

THE HIGH COURT OF THE UNITED REPUBLIC OF TANZANIA

(IN THE DISTRICT REGISTRY OF BUKOBA)

AT BUKOBA

LAND APPEAL NO. 35 OF 2021

(Arising from Misc. Application No. 9/2021 from Karagwe District Land and Housing Tribunal and Original Land Application No. 7/2020 from Karagwe District Land and Housing Tribunal)

SHARIF MATURUNGO ----- 1ST APPELLANT

ADOLF PAULO -----2ND APPELLANT

VERSUS

DR. JOHN KACHENESA-----RESPONDENT

JUDGMENT

Date of Judgment: 13.05.2022

Mwenda, J.:

In Land Application No. 7/2020, before the District Land and Housing Tribunal for Karagwe at Karagwe, the Respondent sued the Appellants for tress pass of his piece of land by shifting and extending boundaries, thereby taking the whole part of shamba which was not the subject matter in their previously suits i.e Civil Case No. 7/2011 at Ndama Ward Tribunal, and Civil Appeal No. 172 of 2011, District Land and Housing Tribunal of Kagera at Bukoba. Served with the respondent's application, the appellants filed their reply. After that, the matter was assigned before Hon. J.K. Banturaki, Hon. Chairman and the case was subjected to several adjournment from 27/5/2020 until 27/11/2020, when the District Land and Housing Tribunal's records shows the respondent informed the Hon. Chairman that

the parties discussed and agreed to settle the matter out of court and that a Deed of Settlement was prepared to that effect. He then prayed to present the deed of settlement. After that prayer, the Hon. Chairman issued an order marking the said application withdrawn.

Following the said order, the respondent filed Misc. Application No. 09 of 2021 before the District Land and Housing Tribunal for Karagwe at Karagwe applying for execution of the decree/order of the Land Case No. 7/2020 issued by the same tribunal. In that execution he sought eviction of the appellants and to be handed the suit land containing bananas plants. After hearing the submission by the parties, the Hon. Chairman allowed the execution and ordered the disputed land to be handed over to the Decree holder (the respondent). Also the Appellants were ordered to vacate the suit land.

Aggrieved by the ruling and orders by the Hon. Chairman, the appellants lodged this appeal with 7 grounds to wit;

1. That, the Hon Chairman erred in law and facts for failure to determine the preliminary objections filed by the appellants on 10.03.2021 before the Tribunal. The copies of preliminary objections dated 10/3/2021 and ruling dated 23/4/2021 are collectively attached to form part of this memorandum of appeal.
2. That, the Hon. Chairman erred in law and facts for failure to afford the appellants rights to be heard hence breach of natural justice.

3. That, the Hon. Chairman erred in law and in facts to receive the land Application No. 07/2020 without taking into consideration that the matter was RESJUDICATA as per decision determined by the District Land and Housing Tribunal for Kagera at Bukoba in Civil Appeal No. 172/2011 and further the Misc. Land Case Appeal No. 41/2012 of the High Court of Tanzania at Bukoba, which are annexed by the appellants thereto. The copies of the judgments are collectively marked annexure "AA" and herewith attached to form part of this claim (sic).
4. That, the Hon. Chairman erred in law and in facts for failure to recognize that the District Land and Housing Tribunal for Kagera was factus officio and had no jurisdiction to try this matter twice in the same competent Tribunal since it was already determined by the same tribunal.
5. That, the Hon. Chairman and erred in law and in facts to receive and adapt the forged document which was not their deed as they signed under the misrepresentation apart from the truth that they have already won the same suit over the property vide the Civil Appeal No. 172/2011 of the District Land and Housing Tribunal for Kagera at Bukoba and further the Misc. Land Case Appeal No. 41/2012 of the High Court of Tanzania at Bukoba.
6. That, the hon. Chairman erred in law and in facts to receive false settlement deed (sic) dated 27/11/2020 which was objected by the appellants in the

tribunal since it was made under misrepresentation contrary to section 18 of the Law of Contract Act [CAP 345 R.E 2019].

7. That, the Hon. Chairman and assessors erred in law and in facts to receive the false settlement deed (sic) by the respondent's counsel who deceived the appellants to sign on the purported deed of settlement written in English without any knowledge of it. The copy of the deed marked Annexure "BB" is herewith attached to form part of this reply with the leave of this Hon. Tribunal.

At the hearing of this appeal the appellant appeared in person without legal representation while the respondent was represented by Mr. Mathias Rweyemamu, learned Advocate.

In support of the grounds of the appeal, the 1st appellant submitted that, he bought the land in 1999 from one Evarist Kahamba and started using it but in the year 2011 the respondent sued them before Ndama Ward Tribunal where he won. Dissatisfied, he said, they appealed before District Land and Housing Tribunal of Bukoba where the respondent lost and they (appellants) proceeded to use the land. He submitted further that the respondent then appealed before this court, Malaba, J (as he then was) where he again lost and they (appellants) went on using the land. He said, in the year 2020, the respondent served them with a summons for a fresh suit which he instituted before Karagwe District Land and Housing Tribunal. Before the said tribunal, he said, they raised a point of law that

the suit was Res judicata and that after the hearing and a visit at the locus in quo the Hon. Chairman ruled in their (appellant's) favor. The 1st appellant further submitted that after their victory the respondent filed an application for execution to be handed the land in dispute while in fact he lost the case. He said, they appeared before the District Land and Housing Tribunal for Karagwe and informed the Hon. Chairman that they were intending to appeal to the High Court as they did not know the matter at hand. He concluded by praying this appeal to be allowed.

On his part, the second appellant submitted that he is a neighbor to the first Appellant as he brought his piece of land on 23/9/1999 from one Evarist Kahamba. He said the transaction was witnessed and the measurements were 39 × 25 meters. He said he was in use of the said land until 19/4/2011 when the respondent sued them before the Ward Tribunal and he won the case. He said, they then appealed before the District Land and Housing Tribunal where they won. After their victory, he said, the respondent appealed before this court where they (appellant's) again won and were declared as the rightful owners of the suit land. He said, they however did not apply for execution of the decree as they were living on the land in dispute. The 2nd appellant further submitted that in 2021 the respondent again sued them before District Land and Housing Tribunal for Karagwe where they (appellants) raised a point of law that the suit was Res judicata but to their astonishment the District Land and Housing Tribunal ordered

them to vacate the suit land. He added that the summons before the Tribunal was accompanied by deed of settlement which they never signed. He said, despite requesting to be furnished with the copy of the said deed of settlement they were not supplied with. He added that they asked about the source of the said deed of settlement as to who prayed for such order but they were not told. He then concluded his submission by praying to abandon ground No. 5 and 6 of the appeal and the appeal to be allowed.

Responding to the grounds of appeal and the submissions by the appellants, Mr. Rweyemamu, the learned counsel for the respondent began by praying the respondent's reply to the grounds of appeal to be adopted to form part of their submissions. The learned counsel submitted that the land which was the subject matter before the Ward Tribunal which ended in this court before Malaba, J (as he then was), is not the same in the second dispute. He said the size of land in dispute in the former suit measured 3×10 meters only. He said, after the conclusion of the said case, the respondent filed Land Application No. 7/2020 before District Land and Housing Tribunal of Karagwe as the Appellants extended/expanded boundaries on the land with measurements of 15×27 paces. The learned counsel said, the respondent prayed for temporary injunction before District Land and Housing Tribunal for Karagwe where on 21/10/2020 the Hon. Chairman visited the locus in quo. In the said visit, he said, the Hon. Chairman was satisfied with the respondent's claims.

With regard to the submissions by the appellants that the deed of settlement was forged, the learned counsel for the respondent submitted that such concern was never raised by the appellants before. He said the deed of settlement was not false or forged and was prepared voluntarily by the parties who were free agents and negotiated terms of the said Deed while knowing its contents regardless of the language used. He said, the plea that it was not their deed cannot be raised at this moment.

With regard to the arguments by the appellants that they signed the said deed of settlement under misrepresentation and without knowing its contents as it was prepared in English language, the learned counsel submitted that such argument is an afterthought because even their grounds of appeal are prepared in English which means they know the language. The learned counsel further submitted that if the deed of settlement was in issue the appellants ought to have filed an appeal against the order of District Land and Housing Tribunal for Karagwe which was concluded on 27/11/2020. He said, that issue cannot be raised before this court and as such, they are required go back to the same tribunal to challenge it.

The learned counsel submitted that following the signing of the deed of settlement the appellants did not vacate the land and this is what prompted the respondent to file an application for execution.

With regard to the submission by the appellants on denial of rights to be heard, the learned counsel for the respondent submitted that the parties were heard but

failed to prove their case as shown in the records. He said Under S. 23 of Evidence Act, the parties are estopped by Deed executed by them. He added that vide order XXI rule 62 of Civil Procedure Code [Cap 33 RE 2019] execution of Decree is not appealable and as such the appellants ought to have appealed against the order which is the foundation of the execution complained against. He then concluded by praying this appeal to be dismissed.

In rejoinder, the 1st appellant submitted that he did not sign the Deed of settlement as if so, his family would be involved.

On his part, the 2nd Appellant rejoined by submitting that the size of his land is 39 × 25 meters and he never expanded the boundaries to the respondent's land. With regard to Deed of settlement he rejoined that he is not aware as to where it came from. He also insisted that the suit they are appealing against is Res judicata. He thus prayed this appeal to be allowed.

After the summary of submissions by the parties is put on records, it is now the duty of this court to determine this appeal. It is also important to note that in the cause of hearing of this appeal the issue of competence of this appeal arose. The learned counsel for the respondent while responding to the submissions by the appellant stated that an orders for execution of decree such as this one is not appealable. On that note, this court is going to deal with this issue alone as it is capable of disposing this appeal. In other words the issue for determination is whether the present appeal is competent.

As I have highlighted in the introductory part to this judgment, this appeal emanates from Misc. Application No. 09 of 2021 before the District Land and Housing Tribunal for Karagwe at Karagwe. That application was in regard to execution of the Decree in Land Case No. 7 of 2020. In other words, this appeal is against an order for execution of Decree in Land Case No. 7 of 2020.


This court is aware that orders for executions are not among the orders appealable under either S. 74 or order XL, Rule 1 of the Civil Procedure Code [Cap 33 RE 2019]. In our case, the Hon. Chairman having ruled in favour of the respondent in application No. 7 of 2020 the appellants ought to have lodged an appeal or revision against the said order.

During submission against the present appeal, Mr. Rweyemamu, learned counsel for the respondent was of the view that orders for execution of decree are not appealable. On their part the appellants' submissions did not cover this point. This court is in agreement with the submissions by the learned counsel for the respondent that orders for executions are not appealable. This stance is pegged on various authorities of the court. In the case of JOSEPH MWITA MAGIGE VERSUS MOKAMI WEREMA GESAYA, MISC. LAND APPEAL NO. 36 of 2020, (unreported) this court, held:


"...The present appeal is against the execution order (Ruling) that evicted the appellant from the disputed land. The said order is not covered under section 74 and

*order XL, Rule 1 of the Civil Procedure Code which outline
appealable orders. Therefore the impugned ruling is not
appellate.”*

From the aforesaid observations, this appeal is incompetent before this court. It is hereby struck out with costs.


A.Y. Mwenda
Judge
13.05.2022

This judgment is delivered in chamber under the seal of this court in the presence of the appellants and in the presence of the respondent.


A.Y. Mwenda
Judge
13.05.2022