

**IN THE HIGH COURT OF THE UNITED REPUBLIC OF TANZANIA
(DAR ES SALAAM DISTRICT REGISTRY)**

AT DAR ES SALAAM

CIVIL APPEAL NO. 188 OF 2019

*(Originating from the decision of Temeke District Court in
Miscellaneous Civil Application No. 306 of 2018 dated 21st June 2019)*

Mpumbeye Yusuph Mgonje ----- APPELLANT

VERSUS

1. **Zabron Mahimba Mgonje**
2. **Abubakar Omary**
3. **Asha Sultan Mahenge**----- **RESPONDENTS**

JUDGEMENT

Date of last order: 20.05.2020

Date of Judgement: 27.10.2020

EBRAHIM, J.:

The Appellant herein was initially sued by the 1st and 2nd Respondents herein for his failure to return money advanced to him as a loan amounting to Tshs. 4,500,000/- for the 2nd Respondent; and Tshs. 7,500,000/- for the 1st Respondent. Upon hearing the witnesses from both parties, the trial magistrate ordered the Appellant to pay the 1st

and the 2nd Respondents Tshs. 6,300,000/- and Tshs. 4,500,000/- respectively. He was also ordered to pay general damages to the tune of Tshs. 1,000,000/- to each Respondent. Thereafter, the Respondents initiated execution proceedings, i.e. Miscellaneous Civil Application No. 306 of 2018 which is the subject matter of the instant appeal.

The Appellant grounds of appeal are as follows:

1. That the honourable Resident Magistrate of the District Court erred in law and fact for failure to afford the Appellant right to be heard.
2. That the Honourable Resident Magistrate of the District Court erred in law and fact by entertaining the application for execution of a decree filed by a person who was not a part to the suit.
3. That the honourable Resident Magistrate of the District Court erred in law and fact by ordering execution of decree to be carried out against a person who was not a party to the original suit.

The appeal was argued by way of written submission. Upon being served with the Applicant's submission, Counsel for the 1st and 2nd Respondents raised three points of preliminary objections. Before arguing the point of objection Counsel for the Respondent prayed to address points of law apparent in the appeal believing that the Appellant shall have a chance to reply in rejoinder. The points of preliminary objections raised are that the appeal is time barred and that the Appellant ought to have made an application for civil reference instead of an appeal. Another objection is that the appeal is defective for want of attachment of a proper judgement and decree.

Indeed, this court ordered the appeal to be argued by way of written submission that the Appellant should file his submission on/before 16th April 2020; the Respondents to file their reply on/before 30th April 2020; and rejoinder by the Appellant to be filed on 20th May 2020. The court further set a date for mention on 20.05.2020 to ascertain the status and entertain any issue that might arise before setting a date for the decision.

The Appellant did not file the rejoinder nor prayed to be allowed more time to reply to the points of objection raised by the Respondents counsel. Therefore, the court shall proceed to address the points of objection first before embarking on considering the appeal on merits if the need be.

Arguing the first point of objection, counsel for the 1st and 2nd Respondents contended that the appeal lodged in this court on 1st October 2019 seeks to challenge the ruling and drawn order of the District Court in Misc. Civil Application No. 306 of 2018 sitting as executing court in respect of the judgement and decree of Civil Case of 72 of 2014. Therefore, in terms of **Order 7 of the Advocates Remuneration Order, 2015**, since the decision of the execution court was delivered on 21st June 2019; then the appeal was logged after expiration of 95 days because the Appellant ought to have filed reference within 21 days from the date of the decision. Counsel for the Respondent further argued his second point of objection that since the Appellant was aggrieved with the decision of the taxing master, he was supposed to file reference in the High Court in terms of

Order 7(2) of the Advocates Remuneration Order, 2015 by way of chamber summons supported by an affidavit. Filing of memorandum of appeal is a serious defect requiring the appeal to be dismissed with costs.

As for the 3rd point of objection, Counsel for the Respondents argued that the memorandum of appeal filed by the Appellant is incompetent for failure to attach a proper copy of judgement and decree of Civil Case No. 72 of 2014 as per the requirement of the mandatory provisions of Order XXXIX Rule 1(1). The Appellant instead attached a copy of judgement of Civil Case No. 72 Of 2014 and drawn order of Misc. Civil Application No. 306 of 2018 which renders the appeal to be incompetent. To cement his argument, he cited the High Court case of **MIC Tanzania Limited Vs Hamisi Mwinyijuma and two others**, Civil Appeal No. 64 of 2016 (unreported) where this court struck out the appeal for being found incompetent.


As stated earlier, the Appellant did not reply to the points of objection raised by the Counsel for the Respondent. I shall therefore proceed to address the same in the absence of the Appellant's rejoinder.


Out-rightly, I wish to point out at the outset that Counsel for the Respondent has seriously misconceived the nature of the instant appeal of which its competency is subject of discussion and application of **Advocates Remuneration Order, 2015, GN No. 264/2015**. The Appellants appeal seeks to challenge execution proceedings that ordered attachment and sell of Plot No. TMK/MTO/SBS27/263 located at Mtoni Sabasaba area within Tememe District. Conspicuously, execution proceedings and consequent order thereof do not fall under **Advocates Remuneration Order, 2015, GN No. 264/2015**. Need I not dwell much on the point because GN No. 264/2015 apply for remuneration of an advocate by a client in contentious or non-contentious matter and taxation thereof; and taxation for costs between clients i.e. Bill of Costs. Therefore, the challenged matter in the instant case is not for Bill of Costs and with respect to the Counsel for the Respondents, GN. No. 264/2015 does not apply. Therefore, this point of objection is a massive misconception and I accordingly overrule it.

Now coming to the competence of the instant appeal. Indeed, right of appeal is statutorily provided. **Order XL Rule 1 (a) to (v) of the Civil Procedure Code, Cap 33 RE 2019** provides for a list of orders amenable for appeal. Clearly in the list there is no appeal on orders under **Order XXI of the CPC** save for the order under **Rule 34 only** which is on a decree for delivery of immovable property when in occupancy of a tenant. It follows therefore, the Appellant's appeal before this court seeking to challenge execution proceedings is also not tenable in law. If the Appellant wished to challenge execution proceedings, he should have come by way of revision because no appeal is allowed.

That being the position of the law, I find that this appeal is untenable as it is not a creature of statute. Accordingly, I dismiss it with costs.

Accordingly ordered.




R.A. Ebrahim
Judge

Dar Es Salaam

27.10.2020