably: See, **SHELL AND B.P. TANZANIA LIMITED V. UNIVERSITY OF DAR ES SALAAM** [2002] T.L.R. 225 at pages 232-3. However, where a decree –holder opts to seek the court's assistance, then the law must be strictly complied with, by all in the entire process.

Under section 33 of the C.P.C., a decree may be executed either by the court which passed it or by the court to which it is sent for execution. The latter court, we have to point out here, shall have the same powers in executing the decree as the one which had passed it: See, section 36 of the C.P.C.

This execution process begins with a formal or written application as provided for in O. XXI, r. 10(2). The application for attachment of property, depending on the nature of the property, must comply with the requirements of the rules 11 and 12.

Upon admission of the application, the court to which the application is made, **shall** under O.XX1, rule 15 (4), ***"order execution of the decree according the nature of the application".***

We want to reiterate here with added emphasis what the Court unequivocally stated in the case of **MS. SYKES INSURANCE** (supra). It said:

> *"...sub-rule (4) casts a mandatory duty on the court to make a specific order for the execution of the decree in the mode applied for. In our considered view, it is this formal order which forms the legal basis for the issuance of, say, a garnishee order, warrant of attachment of movable property, prohibitory order, etc, under rule 22".*

After this order, the court then proceeds *"to issue its process for the execution of the decree"* under rule 22.

It is a mandatory requirement under O.XX1, rule 22 (2) and (3) that every such process shall bear the date of the day on which it was issued, shall be signed by the judge, magistrate or such designated officer, as well as being sealed with the court's seal and shall specify the day on or before which it shall be executed. A warrant not executed until beyond the day specified thereon, becomes invalid unless extended by the issuing court prior to the expiry period. In terms of Rule 4 of the Court Brokers and Process Servers (Appointment, Remuneration and Discipline) Rules, 1997. (*"the Court Brokers Rules"*), the executing officer shall give the judgment debtor a notice of fourteen (14) days either to settle the decretal amount or otherwise comply with the decree.

The C.P.C. makes a clear distinction in the modes of attachment and subsequent sales to be employed in execution of money decrees in respect of movable and immovable properties. Attachment of movable properties, other than agricultural produce, in the possession of the judgment debtor, is effected by actual seizure of the property and the attaching officer shall keep it in his own custody (O.XX1, 42). On the other hand, attachment of immovable properties, is governed by rule 53 of O.XX1.

Rule 53 reads as follows:-

> *"53 - (1) Where the property is immovable, the attachment shall be made* ***by an order prohibiting the judgment debtor from transferring or charging the property in any way,*** *and all persons from taking any benefit from such transfer or charge.*
>
> *(2) The order shall be proclaimed at some place on or adjacent to such property by such means as are used locally to make public pronouncements* ***and a copy of the order shall be fixed on a conspicuous part of the property and then upon a conspicuous part of the court-house."***
> [Emphasis is ours].

The prohibitory order envisaged under the above provision shall be substantially in the Form No. 24, Appendix E to the Indian Code of Civil Procedure, 1908, which is part of our C.P. C., by virtue of the provisions of s. 101 (1) thereof: See, **SHELL AND B.P. TANZANIA LTD** (supra), **UNIAFRICO LTD & TWO OTHERS V. EXIM BANK (T) LTD**, (CAT) Civil Appeal No. 30 of 2006 and **MANTRAC TANZANIA LTD V. RAYMOND COSTA,** Civil Appeal No. 74 of 2014 (both unreported).

After a successful attachment and where no objection proceedings are preferred or if preferred they are disallowed, the executing court may proceed, **upon application by the decree-holder (r. 65 (3), to order** the sale of the property under rule 63. Where the court decides to sell such property, it must make a formal order in the court record. Where the sale is ordered is to be by public auction, the executing *"court shall cause a proclamation of the intended sale to be made in the language of the court"* after a proper notice to the decree -holder and judgment debtor stating the time and place of sale (rule 65). Rule 65 is identical with Rule 66 of the Indian Code of Civil Procedure, 1909. ("the Indian Code").

Commenting on rule 66 of the Indian Code, MULLA, in his treatise entitled **MULLA ON THE CODE OF CIVIL PROCEDURE ACT V OF 1909** at page 1826 of Vol. II 15 edition, says that:

> *"It has been held that when a sale is held without any publication of the proclamation, as distinguished from defective proclamation its void. Where apart from publication in local newspaper the mandatory provisions of r. 54 (2) have not been followed, the omission does not merely amount to a material irregularity as contemplated by r. 90.* ***Such***

an omission amounts to a clear violation of mandatory provisions and renders the sale as being without proclamation and therefore void."

[Emphasis is ours.]

SARKAR in his CODE OF CIVIL PROCEDURE, 11th edition (2007), at page 1768, is of the same view. He says:

*"An auction sale held in execution of a decree without fulfilling the requirements of the mandatory provisions contained in 0.21 Rules 64,66 will make the sale void ab initio [**Dilip Kumar Singh @ Dilip Kr. Sinha v. Mostt. Sakuntala Devi,** 2003(51) (2) BLJR 978....*

*R. 66(1) is mandatory and it cannot be waived. Total absence of proclamation of sale is not an irregularity but makes the sale void [**Jayarama v. Vridhagiri,** 44 m 35: A 1921 m 583... **Vijaykumar Ramrang Chaudhar v. D.K. Soonawalla,** A 2005 Bom 174 (179)... Issuance of sale proclamation is mandatory. Sale held without complying with such mandatory provision would be a nullity and void ab initio [**Madappa v. Lingappa** A 1989 Kant 60]."*

Elaborating on r. 90 of the Indian Code which has it equivalence in rule 88 of our C.P.C., **MULLA** (supra) thus states at page 1889:-

> *"6. When the proclamation is not in accordance with rule 54 as required by sub-rule (1), it is a material irregularity within rule, 90, but when there is a total absence of proclamation, the sale is a nullity. It has been held that where the requirements as to publication laid down in r. 54(2) have been altogether ignored, there is no publication at all and such non-compliance is not merely a material irregularity.* ***Failure to affix the proclamation on any of the items of properties proclaimed for sale constitutes absence of publication amounting to illegality."***
> *[Emphasis is ours].*

Rule 67 of the Indian Code is identical with rule 66 of our C.P.C. which provides thus:-

> *"66- (1) Every proclamation shall be made and published, as may be in the manner prescribed by rule 53, subrule (2).*
>
> *(2) Where the court so directs, such proclamation shall also be published in the Gazette or in a local*

newspaper, or in both, and the costs of such publication shall be deemed to be costs of the sale.

(3) Where property is divided into lots for the purpose of being sold separately, it shall not be necessary to make a separate proclamation for each lot, unless proper notice of the sale cannot, in the opinion of the court, otherwise be given".

Equally worth our consideration in this ruling is rule 67 on the times of sale. It is provided as follows in this rule.

"67. Save in the case of property of the kind described in the proviso to rule 44, ***no sale hereunder shall, without the consent in writing of the judgment debtor, take place until after the expiration of at least thirty days in the case of immovable property,*** *and of at least fifteen days in the case of movable property, calculated from the date on which the copy of the proclamation has been affixed on the court-house of the judge or magistrate ordering the sale".*

[Emphasis is ours].

Commenting on Rule 68 of the C.P.C. which is identical with Rule 68 of the C.P.C., save for the number of days, MULLA (supra) at page 1835, says:

"If a sale is held before the expiration of the period prescribed by this rule, it is not void, but the case is one of material irregularity within the meaning of s. 90, and the sale will be set aside if the court is satisfied that substantial injury has resulted from the irregularities".

Having, we believe, adequately covered the law governing execution of decrees essential for resolving the pertinent issues before us, it is apt now to apply it to the undisputed facts in these proceedings.

We have no flicker of doubt in our minds that the judgment creditor/ the 1st respondent, had formally applied for execution of the decree to the High Court which passed the decree in terms of 0.XX1 r. 9. The decree, as we have already shown, was subsequently transferred to the High Court, Land Division, Dar es Salaam, for execution. The order of transfer made under 0.XX1 rr 5 and 8 of the C.P.C. was made in the absence of the parties.

We have already shown that on 16th February, 2015, Mr. Stolla's application for stay of the execution proceedings was rejected by the Deputy Registrar.

In rejecting Mr. Stolla's application, the Deputy Registrar had reasoned thus:-

> *"Once again I reiterate the earlier position of this court that anything to stop the attempt to execute the transferred decree for execution from Moshi (the sending court) which required this court to execute the order must come from either the sending court or the supreme court of the land (Court of Appeal). The mere allegation that there is a pending application to stay execution before the High Court Moshi cannot suffice in the absence of the order to stay. As such, I hereby order the execution to proceed and in this regard, Rhino Auction Mart as C/broker is hereby appointed to undertake the exercise of the execution process. The warrant of attachment be issued to that effect. It is so ordered".*

We think that the learned Deputy Registrar got it wrong. In our respectful opinion, the executing court had the power to entertain the application and grant it or reject it but not on the basis stated by the Deputy Registrar.

The power of the executing court to stay execution is granted by O.XX1, r. 24(1) of the C.P.C which stipulates as follows:-

"24.-(1) The Court to which a decree has been sent for execution shall, upon sufficient cause being shown stay the execution of such decree for a reasonable time, to enable the judgment debtor to apply to the court by which the decree was passed or to any court having appellate jurisdiction in respect of the decree or the execution thereof, for an order to stay execution or for any other order relating to the decree or execution which might have been made by such court of first instance or appellate court if execution had been issued thereby, or if application for execution had been made thereto".

That being the case, it is our considered opinion that the executing court erred in law to refuse to determine the applicants' application on merit, in as much as there was already a pending application for stay of execution in the court which had passed the decree. We accordingly find merit in the applicants' listed first grievance. This finding, which in our opinion is not determinative of the controversy, of necessity leads us to the second critical issue. This is whether it was proper and lawful for the applicants' property on Plot No. 62 Msasani area to be sold in satisfaction of the decree.

A conclusive answer to the second issue will primarily depend on whether or not the entire execution process was carried out in accordance with the mandatory requirements of the law. It is now settled law that material irregularities in the execution processes will not render the subsequent sale void unless substantial injury is proved by the judgment debtor. All the same, it is settled law, that illegalities committed in the execution process, will make the sale void ab initio.

There is no gainsaying here, that the executing court, in compliance with the mandatory provisions of O.XX1, r. 15(4) of the C.P.C. ordered the execution of the decree to issue. It is important to point out here that one of the modes preferred by the decree-holder in the execution of the decree was by attachment and sale of the applicants' landed properties, i.e. three (3) houses in Dar es Salaam. These were: a house on Plot No. 62 Kimweri/Laibon Road, Oyster Bay, a house on Plot No. 571 Mikocheni and a house on Plot No. 66 Block F Drive- in Estate, Masaki.

As shown above, after ordering the execution process to proceed on 8th May, 2015, the executing court ordered forthwith, "*The warrant of attachment be issued to that effect.*" We have noted with concern that this

order does not indicate what was to be attached. We have convinced ourselves that the words *"to that effect"* must have related to the three houses mentioned above. That being the case, one would have expected prohibitory orders, one in respect of each house, to be issued by the executing court in terms of O. XX1, r. 53(1) of the C.P.C. We have found no such formal orders on record either. On the contrary, we have found one improvised form, totally different in form and substance from Form No. 24, Appendix E to the Indian Code, dated the same day, headed **"ATTACHMENT ORDERS"** and addressed to one **"JOSHUA E. MWAITUKA t/a RHINO AUCTION MART & COURT BROKER".**

The most relevant part of this Form reads as follows:

> ***"TO JOSHUA E. MWAITUKA,***
>
> ***t/a RHINO AUCTION MART & COURT BROKERS***
>
> ***WHEREAS*** *by the Decree of this Court dated 1st JULY, 2011 the judgment debtors were ordered to pay the decree holder the sum stated in the decree of the court. Upon failure of the judgment debtors to pay as stated in the decree of the court, the decree holder submitted the search report of*

the properties to be the subject of execution exercise as directed in the ***order for execution*****.....**

AND WHEREAS *the judgment debtors have failed to pay the principal amount plus interest now amounting to* ***Tshs 3,552,933,021/=***

NOW THEREFORE, *you the said,* ***JOSHUA E. MWAITUKA,*** *t/a* ***RHINO AUCTION MART & COURT BROKERS,*** *are directed to execute the Decree by attaching the properties registered under certificate of* ***title no 79997, located on plot no. 62 MSASANI AREA*** *within Kinondoni Municipality,* ***Dar es salaam*** *in the name of* ***ABUBAKAR RAJAB IBRAHIM of P.O. BOX 605 DAR ES SALAAM,*** *property registered under certificate of* ***title no. 36576 located on plot no. 571 MIKOCHENI PHASE II AREA*** *within Kinondoni Municipality in* ***DAR ES SALAAM*** *in the name of registered under certificate of title no. 21864 located on plot no. 306* ***REGENT ESTATE AREA*** *within Kinondoni Municipality in* ***DAR ES SALAAM*** *in the name of* ***ABUBAKAR RAJAB IBRAHIM of P.O. BOX 4958 DAR ES SALAAM*** *be attached and hold the same until you are paid Tshs* ***3,552,933,021/=,*** *plus brokers fees and court commission or otherwise directed by this court.*

You are further commanded to return this warrant of attachment ***ORDER*** *on or before* ***21st day of MAY 2015*** *showing the manner in which this order has been executed or failed to be executed.*

GIVEN under my hand and the seal of the Court this ***8th day of MAY 2015.***

R.E KABATE

DEPUTY REGISTRAR"

We have certainly been intrigued by this so called **"ATTACHMENT ORDERS"**. In the first instance, the attachment was addressed to the court broker, who was neither the judgment debtor nor the owner of the three houses, contrary to the letter and spirit of O. XX1, r. 53(1) of the C.P.C. What was supposed to be issued here was an order prohibiting and restraining the judgment debtor from transferring or charging any of the three houses by way of sale, gift or otherwise until further orders from that court (the prohibitory orders). Secondly, it was an omnibus one. As we have already demonstrated, since it is necessary to make the judgment debtor aware that attachment of his immovable properties has been effected, a separate form ought to have been issued in respect of each house and addressed personally to the judgment debtor and affixed on each house. Since all this was not done, it cannot be safely held that there

was any valid attachment of any of the three house. It is our finding, therefore, that this was a material irregularity.

As we have alluded to, the court broker informed by letter the "Registrar" of his compliance with the commands contained in the "Attachment Orders". The letter does not indicate how the three houses were attached. Yet, on the basis of the said letter, the Deputy Registrar, with unparallel promptitude, issued a proclamation of sale order on the same day he received the letter, that is on 22nd May, 2015.

The order of sale reads thus:

> *"Upon filing of the attachment report by the court broker indicating the expiration of the 14 days notice to the J/Debtor's issued by the court broker requiring them to pay the decretal amount which report was filed today the 22nd May, 2015 whereas the 14 days notice expired yesterday the 21st May, 2015. I have no doubt whatsoever to go ahead the issuing the proclamation of sale against the immovable properties attached by the order of this court. The proclamation of sale be issued to sale the attached the debt (sic). If the amount after sale won't satisfy the decretal amount, then other*

properties as ordered in the application for execution will be preferred."

Contrary to the mandatory provisions of rule 67 of O.XX1, of the C.P.C., it is shown in the so called proclamation of sale Form, that the sale was to take place within fourteen (14) days on a date to be "*conveniently scheduled by the appointed court broker."* We have found this also to be a material irregularity from three perspectives. One, there was no application for an order for sale from the decree-holder as is required under rule 65(3). Two, there was no written consent of the judgment debtors in terms of O.XX1, rule 67. Three, the issued Form does not substantially conform with Form 29, Appendix E of the Indian Code.

In our view, if the above pointed out three irregularities were curable under rule 88, we are convinced that there was a fourth incurable irregularity. This is that there was no valid publication of the proclamation of sale.

We have already demonstrated that it is an unwaivable requirement of the law that the sale order must be *"proclaimed at some place on or adjacent to such property by such means as are used locally to make public pronouncements".* It is a further mandatory requirement that a

proclamation of sale form whose copies were to have been affixed on the

said house and/or the court-house as the law mandatorily requires. The respondents did not show us any such order or document either.

By way of conclusion, we can now state with certitude that on the material before us, it is established that there was no valid attachment of the applicants' house situated on Plot No. 62 Msasani area, Dar es Salaam. There is also no dispute on the fact that the said house was sold on a public auction by the 2nd respondent in execution of the decree in favour of the 1st respondent. The said house, we have established, was sold in utter violation of the provisions of rule 67 of O.XX1 of the C.P.C. Worst of all, the house was sold without any publication in terms of OXX1, rules 53(2) and 66(1). The latter omission only rendered the sale void *ab initio,* and we so declare. What then are the legal consequences of this finding and declaration?

It was submitted by counsel for the 1st respondent that the purchaser that is, the 3rd respondent, has already paid the purchase price and is *"already in possession of the certificate of sale for purchasing the property".* We are prepared to readily accept the former assertion, but not the latter. This is mainly because, the executing court shall only grant a certificate of sale under O.XX1, r. 92 after the sale has become absolute. A

sale becomes absolute after the executing court has made an order under r. 90(1) confirming the sale. We have found no such order on record. Indeed, the last order in the record is the one made on 22nd May, 2015 issuing a proclamation of sale. That being the case, the sale has not been confirmed: see **PETER ADAM MBOWETO v. ABDALLA KULALA** [1981] T.L.R. 335.

All the same, even if it were proved that the sale has already been confirmed this alone would not have prevented us from make appropriate orders as the justice of the case warrants. This was not a good example of a *bona fide* purchaser for value *per se*. We are saying so because there can be no bona fide purchase by public auction, when there is no due publication as was the case here. It is clear then that no title has passed to the alleged bonafide purchaser

In view of the above discussion, we have found ourselves constrained to hold that the applicants' complaint is not wanting in merit. We, therefore, hold without demur, that the execution process was marred by material irregularities and patent illegality. The established illegality rendered the sale of the applicants' house to the 3rd respondent a nullity

and no good title passed to him. For this reason, we set aside the sale of the house situate on Plot No. 62, Msasani area, Dar es Salaam. We order that the 3rd respondent be refunded his purchase price by whosoever is holding it.

Each party to bear his/her/its own costs.

It is so ordered.

DATED at DAR ES SALAAM this 30th day of October, 2015.

E.M.K. RUTAKANGWA
JUSTICE OF APPEAL

M.S. MBAROUK
JUSTICE OF APPEAL

B.M. LUANDA
JUSTICE OF APPEAL

I certify that this is a true copy of the original.

E.Y. MKWIZU
DEPUTY REGISTRAR
COURT OF APPEAL