

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

AT DAR ES SALAAM

CIVIL APPEAL NO. 287 OF 2020

(Arising from the Ruling of the District Court of Kilosa at Kilosa in Civil Case No. 07 of 2000 before Hon. T.A. Lyon, **RM** dated 17th November, 2020)

MIRAJI MRISHO APPELLANT

VERSUS

FORTUNATE NYANDA RESPONDENT

RULING

03rd June, 2021 & 02nd July, 2021.

E. E. KAKOLAKI J

This is a ruling in respect of the preliminary points of objection raised by the respondent against the appellant's appeal praying to have it struck out with costs. The objections are premised on three grounds namely:

1. That the Appeal is incompetent and untenable for violating the mandatory requirement of Order XXXIX Rule 1 of the Civil Procedure Code [Cap. 33 R.E 2019].
2. That the Appeal is brought against a dead person.
3. That the Appeal is brought against a non-appealable order.

As it has been practice of this court the preliminary points of objection were to be disposed off first. When parties were called for hearing they both appeared unrepresented and with leave of the court agreed to proceed by way of written submissions. The filling scheduling orders were followed by both parties save for the respondent who waived her right to make rejoinder submissions.

Briefly the background story that gave rise to this appeal, as well and precisely narrated by the learned Magistrate in his ruling date 17/11/2020 is not difficult to follow. The appellant before the District Court of Kilosa in Civil Case No. 07 of 2000 successfully sued the respondent for compensation of Tshs. 4,800,000/= which he would have earned had it not been for respondent's conduct of maliciously destroying the property intended to be used by him to raise that amount. The trial court entered ex-parte judgment against the respondent on 09/07/2001 following his default in appearance before the trial court and his failure to file written statement of defence. Execution of the said ex-parte judgment and decree proceeded with appointment of the court broker, issue of warrant of attachment and inventory of attachment filed in court on the 13/09/2006. The respondent unsuccessfully attempted to set aside the said ex-pated judgment as his application in Civil Case No. 07 of 2000 was dismissed. Similarly the respondent did not retreat from the appellant's fight for completion of execution process of the said ex-parte judgment, he filed in this Court Misc. Civil Application No. 76 of 2012 seeking for an order directing the District Court to proceed with execution proceedings to its finality. This court in its ruling dated 02/06/2015 dismissed the application and ordered the trial court to proceed with the main case in Civil Case No. 07 of 2000 which was pending

before the District Court of Kilosa. In compliance with this Court's Order the trial court ordered the respondent to file her Written Statement of Defence in which she raised a preliminary point of objection, which upon being disposed of the suit was on 28/04/2016 dismissed for want of jurisdiction. No appeal was preferred by the appellant against the dismissal order instead kept of pursuing execution proceedings the result of which both parties were to be heard and the application for execution rejected by the court on 17/11/2020. It is that rejection order which the appellant is challenging now in this appeal essentially in one ground as the rest of the purported grounds of appeal in 6 paragraphs narrate nothing but the chronological events of the matter in dispute. As this ruling is dealing with preliminary objections only I see no point of reproducing the grounds of appeal now. I would go straight to the points raised.

For the purposes of smooth disposal of the matter I have chosen to start with the 3rd ground of objection where respondent is contending the order sought to be appealed against by the appellant is non-appealable for not being one of the orders provided under Order XL Rule 1 of the Civil Procedure Code, [Cap. 33 R.E 2019] (CPC). He says the same being a dismissal order of the application for execution is not appealable for not being one of the listed appealable orders under the above cited provision, therefore the appellant ought to have preferred an application revision instead. On that premise the respondent submits the present appeal is incompetent and prays the same to be dismissed with costs. The appellant on his part is resisting the submission putting it that, any person who has his application or matter refused or rejected by the court has a right to appeal. Therefore this appeal

is properly before this court. He thus urged the court to dismiss this point of preliminary objection.

Having paid both parties' submissions the deserving consideration, from the outset I wish to put the record clear that the order subject of this appeal is for rejection of continuation of execution proceedings of the ex-parte judgment of the trial court dated 09/07/2001 and not dismissal order as submitted by the respondent. Having so stated, now the issue for determination by this court is whether the rejection order of application for execution is appealable. As rightly submitted by the respondent the law under Order XL Rule 1 of the CPC lists down all orders under which appeal shall be preferred in which an order for rejection or dismissal of execution proceedings is not one of them. It is from that position of the law I distance myself from the appellant's submission that any decision by the court for dismissal or rejection any application or matter is subject of appeal, since there other orders which are not appealable. I am therefore in agreement with the respondent's submission that the order with which the appellant is seeking to challenge by way of appeal is barred by the law from being appealed against. This ground of objection has merit and I sustain it. As this ground alone has the effect of terminating this appeal, I see no reason to employ much efforts in considering the rest of the grounds.

In the premises and for the fore stated reasons, I hold this appeal is incompetent before this court and the same is struck out.

Each party to bear its own costs of this appeal.

It is so ordered.

DATED at DAR ES SALAAM this 02nd day of July, 2021.


E. E. KAKOLAKI

JUDGE

02/07/2021



Delivered at Dar es Salaam in chambers this 2nd day of July, 2021 in the presence of the appellant in person, Ms. Shael Richard advocate for the respondent and Ms. Asha Livanga, court clerk.

Right of appeal explained


E. E. Kakolaki

JUDGE

02/07/2021

