NATIONAL BANK OF COMMERCE v. DAR ES SALAAM EDUCATION AND OFFICE STATIONERY

COURT OF APPEAL OF TANZANIA

(Omar, Mnzavas and Lubuva, JJA)

CIVIL APPEAL NO 16 OF 1995

November 24, 1995 – DAR ES SALAAM

(From the decision of the High Court of Tanzania at Dar es Salaam, Bubeshi, J)

Civil Practice and Procedure – Temporary injunction – When applicable – Order 37 Rule 1 of the Civil Procedure Code.

Civil Practice and Procedure – Temporary Injunction – Order of injunction sought to set aside the sale of a house – Whether proper.

Civil Practice and Procedure – Temporary injunction – Whether may be issued against strangers to the suit.

Banking Law – Securities – Mortgages – Mortgage deed empowering mortgagee to sell the mortgaged property – Whether and under what circumstances Court may interfere with such sale.

The respondent borrowed money from the appellant bank. As security, a house was mortgaged in favour of the appellant. Upon failure to repay the loan which had swollen more than seven fold the appellant exercised its right under the mortgage deed and sold the house. After the sale of the house the respondent filed a suit followed by, on the next day, a chamber application filed under 0.37 R.1 and ss 48 and 95 of the Civil Procedure Code for an order of temporary injunction restraining the NBC and Registrar of Titles from transferring title of the house and preventing eviction of tenants therefrom. The judge who heard the application issued an order that the sale of the house be set aside, and that NBC and the Registrar of be restrained from transferring the title to the house and further prevented eviction of the tenants. Aggrieved the appellant appealed against the decision of the High Court arguing, *inter alia*, that the order to set aside the sale of the house was not properly given under 0.37 R.1, temporary injunction may not be issued against strangers to the suit, and that the court had no power to interfere with the appellant while exercising its power under the deed of mortgage.

Held:

(i) Where a mortgagee is exercising its power of sale under a mortgage deed the Court cannot interfere unless there was corruption or collusion with the purchaser in the sale of the property;

(ii) Order 37 Rule 1 was inapplicable in the circumstances of the case because there was no court decree in execution of which the house was sold;
(iii) Order 37 Rule 1 would not be applicable in this case on account of the fact that the house was mortgaged in which case it could be sold in execution of the mortgage without resort to a court decree;
(iv) Since the order setting aside the sale of the house was a nullifying act it could not be obtained in an application for temporary injunction under Order 37 Rule 1.
(v) A temporary injunction cannot be issued against strangers to a suit.

Appeal allowed.

Case referred to:
(1) *Garden Cottage Food Ltd v. Milk Market Board*

Uzanda for the appellant.
Maira for the respondent.

Omar, JA delivered the following considered judgment of the Court:

This appeal was brought by Mr *Uzanda*, learned Counsel for the appellant, National Bank of Commerce, to oppose the High Court order (Bubeshi, J) which set aside the sale of a house on plot No 5 Block 3A Kinondoni, Dar es Salaam. The order also restrained the NBC and the Registrar of Titles from transferring Title No 22576 of this house to any person, and also prevented eviction of tenants from this house.

In 1986 the respondent, Dar es Salaam Education and Office Stationery, decided to gain liquidity at the appellant bank (that is National Bank of Commerce, Bank House Branch) where it held an account. The directors of this company applied for an overdraft facility first of Shs 400,000/= in February 1986 to be followed by another overdraft of Shs 1,000,000/= in August 1986 and lastly of Shs 2,000,000/= in March 1987.

The Director of respondent company, Mr Omari Mgeni, deposited the title deed of his own house situated at Kinondoni as security for the second overdraft of Shs 2,000,000/=. In May 1994, seven years later, the appellant bank informed the respondent company that the debt had risen to Shs 15,371,538/20/= and that if not settled the house so mortgaged to them would be sold. It was sold which gave rise to the first application to the High Court by the respondent company to set aside the sale and it was duly set aside for reasons given by the court and now appealed against by Mr

Uzanda, counsel for the bank, who made the following submissions: That the application was made and filed one day after the sale, that is on 30 November 1994, under Ord 37 rule 1 and ss 48 and 95 of CPC for a temporary injunction. The object of Ord 37(1) CPC 1966 is preventative, the whole purpose is to prevent or restrain so as to preserve the subject of the suit in *status quo* for the time being. He cited vol III 6th ed page 3966 *Chitley and Rao* which explains that any order which has the effect of changing or disturbing or altering the *status quo* is not covered by Ord 37 rule (1). Mr *Uzanda* further stated that *status quo* as defined in *Garden Cottage Food Ltd v Milk Market Board* (1) is the state of affairs existing immediately before the filing of the application and injunction should be to maintain the existing status before determination of the suit. The house was advertised to be sold on 7 September 1994 and it was sold on 29 November 1994 and the suit was filed on 30 November 1994. The High Court issued the order that the sale be set aside, this Mr *Uzanda* argued was a nullifying act and not a restraining act and it cannot be made under Ord 37(1) CPC. Not only was the chamber application incompetent but the order was without legal authority. If only intended sale was under an execution of a decree but it was not the case, this he quoted from *Chitley and Rao* vol III 6th ed and he submitted that the order of the High Court should be set aside. He further said that a temporary injunction cannot be issued against a stranger to the suit. Registrar of Titles is a stranger to the suit and he was by this order of Bubeshi, J restrained from changing the name of the owner in his books. Purchaser of this house is also a stranger to the suit, he too was restrained by this order. Equity acts *in personum* not *in rem*. Mortgagee, that is the Bank, had a mortgage deed which entitled the Bank to sell without coming to court. Section 48 CPC cannot be invoked because the mortgagee (the Bank) sold it; it was not attached property. NBC was a mortgagee and was exercising its power of sale under a deed of mortgage. Court cannot interfere unless there was a corruption of collusion with the purchaser in the sale of property. Unless the price is very much less so as to import fraud, corruption or collusion. The High Court, he argued, had no power to interfere with the sale. Temporary injunction was issued without legal authority and it should be set aside in its entirety, a declaration that the sale was valid and the costs to the appellant in both courts.

Mr *Maira*, learned Counsel for the respondent Dar es Salaam Education and Stationery Office, stated in reply that the property was auctioned on 19 November 1994, the certificate of auction was

dated 8 December 1994 and the Chamber Summons was presented for filing on 1 December 1994 it was meant to prevent or arrest the sale of this property in the words NBC should not continue with the sale of this property or that its completion should be arrested. Two houses were offered as security for this loan and the house situated at Singida if sold would deprive its owner of the roof over his head. Mr *Maira* thereafter supported the ruling of the High Court and prayed that it should be left undisturbed. Mr *Uzanda* in reply to Mr *Maira's* submissions stated that they were all irrelevant. Even if the house had not been sold such order of setting aside a sale could not have been made under Ord 37(1) CPC because the house was not in danger of being sold in execution of a decree, so the order could not be made at all. Also the order could not be made against Registrar of Titles, because temporary injunctions are not issued against strangers, purchaser of the house is also a stranger. The applicant/respondent was not a party to the contract guaranteeing the loan. Mr *Uzanda* continued by saying that Mr *Maira* conceded that the respondent was indebted under the banking facilities. He further said that s 95 CPC was mentioned as an alternative to Ord 37(1) CPC; this is erroneous. A sale takes place when the hammer falls and this took place on 29 November 1994 and 30 November 1994 was the date of filing the application that is why it was applied to be set aside. Corruption or collusion were not pleaded therefore the court was not entitled to interfere with the sale. Mr *Uzanda* said that Mr *Maira* had filed a suit for permanent injunction. Now he has applied for setting aside which is sufficient to dispose of his matter, that is his remedy. Interlocutory order does not decide the rights of the parties but this one of the High Court did decide the rights of the parties. Mr *Uzanda* then prayed for this appeal to be allowed.

We have carefully considered these submissions. The central issue in this appeal is the propriety of the order of 30 December 1994 by Bubeshi, J. In that order, the sale of House No 5 Block 3A Kinondoni, Dae es Salaam was set side. That was as a result of a chamber application filed by the respondent, Dar es Salaam Education and Office Stationery, under Ord 37 rule 1 and ss 48 and 95 of the Civil Procedure Code. In the main suit which is still pending before the High Court filed on 30 November 1994, the respondent who was the plaintiff was seeking for judgment and decree against the appellant (NBC) as defendant for:

'an order for a permanent injunction to stop the sale of the property

A situated on Plot No 5 Block 37A Kinondoni, Dar es Salaam until the facts in dispute are resolved in full.'

Otherwise the respondent was not disputing the debt and was willing to settle it upon the establishment of the extent of the
B debt. After the written statement was filed, before the hearing of the suit started, the respondent filed a chamber application which sought to have the sale of the house on Plot No 5 Block 3A Kinondoni set aside. From the affidavit deponed by one Omari Mgeni, the Executive Director of the respondent Company and the submission
C by Mr *Uzanda*, leaned Counsel for the appellant, it is apparent that the house in question was sold on 28 November 1994 when the matter was still pending before the High Court.

Under a certificate of urgency, on 1 December 1994, a chamber application was filed under Ord 37 rule 1 of the Civil Procedure
D Code to set aside the sale of the house. Order 37 rule 1 provides:

> '1. Where in any suit it is provided by affidavit or otherwise —
> *(a)* that any property in dispute in a suit is in danger of being wasted, damaged, or alienated by any party to the suit or suffer loss of value by reason of its continued use by any party to the suit *or wrongly sold in execution of a decree* ...' (Emphasis supplied.)

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On the basis of this provision, can it be said that in the instant case, the property, the subject matter of the suit pending, was the property sold in execution of a court decree? In our view, from the
F facts of the case, the answer is affirmatively in the negative. There was no court decree on the basis of which the house was sold. In that case, we are, with respect, in agreement with Mr *Uzanda*, learned Counsel for the appellant, that Ord 37 rule 1 was inapplicable in the circumstances of the case because there was no court
G decree in execution of which the house was sold. Furthermore, it is our view that Ord 37 rule 1 would not be applicable in this case on account of the fact that the house on Plot No 5 Block 3A Kinondoni was mortgaged in which case it could be sold in execution of the mortgage without resort to the court decree.

H Next we address our minds on the sequence of events leading to the sale of the house and the time when the order setting aside the sale was issued. If the sequence of events was as set out by Mr *Uzanda*, learned Counsel for the appellant, which was not controverted by Mr *Maira*, learned Counsel for the respondent, the ques-
I tion is whether the order of injunction which sought to set aside the sale of the house was proper. The sequence of events was that the

house was sold on 28 November 1994, the main suit was filed on 30 November 1994 and the chamber application, the subject matter of this appeal was filed on 1 December 1994. As indicated, if by 30 December 1994 the house had been sold, was the application for a temporary injunction under Ord 37 rule 1 to set aside the sale on 1 December 1994 of any practical effect? It is common knowledge that the purpose of an order for a temporary injunction as set out under Ord 37 rule 1 is to preserve and retain the *status quo* as obtains at the time immediately before the filing of the application until the determination of the suit. In this case, the matter had already been carried beyond the stage in which the restraining relief being sought would serve any purpose. That is, the house had already been sold in which case there was nothing from which the appellant would be restrained to do. The sale having taken place any measure aimed at preventing the sale from taking place would be an exercise in futility. This was the object of the main suit. As for the sale, the subject matter of the chamber application, in this, with respect, we accept Mr *Uzanda's* submission that in the instant case, it was not a restraining act but a nullifying act which could not be sought in an interlocutory order under Ord 37 rule 1 of the Civil Procedure Code. It being a nullifying act, it could not, in our view, properly be obtained in an application for temporary injunction under Ord 37 rule 1.

Mr *Maira's* submission that the High Court was entitled to make the temporary order under Ord 37 rule 1 because, as he stated though the sale of the house by auction had taken place, the legal formalities of conveyancing and transfer had not been completed, is with respect, untenable. It is our considered view that setting aside the sale of the house not being a restraining act but a nullifying act, would appropriately be dealt with in the course of determining the main suit and not in an application for a temporary injunction. As it happened, with due respect to the learned judge, the order of 30 December 1994 setting aside the sale of the house on Plot No 5 Block 3A Kinondoni pending the hearing of the main suit again renders the whole matter ineffectual. This is because, as pointed out, the main purpose of the main suit was to obtain a permanent order of injunction to stop the sale of the house until the facts are resolved in full. But by 28 November 1994, the matter was overtaken by events when the house was sold. The sale could no longer be restrained.

Finally, we wish to make brief mention on the extent of the order of 30 December 1994. In that order, the Registrar of Titles was also

restrained from transferring Title No 22576 in respect of the house on Plot No 5, Block 3A Kinondoni. The purchaser of the house was also restrained from evicting the occupants of the house. As succinctly elaborated by the learned authors of *Chitty and Rao*, 6th ed, vol III, it is common ground that a temporary injunction cannot be issued against strangers to the suit. In this case the Registrar of Titles and the purchaser of the house were not parties to the suit in which case, we accept Mr *Uzanda's* submission that it was not proper to have them included in the temporary order of injunction on 30 November 1994.

For these reasons, we are satisfied that the order for temporary injunction issued to set aside the sale was without any legal basis. The matter had been overtaken by events. It is accordingly set aside. We allow the appeal with costs to the appellant.

MICHAEL JOSEPH v. REPUBLIC

COURT OF APPEAL OF TANZANIA

(Kisanga, Mfalila and Lubuva, JJA)

CRIMINAL APPEAL 199 OF 1994

NOVEMBER 28, 1995 – DAR ES SALAAM

(From the judgment of the High Court of Tanzania at Dar es Salaam, Bahati, J)

Criminal Law – Armed robbery – What constitutes armed robbery.
Criminal Practice and Procedure – Charges – Charge of robbery with violence – In the commission of the offence an arm is used – Whether offence committed is one of armed robbery.

The appellant was charged with robbery with violence. Evidence led showed that during the commission of the offence the appellant used a knife. The trial court convicted and sentenced him to thirty years imprisonment and five strokes of the cane. On appeal to the High Court the main issue raised was that the sentence imposed was not proper in law because the offence did not amount to armed robbery. The appeal was dismissed. On further appeal to the Court of Appeal of Tanzania.