

THE UNITED REPUBLIC OF TANZANIA
JUDICIARY
THE HIGH COURT OF TANZANIA
IN THE DISTRICT REGISTRY OF MBEYA
AT MBEYA

MISC. LAND APPEAL NO.28/2019

*(From Kyela District Land and Housing Tribunal at Kyela Misc. Application No. 7 of 2019
and Land Case No. 10 of 2018 of Mungano Ward Tribunal of Kyela District)*

FELISTER KIFULUGHA APPELLANT

VERSUS

ROYAL MWALUPEMBE RESPONDENT

Ruling

Date of Last Order: 18.04.2020

Date of Ruling: 20.05.2019

MAMBI, J.

This ruling emanates from the preliminary objection raised by the respondent on the appeal filed by the appellant. Earlier the appellant filed his appeal at this court challenging the ruling made by the District Land and Housing Tribunal of Mbeya in Application No.3/2019 between the respondent and the appellant.

When the matter was scheduled for hearing, the respondent through the learned Counsel raised a preliminary objection that the appeal is

bad in law as it contravenes order XL rule 1 of the Civil Procedure Code Cap 33 [R E 2002]. He argued that the provision of the law, is clear that no appeal lies from an execution order in terms of **Order XL rule 1 of The Civil Procedure Code** [Cap 33 R.E 2002] and Section 74 of the **Civil Procedure Code** cap 33 [R.E 2002] . He referred the decisions of the court in ***General Tire (E.A) LTD VS Amenyisa Macha and Others, Civil Appeal no 21 of 2003, H.C at Arusha (unreported) and Kelvin Rodney Zambo Versus UAP Insurance Tanzania Ltd(Formerly Known as Century Insurance Company) Civil Revision no 39 of 2019 H.C Dar es Salaam(Unreported)*** respectively.

In reply, the learned Counsel for the appellant Mr. Mshokorwa briefly submitted that the appellant has rightly filed her appeal in line to the provisions of the law. He argued that he agrees with the provisions cited by the respondent which allow appeals for some orders but the order refusing to set aside execution order under order XXI of CPC expressly is not among of them. He argued that this appeal is seeking to challenge the order of the chairman of the Tribunal who refused an appeal or complaint which sought to set aside an eviction order against the Appellant from the property of suit Land in execution of a decree of Muungano Ward Tribunal in Land case No. 10 of 2018. He was of the view that the cited provisions of the CPC, do not apply to the present appeal arising, since this appeal is from from the District Land Tribunal in exercise of its appellate jurisdiction, under section 38(1) of the courts (Land Dispute Settlement) Act, Cap 216, RE. He argued that under this provision there is no restrictions such

as one obtaining under section 74 and Order XL Rule 1 CPC where some orders are not appealable. Under section 38(1) Cap 216 R.

I have keenly gone through and considered the points of preliminary objections raised by the respondent in line with the reply by the appellant. The main issues in my considered view whether this appeal is proper or competent before this court or not. The Respondent in his key points of preliminary objection has raised the point that one cannot appeal against execution orders as per section 74 (2) of the Civil Procedure Code, Cap 33 [R.E.2002]. On the other hand, the appellant Counsel submitted that the objection raised had no merit since the order in which the appellant is appealing against is not listed under section 74 of the CPC.

In their submissions, both parties referred this court to various decisions of the High Court and Court of Appeal.

It is on the records that the matter the appellant is appealing against the eviction order of the Tribunal. The question has the appellant properly moved this court?. The records shows that the appellant was not satisfied with the eviction order made by the District Land Tribunal. Having aggrieved by the Ruling of the trial Tribunal, the appellant later decided to opt filling an appeal to this court.

In my view that order is part of ordered listed under section 74 of the Civil Procedure Code, Cap 33 [R.E.2002] which are not appealable. I wish to refer **Order XL Rule 1** of the Civil Procedure Code [Cap 33 R E 2002] which provides for orders where an appeal can lie. That order provides that:

“an appeal shall lie from the following orders under the provisions of section 74, namely-

(a) an order under rule 10 of Order VII returning a plaint to be presented to the proper court;

(b) an order under rule 14 of Order VIII pronouncing judgment against a party;

(c) an order under rule 9 of Order IX rejecting an application (in a case open to appeal) for an order to set aside the dismissal of a suit;

(d) an order under rule 13 of Order IX rejection an application (in a case open to appeal) for an order to set aside a decree or judgment passed ex parte;

(e) an order under rule 4 of Order X pronouncing judgment against a party;

(f) order under rule 18 of Order XI;

(g) an order under rule 10 of Order XVI for the attachment of property;

(h) an order under rule 20 of Order XVI pronouncing judgment against a party;

(i) an order under rule 34 of Order XXI on an objection to the draft of a document or of an endorsement;

(j) an order under rule 72 or rule 92 of Order XXI setting aside or refusing to set aside a sale;

(k) an order under rule 9 of Order XXII refusing to set aside the abatement of dismissal of a suit;

(l) an order under rule 10 of Order XXII giving or refusing to give leave;

(m) an order under rule 3 of Order XXIII recording or refusing to record an agreement, compromise or satisfaction;

(n) an order under rule 2 of Order XXV rejecting an application for an order to set aside the dismissal of a suit;

(o) an order under rule 3 or rule 8 of Order XXXII refusing to extend the time for the payment of mortgage-money;

(p) orders in interpleader-suits under rule 3, rule 4 or rule 6 of Order XXXIII;

(q) an order under rule 3, rule 4 or rule 7 of Order XXXVI;

(r) an order under rule 1, rule 2, rule 4 or rule 9 of Order XXXVII;

(s) an order under rule 1 or rule 4 of Order XXXVIII;

(t) an order of refusal under rule 19 of Order XXXIX to readmit, or under rule 21 of Order XXXIX to re-hear, an appeal;

(u) an order under rule 23 of Order XXXIX remanding a case, where an appeal would lie from the decree of the High Court;

(v) an order under rule 4 of Order XLII granting an application for review”.

Reading between the lines on the above provision that section implies that one cannot appeal against execution order only. I also wish to refer the decision of the Court as correctly cited by the respondent in ***General Tire (E.A) LTD VS Amenyisa Macha and Others, Civil Appeal no 21 of 2003, H.C at Arusha (unreported*** where the court observed and stated that:

“In the light of the aforesaid, apparently; no appeal lies from an execution order. Any person aggrieved by a decision on execution may challenge the same by way of a revision in the Court higher in the Judicial hierarchy”.

In my considered view the remedy for the appellant was to appeal against the whole decision of the Tribunal and file for application for stay of execution (eviction) order pending his appeal.

Having found that the appellant wrongly appealed to this court, the only remaining question before me will now be, whether there is any appeal before this court. In my considered view, since the appellant did not comply with the mandatory requirements of the law, it is as good as saying there is no appeal at this court. I wish to refer the decision of the court in **Joseph Ntongwisangue another V. Principal Secretary Ministry of finance & another Civil Reference No.10 of 2005** (unreported) where it was held that:

“... Experience shows that the litigations if not controlled by the court, may unnecessarily take a very long period and deny a party in the litigation enjoyment of rights granted by the court.

Reference can also be made to the decision of the court of Appeal of Tanzania in **The Director of Public Prosecutions v. ACP Abdalla Zombe and 8 others** Criminal Appeal No. 254 of 2009, CAT (unreported) where the court held that:

“this Court always first makes a definite finding on whether or not the matter before it for determination is competently before it. This is simply because this Court and all courts have no jurisdiction, be it

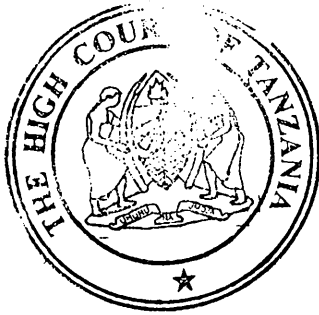
statutory or inherent, to entertain and determine any incompetent proceedings.”

I also wish to refer the decision of the court in **Joseph Ntongwisangue another V. Principal Secretary Ministry of finance & another Civil Reference No.10 of 2005** (unreported) where it was held that:

“in situation where the application proceeds to a hearing on merit and in such hearing the application is found to be not only incompetent but also lacking in merit, it must be dismissed. The rationale is simple. Experience shows that the litigations if not controlled by the court, may unnecessarily take a very long period and deny a party in the litigation enjoyment of rights granted by the court.

From what I have observed, I am constrained to hold that the appeal before this court is fatally incompetent. From the reasons stated above, I am of the settled view that the appeal before this court is incompetent. This means that I entirely agree with the preliminary objection raised by the respondents. I therefore hold that there is no any appeal before me in this court. In the default of appealing against orders in contravention of **Order XL Rule 1** and section 74 of the Civil Procedure Code, Cap 33 [R.E.2002], the present appeal is certainly not proper before this Court. It is incompetent and should be struck out, as I hereby do.

In the circumstances, the preliminary raised by the respondent is sustained and upheld which means that the intended appeal is struck out on the reasons I stated above. Considering the circumstance of the case, I make no order as to costs.




DR. A. J. MAMBI

JUDGE

20.05. 2020

Ruling delivered in Chambers this 20th day of May, 2020 in presence of both parties.


DR. A. J. MAMBI

JUDGE

20.05. 2020

Right of appeal is explained.


DR. A. J. MAMBI

JUDGE

20.05. 2020