

**IN THE HIGH COURT OF THE UNITED REPUBLIC OF TANZANIA
IN THE DISTRICT REGISTRY OF ARUSHA**

AT ARUSHA

CIVIL APPEAL NO. 14 OF 2021

(Originated from Civil Case No. 50 of 2017 of The Resident Magistrate's Court of Arusha at Arusha)

SNOW CREST HOTEL AND WILDLIFE SAFARIS LTD.....APPELLANT

VERSUS

ZERAQ TRADERS CO. LTD.....1st RESPONDENT

AL AZIZIA CO. LTD.....2nd RESPONDENT

RULING

16/08/2022 & 13/08/2022

MWASEBA, J.

This ruling is in respect of the preliminary objection raised by the respondent's advocate on the following points of law:

1. That, this appeal No 14 of 2021, which originates from civil case No.50 of 2017 of the Resident Magistrate's Court of Arusha at Arusha is hopelessly time barred.
2. That this appeal No. 14 of 2022 is violative of the procedure prescribed by law in relation to judgments and decrees made Ex-
parte

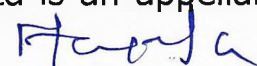
Handwritten signature

3. That, the parties to this appeal No. 14 of 2021 are different from the ruling of Honourable M. J. Mahumbuga- RM dated 8.02.2021 which emanates from Execution proceedings

Briefly, this case is originated from civil case No. 50 of 2017 which was determined ex parte by Hon Mwankuga RM and its judgment was delivered in favour of the respondents herein on 27/03/2018. Thereafter the matter went for execution before Hon Mahumbuga SRM where the court broker was seeking for an order to disassemble the appellant's generator. The application for execution was determined inter parties and was granted as prayed. Aggrieved by the said ruling, the appellant has knocked the door of this court challenging the ruling for execution.

Before this court, the appellant was represented by Mr Ngeseyan learned counsel while the respondents enjoyed the legal service of Mr Mwale learned counsel. As agreed by both parties, the preliminary objection was disposed of orally.

Submitting in support of his points of preliminary objection, Mr Mwale learned counsel averred that the appeal is time barred as the title of the appeal are different from the title of the execution proceedings which the appellant intends to challenge. He said that the grounds of appeal show that Snow crest Hotel and Wildlife Safaris Ltd is an appellant and



Zeraq Traders Co. Ltd and Al Azizia Co. Ltd are first and second respondents respectively. That the names of the parties portrays that the appeal emanates from the original decree and judgment of the lower court which was delivered ex parte on 27/3/2018. To their surprise the ruling that had been annexed to the grounds of appeal is a ruling which emanates from the execution proceedings in which the parties are Zeraq Traders Co. Ltd and Al Azizia Co. Ltd as the first plaintiff/Decree holder and second plaintiff/ Decree holder respectively and on the other party is Snow crest Hotel and Wildlife Safaris Ltd as the defendant/Judgment debtor. He explained that if the appeal as it is coached in the title is against the ruling which was delivered on 8/2/2021 then this appeal has nothing to do with execution proceedings because the procedure of challenging the ruling in execution proceedings is by way of reference and not an appeal.

He further pointed out the shortcomings of the filed appeal that if the appellant is challenging the original decree and judgment as it is coached from the title of the grounds of appeal which was delivered on 27/03/2018 then the same is time barred and in his grounds of appeal, the appellant did not annex the said exparte judgment as per legal requirement. To buttress his point, he referred this court to **Order**

Handwritten signature

XXXIX Rule (1) (1) of the Civil Procedure Code, Cap 33 R.E 2022 which specifies the procedure of bringing an appeal to the High Court from the subordinate court. (See the case of **Registered trustees of Pentecostal Church in Tanzania Vs Magreth Mukama (A minor by her next Friend, Edward Mukama)**, Civil Appeal No. 45 of 2015, High Court Mwanza Registry.

Responding to the raised preliminary points of objection, Mr Ngeseyan learned counsel opposed that their appeal is in respect of the exparte judgment that was delivered on 27/03/2018. He clarified that their appeal is intended to challenge the decision of the Resident Magistrate which was delivered on 8/2/2021 by Hon Mahumbuga SRM and they annexed its ruling to the memorandum of appeal. So, the cited case of **Registered Trustees of Pentecostal Church** (supra) is distinguishable in this case as they are not dealing with exparte order.

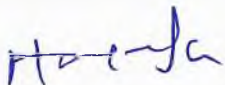
Submitting in reply to the third point of objection as to the variance of names which appears in the ruling which is subject to be challenged for and the parties in the memorandum of appeal, Mr Ngeseyan stated that the counsel for the respondent has not pointed out the difference in the said names so he prays that the preliminary objection be overruled with costs.

Handwritten signature

In his rejoinder, Mr Mwale learned counsel for the respondent reiterated what he submitted in chief.

Having heard the submissions from both sides and the record, the issue to be determined here is whether the preliminary objection has merit.

Mr Ngeseyan learned counsel for the appellant clarified well that their appeal is against the decision of the resident magistrate Court of Arusha in Civil Case No. 50 of 2017 delivered on 8th February, 2021 by honourable Mahumbuga RM. The same is depicted in the first paragraph of the memorandum of appeal and the ruling subject to the appeal has been annexed to the memorandum of appeal. Therefore, I agree with him that the exparte judgment which was delivered on 27/03/2018 with the same parties is less concerned here.

Now I will turn to the fact with regard to the variance of the names in the memorandum of appeal and the ruling which is being challenged. The counsel for the respondent submitted that the appellant and respondents herein appear as appellant and 1st and 2nd respondent respectively while in the ruling which is subject for this appeal the respondent were 1st and 2nd plaintiffs/ Decree holders while the appellant was the defendant/ judgment debtor. For clarity, the names in the Memorandum of appeal appears as follows: 

SNOWCREST HOTEL AND WILDLIFE SAFARIS LTD.....APPELLANT

VERSUS

ZERAQ TRADERS CO. LTD.....1st RESPONDENT

AL AZIZIA CO. LTD.....2nd RESPONDENT

The names of the parties in the ruling which is subject for this appeal is
coached as follows:

ZERAQ TRADERS CO. LTD.....1st PLAINTIFF/ 1st DECREE HOLDER

AL AZIZIA CO. LTD.....2nd PLAINTIFF/ DECREE HOLDER

VERSUS

*SNOWCREST HOTEL AND WILDLIFE SAFARIS LTD..... DEFENDANT/ JUDGMENT
DEBTOR*

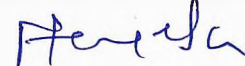
Looking at the above title, the title of the memorandum of appeal and
the attached ruling differs. In the memorandum of appeal, the parties
do not stand as decree holders and judgment debtor. It seems as if the
counsel for the appellant is challenging the original decree of which he
ought to meet the requirement of **Order XXXIX Rule 1 (1) of the
CPC** by attaching the original decree which in this case is an exparte
judgment. So long as he intended to challenge the execution order as he
clarified so, his memorandum of appeal and the attached ruling does not

Ata

meet the requirement of **Order XXXIX Rule (1) (1) of the CPC** as alleged by the counsel for the respondent.

More to that, the counsel for the appellant has insisted that his appeal is based on the execution proceedings. The counsel for the respondent submitted in court that if the appeal was based in challenging execution proceedings, appeal is not a right procedure. I concur with the learned counsel that the execution proceedings are not among the orders which are subject for appeal. The appealable orders are listed under **Section 74 and Order XL of the Civil Procedure Code**, Cap 33 R.E 2022. Execution orders are not among them. Thus, this appeal is misconceived.

The position that execution orders are not appealable has been regularly stated by this Court in various cases. See **Kelvin Rodney Zambo Vs. UPA Insurance Tanzania LTD (Formally known as Century Insurance Company)**, Civil Revision No. 39 of 2019, High Court at Dar es Salaam, **Felister Kifulugha vs Royal Mwalupembe**, Misc. Land Appeal No. 28 of 2019, High Court of Mbeya, **Joseph Mwita Magige vs Mokami Werema Gesaya** (Misc. Land Appeal 36 of 2020) [2020] TZHC 3348 (TANZLII) and also the case of **General Tire (E.A) LTD Vs.**



Amenyisa Macha and Others, Civil Appeal No. 21 of 2003,
(Unreported) in which the High Court Sitting at Arusha had this to say:

"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 the upshot, I find the appeal is incompetent as it is preferred against an execution order. Consequently, I sustain the preliminary objection and struck out the appeal with costs.

It is so ordered.

DATED at **ARUSHA** this 13th day of September, 2022.




N.R MWASEBA
JUDGE
13/09/2022