IN THE COURT OF APPEAL OF TANZANIA
AT DAR ES SALAAM

(CORAM: KWARIKO, J.A., MAIGE, J.A. And MWAMPASHI, J.A.)

CIVIL APPEAL NO. 166 OF 2019

HAMIS BUSHIRI PAZI ..... **1ST APPELLANT**
HAMIS BUSHIRI PAZI (as the Administrator of
the deceased estate of **NEEMA BUSHIRI PAZI**-Deceased and **...2ND APPELLANT**
MWAJUMA BUSHIRI PAZI-Deceased) .....**RD APPELLANT**
STUMAI BUSHIRI PAZI .....**4TH APPELLANT**
HATUJUANI BUSHIRI PAZI .....**5TH APPELLANT**

VERSUS

SAUL HENRY AMON .....**1ST RESPONDENT**
S.H. AMON ENTERPRISES LTD .....**2ND RESPONDENT**
MUSA HAMISI KAZUBA .....**3RD RESPONDENT**
KASSIM ALLY OMARI (as the Administrator of the
estate of **TATU BUSHIRI PAZI** deceased) .....**4TH RESPONDENT**

AND

THE ATTORNEY GENERAL .....**THIRD PARTY**

(Appeal from the decision of the High Court of Tanzania ,
Land Division at Dar es Salaam)

(Sambo, J.)

dated 9th day of March, 2012
in
Land Case No. 185 of 2004
.....

JUDGMENT OF THE COURT

7th February & 13th April, 2022

MAIGE, J.A.:

This judgment is a culmination of twenty years struggle for a piece of land described as house No. 113 Plot No. 4, Block 17, Kariakoo Area, Ilala District, Dar es salaam ("the suit property") which is currently held under certificate of title No. 57275 dated 24th March 2005 in the name of the second respondent (exhibit P4). It is not in dispute that until 2002, the

suit property was held under a letter of offer issued on 4th of January, 1990 in the names of the appellants and the fourth respondent (exhibit P2). The legality and validity of the change of ownership from the appellants and the fourth respondent on one hand to the second respondent on the other is the theme of this contention.

Though the instant appeal is against the judgment of the High Court of Tanzania, Land Division ("the trial court") dismissing the suit by the appellants against the respondents pertaining to the ownership of the suit property and other consequential reliefs, the genesis of the dispute is traceable from a three years lease agreement between the fourth and the third respondents in respect of a portion of the suit property constituting part of the fourth respondent's share. For the reasons which may not be relevant in this appeal, the fourth respondent prematurely terminated the said agreement and as a result, the third respondent commenced a suit against the fourth respondent vide Application No. 112 B of 1999 at the Regional Housing Tribunal of Dar es salaam ("the defunct trial tribunal").

At the end of the trial, the defunct trial tribunal pronounced a judgment in favour of third respondent for three substantive reliefs. **First,** payment of TZS 1,800,000.00 with interest as money had and received by the fourth respondent as rent. **Second**, payment of TZS 900,000.00 per

month from May 1999 to the date of full payment as loss of income. **Third**, the fourth respondent to rent out to the third respondent one room of his choice in the suit property for the agreed three years with the same terms as the breached lease agreement.

The fourth respondent appealed to the Housing Appeals Tribunal of Tanzania ("defunct appeal tribunal") vide House Appeal No. 20 of 2000 where it was decreed on 31st August, 2000 as follows:

> *"1. Appeal dismissed with few variations.*
> *2. The respondent to be refunded by the appellant Shs. 1,800,000/= with interests at court rate.*
> *3. The appellant to pay to the respondent a sum of Shs. 900,000/ per month from 15th May, 1999 to the date of judgment being for loss of income for breach of contract."*

The fourth respondent's further appeal to the High Court vide Misc. Civil Appeal No. 13 of 2000 proved futile. The appeal was dismissed in its entirety on 17th April, 2001. Her third appeal to this Court vide Civil Appeal No. 61 of 2002 was struck out on technical ground on 4th December, 2007.

It would appear from the record that, sometime after the decision of the defunct trial tribunal, the third respondent initiated execution proceedings at the Resident Magistrates' Court of Dar es salaam at Kisutu

("the executing court") vide RM Miscellaneous Cause No. 71 of 2000. In accordance with the certificate of sale (exhibit D1), which was issued on 26th July, 2001, the suit property was attached on 19th April, 2000 and sold to the first and second respondents on 13th day of May, 2001. On becoming aware of the execution proceedings, the appellants unsuccessfully instituted various proceedings to challenge the execution and sale of the suit property.

Still aggrieved, the appellants, seemingly under O. XX1 r. 62 of the Civil Procedure Code [Cap. 33 R.E. 2019] ("the Code") commenced, at the trial court, Land Case No. 185 of 2004 claiming among others, for declaration that the suit property belonged to them and that, the attachment, sale and their subsequent eviction from and demolition of the house on the suit property purportedly in execution of the decree between the third and fourth respondents were illegal and fraudulent. The particulars of fraud and illegalities were set out in paragraph 23 of the amended plaint as follows:

> *23. That the plaintiffs aver that the attachment, sale and demolition of the plaintiff's suit premises as well as the eviction of the Plaintiffs' tenants from the plaintiffs' suit premises by or at the instance of the 1st, 2nd and 3rd*

Defendants was actuated with fraud and was full of illegalities, improprieties and irregularities in that:

(i) The attachment and sale was carried out despite that the plaintiffs who own 6/7 of the suit premises were not parties to the application before the Regional Housing Tribunal of Dar es salaam.

(ii) That the suit premises were auctioned and sold without the plaintiffs or any of them having been adjudged or decreed to make payment to the third Defendant or any other person.

(iii) That the plaintiff's house was pulled down at the instance of the 1st and 2nd defendants without any court order to that effect.

(iv) That the plaintiff's tenants were evicted from the suit premises without being adjudged or decreed liable to the 3rd defendant by any court or tribunal.

(v) That the 1st and 2nd Defendants misrepresented before the Court that it was the decree holder whereas the plaintiff's tenants were judgment-debtors in order to justify the unlawful and illegal eviction of the plaintiffs' tenants from the suit premises.

(vi) That the attachment and sale was done without first evaluating the suit premises and identifying the

rightful share of the 4th defendant in the suit premises so that only that identified share would be amenable to attachment and sale.

(vii) That the suit premises are registered and a caveat had been entered therein and thus the 1st and 2nd defendants are not a bona fide purchaser because they knew that the greater portion of house No. 113 Plot No. 4, Block 17, Kariakoo Area, Ilala District, Dar es salaam did not belong to the 4th defendant and were encumbered. A copy of the caveat to that effect is attached hereto and marked ***Annexure P-15*** *in relation to which the plaintiffs crave for leave out of the court to refer it as forming part of this plaint.*

(viii) That having noted that the suit premises were co-owned the 1st and 2nd defendants did not bother to look at the tenor and content of the decision and decree of the Regional Housing Tribunal of Dar es salaam to establish that the plaintiffs were not parties to the proceedings in the Tribunal.

(ix) That the 2nd defendant obtained a certificate of title using falsified information and documents.

In response to the claim, the 1st and 2nd respondents filed a joint written statement of defence and in paragraphs 11, 12 and 13 thereof they rebutted the facts in paragraph 23 of the amended plaint as follows:

11. *The defendants dispute the contents of paragraph 23 of the amended Plaint and state in reply that no fraud was committed by any one of the defendants and no irregularities, illegalities or improprieties have been committed in relation to the property as the first and 2nd defendants are purchaser for value in a public auction without any notice of any incumbrance.*

12. *In further reply, except for the averments in 23(iii), 23(v), 23(viii) and 23(ix) of the amended plaint which touch on the 1st and 2nd defendants , the other allegations are misdirected as the defendants are not Court officials who conducted the sale by public auction, and no misdeeds were committed ed by the said officials.*

13. *As regard the allegation in paragraphs 23(iii), 23(v), 23(viii) and 23(ix) of the amended plaint, the defendants specifically state that:-.*

    (i) Pulling down of the old structure was intended to give way for construction of an ultra-modern property in accord with the Development Plan in the area, and the Building Permit.

    (ii) The defendants did not attend court to ask for any unlawful orders and no misrepresentation.

(iii) *The plaintiffs were aware of the order for sale by public auction and did not take steps to intervene or pay the judgment debts, and their advocates took wrong steps which ended in the plaintiffs' disfavor.*

(iv) *No falsified information was used to obtain any service or order from court or title to the property.*

Aside from filing a written statement of defence as above stated, the first and second respondents instituted a third party notice against the Attorney General ("the third party"), claiming indemnity. In paragraph 5 of the affidavit in support of the application for leave to issue a third party notice, the first and second respondents explained the reasons for the issuance of the notice at paragraph 5 thereof in the following words:

"4. *That the application to join the Attorney General as a third party is founded on the ground that the applicants bought the property through court appointed broker in execution of a lawful court decree, and that if there is any fault, such fault, is not attributable to the applicants as buyers of the property for value without notice of any incumbrances , hence the Attorney General must be in a position to indemnify the applicants in the events this court impugns the sale."*

Upon being served with a third party notice, the third party filed a written statement of defence against the main suit in which it raised a notice of preliminary objection to the effect that, the third party notice was violative of O. 1 r. (1) (a) of the Code, the objection which was overruled.

On his part, the third respondent generally denied the allegation of fraud and illegalities in paragraph 6 of his written statement of defense.

At the final pretrial conference, the trial court framed five issues for determination. **First**, whether the plaintiffs are lawful owners of the suit property. **Second,** whether the plaintiffs were unlawfully evicted from the suit property. **Third**, whether the sale of the suit property under court's supervision to the first and second defendants was lawful and valid. **Fourth**, weather the 1st and 2nd defendants are entitled to recover compensation and loss from the 3rd party. **Fifth**, what reliefs are the parties entitled to.

In a bid to establish their case, the appellants paraded four witnesses. The first appellant Hamis Bushiri Pazi in his individual capacity and as the administrator of the estates of the second and third appellants, testified as PW1. It was his evidence that, the suit property had until the date of the sale under discussion, been under the joint ownership of the appellants and the fourth respondent with the first appellant owning two

shares while the last four appellants and the fourth respondent owning one share each. He produced the relevant letter of offer as exhibit P2. He further produced which were admitted as exhibits P1, P3 and P4, respectively, letters of administration of the estate of the second appellant, a lease agreement dated 28/04/2000 and a photocopy of the certificate of occupancy on the suit property.

PW1 testified that, according to the lease agreement in exhibit P3, the appellants had to receive a rental amount of TZS 14,400,000.00 per annum, the amount which they were denied after they were unlawfully evicted from the suit property and the house therein demolished without there being a court order. He blamed the second respondent for illegally purchasing the entire suit property in an execution of a decree against the fourth respondent who had only one share in the property.

The fifth appellant testified as PW2 whereas the fourth respondent as PW3. They in essence repeated what PW1 testified about. In her evidence on cross examination, PW3 admitted that, at the time when she was testifying, there was a 8 floor building on the suit property developed by the second respondent.

Sambon Mkamba who represented himself as an Assistant Land Officer from Ilala Municipal Council testified as PW4. His testimony was

essentially based on record. He told the trial court that, according to the record, the suit property had from 1990 to 2005 been under the joint ownership of the appellants and the fourth respondent through the letter of offer in exhibit P2 which they duly accepted having paid all the relevant fees. On cross examination by the advocate for the first and second respondents, PW4 produced which was admitted as D1, the certificate of sale under which the suit property was transmitted, by operation of the law, to the second respondent.

The first respondent testified as DW1. He represented himself as a businessman. From 1991 to 1999, it is in his testimony, he was a sole proprietor trading as S.H. Amon Enterprises Co. Limited. In 1992, the said name was incorporated as a limited liability with the first respondent, Silvester, Sarah and Loyce being shareholders. He said, he purchased the suit property in 2001 in a public auction at the total purchase price of TZS 105,000,000/=upon there being advertisements in newspapers and by loud speakers that, the same was being sold pursuant to a court order. On cross examination, he admitted that he did not see the said newspapers. He further admitted that he did not go to the office of the court broker nor to the municipality before the purchase. Further admitted, is the fact that he did not go to the court to know who the owner was.

The second respondent on his part, called her company secretary Godwin Mussa Mwapongo who testified as DW2 and produced which were admitted as exhibits D2, D3, D4, D5 and D6, respectively, a ruling of the executing court dated 15/11/2000, a ruling of the executing court dated 27/8/2001, the ruling of the High Court dated 19/4/2002, a notice of appeal dated 30/4/2002 and a drawn order of the executing court dated 20/12/2002. He told the trial court that, in early May, 2001, there were minute in his office that the 2nd respondent wanted to purchase a house to be sold by a court broker in execution of a decree in Misc. Civil Application No. 71 of 2000. He perused the file and found that the intended sale was proper because there was an attachment order of 19th April 2000 and a proclamation for sale and a ruling on objection proceedings (exhibit D2). He said, he was informed on 13th May, 2001 that, the second respondent won at the auction and purchased the suit property. He testified further that, when they wrote to the executing court on how the suit property could be handed over to them, they noted of their being an objection which was dismissed on 27 August, 2001 (exhibit D3). He said, the appellants applied for revision and then applied for setting aside the sale without a success (exhibits D4 and D6).

On their part, the third and fourth respondents testified as DW3 and DW4, respectively. The third party did not have any witness to call.

At the end of the trial, the parties were afforded an opportunity to address the trial court generally by way of written submissions. The third and fourth respondents opted not to file any written submissions

In its judgment, the trial court dismissed the suit for being without merit. In respect to the first and third issues, the trial Judge having observed that; after the first and second respondents had procured a certificate of title, the sale became absolute and any proceedings to challenge the same were barred under O. XXI r. 90(3) of the Code, declared the second respondent the lawful owner of the suit property and thus answered the first and third issues against the appellants. In his own words the trial Judge stated at page 441 and 442 of the record as follows:

> *"The sale having become absolute under Order XXI Rule 90(3) of the Code, the 1st and 2nd defendants were issued with a certificate of sale under Order XXI Rule 92 of the Code, on 20th July, 2001. This was a necessary document of the court which assisted the 1st and 2nd Defendants to obtain a certificate of occupancy or Title Deed No. 57275 on 24th March 2005. Under section 100(1) of the Evidence Act, CAP 6, a title deed proves ownership of that land and ".. no evidence shall be given in proof of the terms of such contract, grant, or other disposition of property, or of such*

matters except the document itself, or secondary evidence of its contents in cases in which secondary evidence is admissible under the provisions of this Act.

In view of what I have narrated herein above, I am completely satisfied that the Plaintiffs are not the lawful owners of house No. 113, Plot No. 4 Block 17, Kariakoo, Area, Ilala District in Dar es salaam. The lawful owner of the landed property is S.H. AMON ENTERPRISES COMPANY LIMITED, the 2nd Defendant. The facts and legal position exposed herein above, are the reasons why the court's decision differ with the opinion of both gentlemen assessors in this regard, it follows here to state that the sale of the said property to the 2nd Defendant under the court's supervision was lawful and valid in all respects. The 1st issue is negatively answered while the 2nd one is positively answered".

Consequential to its holding in respect of the first and third issues, the trial court answered the second issue against the appellants for the reason that, they were not justified to take possession of a property belonging to another person without his consent. As regards the fourth issue which related to the thirty party, the trial court held as follows:

"As the learned State Attorney rightly submitted in his final submissions, which is in line with the adduced evidence, the decree holder, Mussa Hamisi Kazuba, rightly applied for execution of his decree in the RM'S. The Plaintiff had and utilized their rights

to challenge the attachment and sale of the property. The court conducted fair hearing and finally determined the objections which were dismissed with costs as per exhibits D2 and D3. Decisions of Courts of law cannot be faulted by joining the court in another Civil proceedings the subject matter being that decision pronounced when the court was performing its judicial functions. That notwithstanding, in the instant case we have seen that no wrongful act (s) was done to the 1st and 2nd Defendants by the lower court which would entitle them to be awarded damages."

In the memorandum of appeal, the appellants have enumerated 11 grounds of appeal which in summary fault the trial court for; **One**, holding that the appellants are not the lawful owners of the suit property; **Two,** not holding that the attachment and sale of the suit property were tainted with fraud, collusion and/ misrepresentation; **Three,** not holding that the sale of the suit property was illegal and improper; **Four** and in the alternative, not holding that the attachment and sale of the interests of the appellants in the suit property was improper and illegal; **Five** and further alternative, not holding that the attachable and sealable interest in the suit property was that of the 4th respondent; **Six**, holding that the eviction of the appellants from the suit property was lawful and proper; **Seven**, holding that the suit instituted by the appellants was barred;

Eight, holding that, the first and second respondent were bonafide purchasers for value without notice; **Nine**, dismissing the suit with costs; **Ten**, not entering a judgment and decree in favour of the appellants and **Eleven**, being otherwise faulty and wrong in law.

At the hearing of the appeal, Mr. Melchisedeck Lutema assisted by Ms. Dora Mallaba, both learned advocates, represented the appellants. Mr. Mafuru M. Mafuru, also learned advocate represented the 1st and 2nd respondents whereas Ms. Jesca Shengena, learned Principal State Attorney, Mr. Masunga Kamihanda and Ms. Rose Kashamba, both learned State Attorneys, represented the third party. The third and fourth respondents appeared in persons and were unrepresented.

In their oral address, Mr. Lutema who argued the appeal for the appellants and Ms. Shengena who argued the same for the third party, fully adopted their written submissions to form part of their oral arguments. Mr. Mafuru did not file any written submissions. He however made an oral argument to oppose the appeal. The third and fourth respondents had nothing to submit. However, while the third respondent opposed the appeal, the fourth respondent supported it.

It is worthy to note that, in his oral address, Mr. Mafuru called upon the Court not to consider the appellant's submissions in respect of 2nd, 3rd,

4th, 5th, 6th, and 8th grounds as they raise new issues which were neither pleaded nor adjudicated upon at the trial court. By way of rejoinder submission, Mr. Lutema contended that, the claims as to illegality and fraud were pleaded and particularized in paragraph 23 of the amended plaint and therefore, were part of the dispute at the trial court.

We have gone through paragraph 23 of the amended plaint and examined the record in line with the appellants' submissions and we are satisfied that, the complaints in the grounds under discussion are captured by the facts in the amended plaint and reflected in the second and third issues. We have noted however that, the appellants submissions more particularly in paragraphs 4.2.2, 4.2.3 and 4.5.12 of the written submissions, seek to question the existence of attachment order and proclamation for sale which was neither raised in the pleadings nor evidence. Indeed, the said issue was not even adjudicated upon by the trial court. Therefore, since what was in dispute at the trial court was the legality and effectuality of the attachment and proclamation for sale and not their existence, we shall not, in our judgment, consider any submissions which purport to question the existence of the same. This is in line with the principle in **Hassan Bundala @ Swaga v. Republic,** Criminal Appeal No. 386 of 2015 (unreported) to the effect that:

"It is now settled that as a matter of general principle this Court will only look into matters which came up in the lower courts and were decided; and not new matters which were neither raised nor decided by neither the trial court nor the High Court on appeal"

With those remarks, we shall now address ourselves to the issues raised in the said grounds of appeal and the rival submissions. In our careful reading, the grounds of appeal raise four substantive issues. **One**, whether the attachment, sale and subsequent eviction of the appellants from the suit property was illegal and ineffectual. **Two,** whether, the institution of the suit at the trial court was barred by law. **Three**, whether the second respondent is the *bonafide* purchaser for value without notice. **Four**, whether the trial court was right in holding that, the appellants were not the lawful owners of the suit property or part thereof. We should perhaps put it clear right from the outset that, since the dispute between the parties has, since the trial court been limited to the appellants' alleged 6/7 ownership interests on the suit property, we shall confine our decision to that extent.

Before we direct our mind to the issues involved in this appeal, we find it imperative to address a legal point which was raised in the

submissions by the third party pertaining to the joinder of the same in the proceedings. It was submitted that, since the third party was joined in the proceedings as the Government in terms of section 3 of the Government Proceedings Act [Cap. 5. R.E. 2019] ("the Act"), the proceedings preferred against him at the trial court in so far as they emanated from an act arising from the discharge of judicial function, is barred by section 5 of the Act which provides as follows:

> *"5. No proceedings shall lie against the Government by virtue of this section in respect of anything done or omitted to be done by any person whiie discharging or purporting to discharge any responsibilities of a judicial nature vested in him or any responsibilities which he has in connection with the execution of judicial process".*

In their submissions, both Mr. Lutema for the appellants and Mr. Mafuru for the first and second respondents did not remark on this pertinent point of law.

This issue cannot detain us. It speaks for itself if we can say. The provision of section 5 of the Act under which the issue is premised is clear and unambiguous. It does not, in our humble view, need any interpretation. It bars commencement of proceedings against the Government in terms of the Act in claims arising from an act or omission

of a public officer or institution in the ordinary course of the discharge of a judicial function or any function of judicial nature. As we pointed out earlier on, this issue was raised at the trial court and the trial court observed as follows;

> *"Decisions of Courts of law cannot be faulted by joining the court in another Civil proceedings the subject matter being that decision pronounced when the court was performing its judicial functions".*

In effect, the trial Judge was in the above finding, in agreement with the learned Principal State Attorney that, the proceedings against the third party were barred by law. The first and the second respondents against whom the finding was made, did not prefer any cross appeal. We understand the learned State Attorney to mean in her submissions that, like in the trial court, the third party has been wrongly joined in this appeal. With respect, she is quite right. The trial court having established that the claim against the third party was barred by law, it ought to have struck out the claim against the third party for being incompetent. In the circumstance, we strike off the name of the third party in this appeal and declares that, the proceedings against the third party at the trial court were null and void.

We now turn to the issues raised in the grounds of appeal. For convenience, we shall address the first and second issues as to legality of the sale of the suit property and the bar under O. XX1 r. 90(3) of the Code concurrently. We have found prudent so to do since the legality of the procurement of the certificate of sale on whose basis the bar under O. XXI r. 90(3) is premised, and from which the second respondent traces title on the suit property, was the basic contention at the trial court. In such a situation ,therefore, the said two issues are so interwoven that, they cannot be separated. This is more so because the 6/7 interests of the appellants on the suit property prior to issuance of the certificate of sale and the subsequent certificate of title has never been in dispute. It is probably because of that reason that the trial Judge refused, at pages 435 and 436 of the record of appeal, to frame the estoppel under the respective provision as a separate additional issue and insisted, correctly in our view, that the same was implied in the first issue.

In his submissions on the absoluteness of the certificate of sale and the bar under O. XXI r. 90 (3) of the Code, Mr. Lutema started by drawing the attention of the Court that the bar under the respective provision applies only where there is an application under either rule 87, rule 88 or 89 of O. XX1 of the Code. He submitted further that, an application under

those provisions can only be made where an immovable property has been sold in execution of a decree. It cannot, in his view, apply to proceedings done before the sale of the suit property. He submitted therefore that, since the applications in exhibits D2, D3 and D4 were made before the sale of the suit property, they fell under O. XX1 r. 57 of the Code and therefore, the suit at the trial court was properly instituted under O. XX1 r. 62 of the Code and sale never became absolute. The learned counsel cemented his contention with the decision of the Court in the case of **Bank of Tanzania V. Vallambhia,** Civil Appeal No. 15 of 2002 (unreported) where it was stated that:

> *".....it is abundantly clear to me that there is no right of appeal to the court once an objection to the attachment has been adjudicated upon. The remedy open to the objector is to file a suit to establish the objection to the claim of the property in dispute."*

As to the legality of the sale, it was Mr. Lutema's submission that, since the attachment and sale was in execution of a decree between the third and fourth respondents, the executing court had no jurisdiction to order attachment and sale of the entire suit property while it was aware, in accordance with the ruling in exhibit D2 that, the judgment debtor owned the suit property with the appellants. In his humble submissions,

the executing court ought to have explicitly directed that the attachment and sale be restricted to the fourth respondent's interest on the suit property.

In his brief oral submissions, Mr. Mafuru contended that, since the attachment and sale of the suit property was in respect of the entire suit property, the application by the appellants for setting aside the sale having been dismissed by the executing court, the sale became absolute and the appellants could not challenge the same by way of a suit as that is expressly barred by O. XX1 r. 90(3) of the Code.

We have considered the rival submissions in line with the judgment of the trial court. As we alluded to earlier, the trial court held that the suit was barred under O. XXI r. 90(3) of the Code on account that after the application by the appellants to set aside the sale of the suit property had been rejected, the executing court confirmed the sale and thereby issued a certificate of sale under O. XXI r. 92 of the Code and pursuant to the said certificate, the second respondent procured a certificate of title by transmission under the operation of the law. In the opinion of the trial court, which is in dispute, after the sale had been confirmed and a certificate of sale issued, the sale became absolute and thus under O. XXI

r. 90(3) of the Code, the appellants would not, as they did, initiate the suit under scrutiny.

We have closely followed the learned counsel's debate on this issue. So as to appreciate the nature of contention, we find it necessary to reproduce hereunder the provisions of O. XX1 r. 90 of the Code. Thus:

> *"90.(1) Where no application is made under rule 87, rule 88 or rule 89, or where such application is made and disallowed, the court shall make an order confirming the sale and thereupon the sale shall become absolute:*
>
> *Provided that where it is provided by any law that a disposition of property in the execution of a decree or order shall not have effect or be operative without the approval or consent of some person or authority other than the court, the court shall not confirm such disposition under this rule unless such approval or consent has first been granted.*
>
> *(2) Where such application is made and allowed, and where, in the case of an application under rule 87, the deposit required by that rule is made within thirty days from the date of sale, the court shall make an order setting aside the sale:*

Provided that no order shall be made unless notice of the application has been given to all persons affected thereby.

(3) No suit to set aside an order made under this rule shall be brought by any person against whom such order is made".

A careful reading of the above provisions reveals that what is barred therein, is institution of a suit to set aside an order made under O. XXI r. 90 of the Code in respect of an application under either of the provisions of O. XXI r. 87, O. r. 88 or. O. XXI r. 89 of the Code. The order therein envisaged in our view, is an order confirming the same. In this case, such an order was neither pleaded in the written statement of defence of the first and second respondents nor produced into evidence.

In his judgment, the trial Judge relied on the certificate of sale in exhibit D1 to establish absoluteness of the sale and the bar under O. XXI r. 90 (3) of the Code. He was wrong in our view for two main reasons. **First**, as we have established herein above what is barred in the said sub-rule is a suit to set aside an order under O. XX1 r. 90 of the Code and not O. XX1 r. 92 of the Code. **Second** and more importantly, the certificate of sale was issued on 26th July, 2001 while the decision purporting to refuse setting aside the sale in exhibit D6 was delivered on 20th day of December,

2002. It follows, therefore, that since the claim by the first and second respondents at the trial court was that, the application for setting aside was preferred and disallowed under O. XXI r. 90 of the Code, a certificate of sale under O. XXI r. 92 should have been issued subsequent to 20th December 2002 when the order in exhibit D6 was issued. That would also be conditional upon a confirmation order under O. XXI r. 90 (1) of the Code being issued.

We are guided on this by the principle in the case of **Balozi Abubakar Ibrahim and Another V. MS Benandys Limited,** Civil Revision No. 6 of 2015 (unreported) where we remarked as follows:

> *"This is mainly because, the* ***executing court shall only grant a certificate of sale under O. XXI 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****. Indeed, the last order in the record is the one made on 22nd May, 2015 issuing a proclamation for sale. That being the case, the sale has not been confirmed: See PETER ADAM MBOWETO V. ABDALLAH KULALA [1981] TLR. 335."* [Emphasis is ours].

In view of the foregoing therefore, it can be held without any hesitation that, the institution of the suit at the trial court was not barred by O. XX1 r. 90(3) of the Code. It can further be held that, the certificate

of sale upon which the second respondent procured a certificate of title was not made under O. XXI r. 92 as suggested in the judgment of the trial court. The sale was thus not absolute. It follows, therefore, that, since the transfer of the suit property to the second respondent was based on a certificate of sale not made under O. XXI r. 92 of the Code and in the absence of an order confirming the sale, the same was illegal and the trial court should, in the circumstance of the case, have held so.

More to the point, since it is not in dispute that the 4th respondent's share in the suit property was, soon before the sale in question, 1/7, the fourth respondent being the only judgment debtor, had no title to pass to the second respondent other than the said share. Therefore, the sale of the suit property and its subsequent transmission to the second respondent culminated in the certificate of title in exhibit P4 was, to the extent of 6/7 interests of the appellants in the suit property, illegal and ineffectual.

It would sound to us to be the law that where, like in the instant case, a landed property is held under a certificate of title or letter of offer, the executing court cannot make any order for sale of the same in execution of a decree without having a *prima facie* evidence of the title of the judgment debtor on the property.

In view of the above discussions, we answer the first and second issues against the respondents.

We pass to the third issue as to whether the second respondent was a *bonafide* purchaser for value without notice. Mr. Lutema submitted on this point that, since the suit property is surveyed and the second respondent did not, before purchasing it, conduct any inquiry to the relevant authority as to the title of the judgment debtor on the suit property, she is deemed to have been aware of the interests of the appellants in the suit property and, therefore, cannot deserve to be called a *bonafide* purchaser for value without notice.

In cementing his contention, the learned counsel cited numerous English authorities in support of the proposition that, a purchaser has a constructive notice of rights which he would have discovered had he investigated the title to the land; and if he fails to investigate, the title at all, he is fixed with constructive notice of everything that he would have discovered had he investigated the title. Among the authorities cited are **Re Cox and Neve's Contract** [1891] 2 Ch. 109, **Oliver v. Hinton** [1899] ChD 264 **and Bailey v. Barnes** [1894] 1 CHD 25. Mr. Mafuru argued

otherwise maintaining that there is no evidence of such notice of the incumbrances. We shall decide hereunder who is right.

The evidence of the first respondent appearing at page 259 of the record is such that he could not, before the purchase, personally establish who the owner of the suit property was as the purchase process was made on his behalf and on behalf of the second respondent by his employee one Michael Bautemile and the second respondent's company secretary (DW2). In his testimony appearing at page 263 of the record, DW2 claimed that, after having seen the minutes in the offices of the 2nd respondent to the effect that, the company was intending to purchase the suit property, he went to the court and "*perused the court file and found that the sale was proper because there was an attachment order of 19/4/2000, also there was a proclamation of sale and a ruling on the objection proceedings conducted by two advocates, Dr. Twalibe for Mussa Hamisi Kazuba and Mr. Hyera advocate for Hatujuani Bushiri Pazi on 15/11/2000, the court dismissed the objection with costs*". He produced the ruling as exhibit D2.

What is clear from the above evidence is that, the second respondent purchased the suit property while aware of the ruling in exhibit D2. In the said ruling which appears in page 307 of the record, the executing court remarked as follows:

"On perusal of the record, I have come across that the objector's counsel through a letter dated 9th November, 2000 addressed to this court, he has pointed out that the suit premises which is jointly owned by the judgment debtor and his relatives has been leased and the rental income realized from the leasing out of the premises is shs. 14,400,000/= per year which is shared among the 6 family members ....."

DW2 was, during trial, cross examined on this issue and responded as follows:

"It was not my duty to search title, because the house was not sold by an individual but by an order of the court".

As the suit property appears from the ruling in exhibit D2 to be held under a letter of offer with a plot and block numbers, and there being information in the said exhibit that the same was jointly owned by the fourth respondent and her relatives, the second respondent having purchased the property without prior inquiry into the extent of the title of the judgment debtor on the suit property, cannot qualify as a *bonafide* purchaser for value without notice. This is because in the circumstance of this case, any reasonable man would have expected the second respondent to, before purchasing the suit property, inquire and find out in the relevant authorities what interests, if any, the said fourth respondent's

relatives had in the suit property. Her unreasonable omission to make an inquiry, put her to constructive notice and/ or imputed notice of the appellants' ownership interests on the suit property. This is in accordance with the provisions of section 67 (a) and (b) of the Land Act read together with section 66(1) (a) thereof, which provides as follows:

> *"67. The following are the covenants implied, subject to section 66, in every instrument to which section 66 refer-*
>
> *"(a) a disposition of a right of occupancy or a lease is to be taken to include and convey with the interest being conveyed all rights, easement, and appurtenances belonging to the land, or the interest being conveyed or usually held or enjoyed with the land or interest being conveyed, but this covenant does not give a person a* ***better title to any interest in land referred to in this covenant than the title which the disposition of which it is a part gives that person****;*
>
> *"(b) a person obtaining a right of occupancy or a lease by means of a disposition not prejudicially affected by notice of any instrument, fact or thing unless-*
>
> *(i) it is within that person's knowledge, or* ***would have come to that person's knowledge if any inquiries and inspections had been made which***

***ought reasonably to have been made by that person**; or*

(ii) it has in the disposition as to which a question of notice arises, come to the knowledge of the person's advocate or agent as such if such inquiries had been made as ought reasonably to have been made by that advocate or agent as such".

[Emphasis is ours].

That aside, the second respondent cannot be a *bonafide* purchaser for value without notice by a mere claim that the sale had become absolute because, as held in **Balozi Abubakari Ibrahim and Another V. MS Benandys Limited** *(supra)* for the purchaser to be a *bona fide* purchaser there must be, which was not, an order confirming the sale under O. XXI r. 90(i) of the Code.

For the foregoing reasons, therefore, we answer the third issue against the respondents as well.

Since we have established, in address of the first three issues that, the sale of the suit property was illegal and ineffectual to the extent of 6/7 shares of the appellants on the suit property, we are inclined to answer the fourth issue in favour of the appellants that, it was wrong for the trial

court to hold that, the second respondent was the lawful owner of the suit property.

We now turn to the last issue as to reliefs. The appellants prayed, to be declared the lawful owners of the entire suit property and in the alternative, to be declared the lawful owners of 6/7 of the same. Since the appellants' asserted interests on the suit property is 6/7 shares, they cannot be awarded more than that. An order declaring them the owners of the suit property and the developments thereon to the extent of 6/7 shares therein would, therefore, be fair and appropriate. The second respondent's complaint that, he has invested a huge amount of money on the suit property is unworthy of being considered since it is clear from the record that, she had been aware of the dispute on the suit property right from the beginning. Thus, whatever investment she injected on the suit property, was at her own risk. The appellants also prayed for specific damages at the tune of TZS 1,500,000,000.00 as loss of earning. As the particulars of damages were not specifically pleaded and proved as the law requires, we shall not grant the same. We cannot also order for demolition of the current buildings on the suit property as we see nothing wrong with the building itself. In any event such order will not benefit either of the parties and it will have adverse effects to the national economy.

In the final result and for the reasons as aforesaid, we allow the appeal with costs to the extent as afore stated. We quash and set aside the judgment and decree of the trial court and declare the appellants as the rightful owners of the suit property and all developments thereon to the extent of their 6/7 shares reflected in exhibit P2.

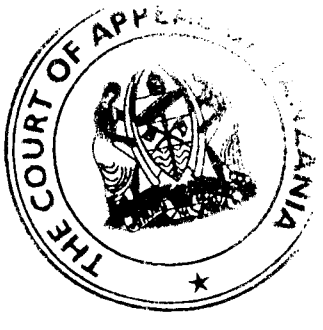
DATED at **DAR ES SALAAM** this 13th day of April , 2022.

M. A. KWARIKO.
JUSTICE OF APPEAL

I. J. MAIGE
JUSTICE OF APPEAL

A. M. MWAMPASHI
JUSTICE OF APPEAL

The judgment delivered on 13th day of April, 2022 in the presence of Ms. Subira Omary, learned counsel for the appellants and Ms. Sia Ngowi, learned counsel for the 1st and 2nd respondents, 3rd and 4th present unrepresented and Mr. Gallus Lupogo, learned State Attorney for the third party, is hereby certified as true copy of the original.



A. L. KALEGEYA
DEPUTY REGISTRAR
COURT OF APPEAL