

IN THE HIGH COURT OF TANZANIA
(DAR ES SALAAM DISTRICT REGISTRY)
AT DAR ES SALAAM

CIVIL APPEAL No. 59 OF 2020

IYEN JAIRUS NSEMWA..... APPELLANT

VERSUS

MARY THOMAS MUSHI.....RESPONDENT

(Appeal from the decision of the Court of Resident Magistrates of Dar-es
Salaam at Kisutu)

(Mhina- Esq, SRM.)

dated 21st January, 2020

in

Execution No. 81 of 2018

JUDGEMENT

22nd September & 14th December 2020

AK. Rwizile, J

This appeal has its origins in matrimonial cause No. 65 of 2014. Parties, who at one point in time were husband and wife decided to end their marriage in court. The respondent herein, petitioned for separation, division of matrimonial assets, maintenance and custody.

Before the matter came to a full hearing, they agreed to end their tag-of-war and filed a settlement deed. Therefore, the matter was marked settled by a consent on 16th July 2015. Following years of silence, after failure to execute terms of the agreement, an application for execution was filed by the respondent in 2018. The appellant was asked to show cause why execution should not issue. Upon failure to give sufficient reason, the application was granted. The appellant was not satisfied. He has now appealed to this court advancing 4 grounds of appeal.

- i. That the Magistrate erred in law and in fact in holding that clause No. 12 of the settlement decree required the document to be handed to the respondent without considering that the clause is silent on how, where, when and whom the document of title No. 53144 farm No. 2003 located at Mapinga, Bagamoyo should be surrendered after seven days, since the required seven days indicated in clause 12 of the settlement decree has already elapsed.*
- ii. That the magistrate erred in law and in fact in holding that clause 9 of the deed of settlement speaks for itself as it shows that the applicant should redeem farm No. 2003, title No. 53144 in November 2015, located at Mapinga Bagamoyo, from Tanzania Microfinance Limited which was mortgaged without the spouse consent and be given to Matrimonial issues without considering that the court cannot allow execution of illegal terms thought agreed by the parties themselves*
- iii. That the magistrate erred in law and fact, in holding that parties to land case No. 53 of 2018 in the District and Land and Housing Tribunal for Kibaha and Matrimonial cause No. 65 of 2014 were different*

without considering that inclusion of Tanzania Microfinance Limited in both cases was necessary as the said Financial institution is custodian of the title deed of the suit property

iv. That the magistrate erred in law and in fact in holding that the causes of action of the land case No. 53 of 2018 and matrimonial cause No. 65 of 2014 were in the sense that in matrimonial cause No. 65 of 2014, the cause of action was handing over the title deed while in the land Application the issue was to redeem a mortgage without considering the issue in both land application and matrimonial cause.

Before, the appeal was heard, the respondent raised two points of objection; **one**, that this appeal is incompetent as the order appealed against emanates from non- appealable orders in terms of order XL rule 1 and section 74 and 75 of the Civil Procedure Code [Cap 33 R.E 2019], **two**, that the appeal is incompetent as the order sought to be appealed against emanates from a consent judgement which is not appealable in terms of section 70(3) of CPC and the case of **Chongoro Hamis Mlezi versus the United Construction Co. Ltd** [1980] TLR. 71

An agreement was reached on the day of the hearing that the same be argued by way of written submission. I directed parties to argue both, the preliminary objection and the appeal.

Mr. Sadam Khamis and Nehemia Gabo represented the appellant, while the respondent was represented by Mr. Ashiru Lugwisa learned advocate. Arguing in support of the preliminary objection, it was said order XL rule 1 was referred to read with section 74 and 75 of the CPC.

By citing the law, the counsel was of the view that this appeal is not maintainable. It is so because, the execution order is not subject of appeal. According to the respondent, this appeal has to be dismissed.

Arguing the second point of objection, it was stated that since the execution proceedings arose from Matrimonial cause that was terminated by a settlement decree, it is not subject of appeal as under section 70(3) of the CPC. He further referred this court to the case of **Chongoro Hamis Mlezi versus the United Construction Co. Ltd** [1980] TLR. 71. This was in his view, enough to dispose of the preliminary objection. he therefore asked this court to dismiss this appeal with costs.

Mr. Gabo for the appellant submitted in respect of the preliminary objections that the same are baseless. It was his view in respect of the first objection, gauged under order XL Rule 1 and section 74 and 75 of the CPC are not restrictive to appeals from orders that have finally determined the matter. According to him, the execution proceedings have determined the matter finally and so appealing is allowed.

On the second point of objection, it was his view that the respondent has misconceived the matters. He submitted that this appeal does not emanate from the settlement decree but from the execution proceedings. This means, he concluded, this appeal is maintainable. This court was therefore invited to overrule the objections and proceed to determine this appeal on merit.

Having considered submissions of the parties in respect of this appeal. It is of essence to deal with the preliminary objection because I think it will determine this appeal.

The objection raised is clear and is gauged under order XL Rule 1 of the CPC which lists appealable orders. Execution is not among the appealable orders so to speak. This court has been clear on this position and has consistently held so. Authorities in this point are not in short supply. In **General Tire (E.A) LTD vs Amenyisa Macha and Others**, Civil Appeal No 21 2003, (unreported), the High Court sitting at Arusha was of view that:

"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".

This decision was applied in a number of other cases by this court. In **Kelvin Rodney Zambo vs UPA Insurance Tanzania Ltd (formerly known as century Insurance company**, Civil Revision No. 39 of 2019, High Court at Dar es salaam, arrived at the same position; that no appeal lies from execution orders because order XL and section 74 of the CPC are silent on the issue. Therefore, it was the decision of the court that since execution is not one among the listed orders that appeal lies, revision is the proper cause of action to take.

In yet another decision of this court, perhaps the most recent one, the court held that since execution is not among the orders listed under order XL and section 74 of the CPC, it is therefore not appealable. See the case of **Felister Kifulugha vs Royal Mwalupembe**, Misc. Land Appeal No.28 of 2019, High Court at Mbeya

Having shown the position of the law, it is now safe to hold that since appeal is a creature of the law, one cannot prefer an appeal in the absence of clear and elaborate provisions of the law. It is neither section 74 or 75 of the CPC nor order XL of the same that provides for appeal whenever one is aggrieved by the decision of the executing court. Revision as it is known, is applied where there is no right of appeal as in this case. To decided otherwise, will be as good as applying the law and authorities cited upside down. That far, this court cannot go. Having said so, I find no reason to proceed determining this appeal on the grounds advanced. I sustain the objection, and dismiss this appeal with costs.

AK Rwizile
JUDGE
14.12.2020

Delivered in the presence of Mr. Lugwisa for the respondent also holds briefs of Mr. Gabo for the appellant this 14th day of December 2020.

AK Rwizile
JUDGE
14.12.2020

 Recoverable Signature
X 
Signed by: A.K.R.WIZILE

