

**IN THE HIGH COURT OF THE UNITED REPUBLIC OF TANZANIA**

**(DAR ES SALAAM DISTRICT REGISTRY)**

**AT DAR ES SALAAM**

**CIVIL APPEAL NO.152 OF 2022**

*(Originating from the decision and order of the Resident Magistrate's Court  
of Dar es Salaam at Kisutu in Execution No.59 of 2019 dated 1/09/2022 Hon.*

*G.N. Isaya, Taxing Master - SRM)*

**AJAY HANSRAJ ASHER.....APPELLANT**

**VERSUS**

**TRIUMP IMPEX LIMITED .....RESPONDENT**

**RULING**

*Date of last Order: 1/11/2022*

*Date of Judgment: 8/11/2022*

**POMO; J**

The Appellant is aggrieved with the ruling and order of the resident Magistrate's Court of Dar es Salaam in Execution Case No. 59 of 2019 delivered on 17<sup>th</sup> August, 2022 overruling his Preliminary Objections he

*18/11*

raised against that execution case as such he has lodged this appeal containing five grounds of appeal, to wit: -

- 1. That, the Honourable Senior Resident Magistrate as he then was, erred in law and fact by finding that the decree holder's failure to indicate date of the decree, instead, the executable decree wrongly dated 27<sup>th</sup> February, 2019 was a minor and curable error*
- 2. That, the Honourable Senior Resident Magistrate grossly erred in law and fact by not striking out the Respondent's Execution after finding that the Execution Application was filed by TRIUMPH IMPEX LIMITED which is a person different from the decree holder who is TRIUMPH IMPEX LTD*
- 3. That, the Honourable Senior Resident Magistrate grossly erred in law and fact by holding that the decree holder is not bound to exhaust all other modes of execution before resorting to arrest and detention civil prisoner*
- 4. That, the Honourable Senior Resident Magistrate grossly erred in law and fact by not properly considering and analysing the authorities cited in the Appellant's written submission in support of the preliminary objection, that the application for execution was not maintainable in law*
- 5. That, the Hon. Magistrate erred in law and fact for failure to struck out the application for execution as no notice to show cause had been issued to the judgment debtor*



The background, albeit briefly, to the appeal is that, the Respondent filed, under Order XXXV summary procedure, the Civil Case No.25 of 2017 at Kisumu Resident Magistrate (the RM Court) against the Appellant, the suit which was on 14/12/2017 decided in the Respondent's favour, Hon. W.R. Mashauri, PRM. In that decision the Appellant was ordered to pay Tshs 54,000,000/- the amount due because of the dishonoured cheque, Tshs 50,000,000/- general damages for loss of business, customers and embarrassment; payment of interest at a commercial rate of 26% per annum from 16<sup>th</sup> September, 2016 to the date of paying in full the above Tsh 54,000,000/- and Tsh 50,000,000/- respectively, and lastly, he was ordered to pay costs of the suit.

On 15<sup>th</sup> May, 2019 the Respondent filed Execution Case No.59 of 2019 Kisumu RM Court applying for payment of Tsh 126,000,000/- and should the appellant fail to pay that amount then will be committed in jail as a civil prisoner. The Execution Case was resisted by the appellant who on 13<sup>th</sup> May, 2022 filed Notice of Preliminary Objections objecting that; **one**, there is no decree dated 27<sup>th</sup> February, 2019 as applied for execution by the Respondent; **two**, the name appearing in the judgment and decree is different to that of the Respondent, **thirdly**, the execution application for

187,

arrest and detention of the Appellant as civil prisoner was pre-maturely filed by the Respondent, and **lastly**, that the Execution Case is incompetent for being filed without issuing notice before the filing.

On 17<sup>th</sup> August, 2022 the RM court determined the Appellant's raised Preliminary objections by overruling them and ordered the execution case to proceed for hearing on merit, the findings which the Appellant is not happy with hence the present appeal with the grounds above enumerated

When the appeal was called on for hearing on 1<sup>st</sup> November, 2022, the appellant was present and represented by Mr. Jerome Joseph Msemwa, learned advocated while Ms Maryan Saleh Msean, the learned advocate appeared for the Respondent. Before the appeal could be heard on merit, this court ordered for hearing of the preliminary objection raised by the Respondent against the appeal, the notice of which being filed on 1<sup>st</sup> November, 2022. The said objection reads thus: -

*"This Honourable Court lacks the requisite jurisdiction to entertain this Application"*

Submitting in support of the preliminary objection, Ms Maryan argued that under **section 74(2) of the Civil Procedure Code, [Cap 33 R.E.2019] (the CPC)** bars appeal to be raised against interlocutory

*JS*

orders. That since the ruling appealed against arises out of the determination of the preliminary objections against the execution case which in no way determined the matter to finality then it is not appealable. The decision of the court of Appeal of Tanzania in **Generator Logic Vs Eli Mukuta, Civil Appeal No.272 of 2019 CAT at Dar es Salaam (Unreported) at page 5** was referred. She further referred to the holding in the Court of Appeal decision in **Celestine Samora Manase & Others vs Tanzania Social Action Fund & Another, Civil Appeal No.318 of 2019** referred in **Generator Logic case (supra)** at p.7.

Again, Ms Maryan cited the case of **Kalebu Kuboja Mjinja Vs Shadrack Daniel Tembe, Civil Appeal No.24 of 2020 High Court at Musoma (Unreported)** at page 2 where this court gave emphasis that under **section 74(1) of the CPC** interlocutory orders are not appealable. The learned counsel then argued that the appeal be struck out with costs for being incompetent

Responding to the submission, Mr. Msemwa the learned advocate submitted that the notice of Preliminary Objection (The P/O) indicates that it is against the Application before this court, so the respondent is bound by the notice. He added that the Respondent can not substitute what has

been put in the notice as an application to an appeal without leave of the court. To him, that alone makes the notice incompetent

It was his further contention that the P/O is based on jurisdiction of which Ms Maryan, the learned counsel hasn't submitted anything on the same. It was his further argument that jurisdiction issue has three things, **one**, pecuniary jurisdiction, **two**, territorial jurisdiction and **lastly**, limitation. He argued that, under the circumstances therefore, Ms Maryan the learned counsel for the Respondent submitted nothing on jurisdiction. The counsel therefore arguing that this court has jurisdiction and asked the court to be jealous in protecting its jurisdiction.

As to the cited authorities, it was Mr. Msemwa's contention that they refer to the incompetence and not on jurisdiction issues and thus submitted that the issue of jurisdiction does not arise here.

Countering the cited section **74(2) of the CPC** Mr Msemwa argued that Ms Maryan the counsel for the respondent wrongly interpreted the provision. He submitted that the section applies to a suit. The herein appeal is in respect of the execution proceedings and not a suit. He, as well, argued that the cited **Generator's case (supra)** dealt with setting

aside *ex parte* award, so it was dealing with a suit. It is distinguishable to the circumstances we have in the appeal herein

As to **Kalebu case (supra)** the learned counsel argued that going by the ruling at page 2 the ruling was dealing with final orders in execution proceedings and not orders which the court made during the execution proceedings in that the order was of attachment and sale of the appellant's property to satisfy the decree. That was a final order, which order does not appear in **section 74 of the CPC** as appealable. The counsel is of the view that the order complained of in this court is not a final order in execution proceedings thus is appealable. That, their complaint is over the order dismissing the P/O in which the Appellant was complaining there was no decree capable of being executable against him to be imprisoned as civil prisoner and submitted the order is appealable for the court to determine the lower court order. He then argued the P/O raised on jurisdiction, and not otherwise, be overruled with costs.

In her rejoinder submission, Ms Maryan admitted the notice of P/O to be in respect of the application but was quick to argue that it was a slip of hand because it is clear that the P/O is in respect of the instant appeal. According to her, the description of an application instead of an appeal can

not be held to be fatal arguing that the appellant was in no way prejudiced with this clerical error. That, with the coming in place of the overriding objectives principle, she prayed the court to disregard the error and referred the court to be guided by the court of appeal decision in **Prof. T.L.Maliyamkono Vs Wilhelm Sirivester Erio, Civil Appeal No.93 of 2021 CAT at Dar es Salaam (unreported)** at page 7 last paragraph and thus prayed the slight clerical error be overlooked.

On the argument that nothing as to jurisdiction was submitted in support of the P/O, Ms Maryan argued that jurisdiction is the power to make legal decisions and contended that she submitted to the effect that this court has no jurisdiction as it is barred by **section 74 of the CPC**.

On the argument that this court has jurisdiction to entertain the appeal, Ms Maryan submitted that they have cited no provision of law to support their assertion that this court has jurisdiction to entertain the appeal of this nature.

As to the argument that **section 74(2) of the CPC** deals with a suit and the appeal herein does not emanate from a suit thus appealable, in disagreement with that assertion, Ms Maryan, the learned counsel for the Respondent argued that the said section bars an appeal on any

18/11



preliminary or interlocutory decisions of the lower courts, the appeal herein is such a decision.

In the end, Ms Maryan reiterated her submission in chief and argued this court is not clothed with jurisdiction to entertain this appeal and argued the court to strike it out.

On my part, I have carefully considered the lower court record as well as the rival submissions by the parties, and I think the issue is whether this court is vested with jurisdiction to entertain the appeal herein.

The parties are not in dispute that this appeal is against the ruling and drawn order on the preliminary objections the appellant raised against the Respondent's Execution Case No. 59 of 2019 Kisumu Resident Magistrate' Court, the ruling which overruled the objections and ordered hearing of the execution case to proceed. This means that the objections raised did not determine to finality the execution case, that is why the execution proceedings is still pending for hearing.

Now, while the Respondent is arguing that this court is not clothed with jurisdiction to hear and determine this appeal on the reason that it originated from an interlocutory order, the preliminary objections for that

matter, which didn't determine the execution case to its finality, the appellant is of the different views that it has jurisdiction.

Again, the Appellant challenged, **one**, the Respondent's raised notice of preliminary objection that it is against the application and not the appeal, and **two**, that they haven't argued anything about the jurisdiction of the court.

Looking into the Respondent's submission in support of the preliminary objection raised, it is obvious that the submission is centred on the argument that this court has no jurisdiction to hear and determine this appeal and nowhere is heard to have submitted against an application meaning that writing an application instead of an appeal in her notice of Preliminary Objection was just an oversight and not otherwise. As correctly submitted by Ms Maryan, in my view, the Appellant is in no way prejudiced by the error and I am supported by the court of appeal decision in **Prof. T.L. Maliyamkono** cited (**Supra**) at page 7 where the court stated thus:

-

*"From what we have shown above, we are of the view that since the omission did not occasion any injustice and with the coming of the overriding objective principle in our law which propagates for the*

1871

*substantive justice by the court without regard to undue technicalities, it was not fatal to the proceedings".* End of quote

A court of law cannot assume the jurisdiction it does not have. This position was so stated in **Shyam Thanki and Others v. New Palace Hotel** [1972] HCD n. 92 where it was held:

*"All the courts in Tanzania are created by statutes and their jurisdiction is purely statutory. It is an elementary principle of law that parties cannot by consent give a court jurisdiction which it does not possess."*

Now, in resolving the rival arguments as to whether this court has jurisdiction or not to entertain the appeal herein, I have to be guided by the law which regulated the conduct of the dispute between the parties herein. As pointed out earlier in the background of the matter, the Execution Case No.59 of 2019 Kisumu RM's Court emanated from Civil Case No. 59 of 2017 of that court and was filed under **Order XXXV Summary Procedure of the Civil Procedure Code, [Cap. 33 R.E.2019] (the CPC)**. Likewise, the law governing the execution the subject of this appeal is the CPC which means even the appeal have to be governed by the CPC.

**Section 74(1)&(2) of the CPC** deals with an appeal. The section provides thus: -

18/1

**"S.74(1) - An appeal shall lie to the High Court from the following orders of the District Courts, Resident Magistrate's Courts and any other tribunal, the decisions of which are appealable to the High Court, and save as otherwise expressly provided in this code or by any law for the time being in force from no other order-**

- (a)** an order superseding an arbitration where the award has not been completed within the period allowed by the court;
- (b)** an order on an award stated in the form of a special case;
- (c)** an order modifying or correcting an award;
- (d)** an order filing or refusing to file an agreement to refer to arbitration;
- (e)** an order staying or refusing to stay a suit where there is an agreement to refer to arbitration;
- (f)** an order filing or refusing to file an award in an arbitration without the intervention of the court;
- (g)** an order under section 69;
- (h)** an order under any of the provisions of this Code imposing a fine or **directing the arrest or detention as a civil prisoner of any person except where such arrest or detention is in execution of a decree**; or
- (i)** any order made under rules from which an appeal is expressly allowed by rules.

107.

**74(2)** - *Notwithstanding the provisions of subsection (1), and subject to subsection (3), no appeal shall lie against or be made in respect of any preliminary or interlocutory decision or order of the District Court, Resident Magistrate's Court or any other tribunal, unless such decision or order has effect of finally determining the suit.*" End of quote

From the above reproduced **section 74 of the CPC** it is obvious that while **section 74(1)(h)** allows an appeal to this court against the lower court **order under any of the provisions of this Code imposing a fine or directing the arrest or detention as a civil prisoner of any person**, the same provision is categorical in that the right of appeal doesn't exist where such arrest or detention is in respect of execution of a decree. That is to say, according to the above position of the law, where the execution case is determined to its finality then the law bars any appeal to high court against that final execution order

**Section 74(2)** of the CPC **deals with preliminary or interlocutory decisions or orders issued** by the District Court, **Resident Magistrate's Court** or any other tribunal, the order which does not have the effect of determining the suit to its finality. The above law

18.

provides that such orders, as long as they do not determine the suit to its finality then they are not appealable.

The term suit is not defined under the CPC but in the **Law of Limitation Act, [Cap 89 R.E.2019]** the word "**suit**" is defined under section 2 the interpretation section. The same reads thus: -

*"suit" means **any proceeding** of a civil nature instituted in any court but does not include an appeal or application;*

In my view, Execution No.59 of 2019 Kisumu RM's Court is such "any proceedings of a civil nature" envisaged under the above interpretation of the word "suit".

Faced with an appeal arising from the interlocutory order, the court of appeal in **Generator Logic Vs Eli Mukuta, Civil Appeal No.272 of 2019 CAT at Dar es Salaam (unreported) at pp.5 – 7** had this to state: -

*"Over the years, case law had made this task easier for us. This is because **case law has defined what an interlocutory order is and what it means by an order being final.***

187.

*In Murtaza Ally Mangungu V. The Returning Officer for Kilwa North Constituency and 2 Other, Civil Application No.80 of 2016 (unreported) after citing our unreported decision of Peter Noel Kingamkono V. Tropical Pesticides Research, Civil Application No. 2 of 2009, the Court stated: -*

*"From the above, **it is our view that an order or decision is final only when it finally disposes of the rights of the parties.***

*This means that **the order or decision must be such that it could not bring back the matter to the same court".***

The court of appeal went further, at page 7, to quote its decision in **Celestine Samora Manase & 12 Others v. Tanzania Social Action Fund & Another, Civil Appeal No. 318 of 2019** where it stated thus:

*"Perhaps as we conclude, it would be helpful to recall what we said in **Paul A. Kweka (supra)** as the rationale of the bar to appeals against interlocutory decisions:*

***Firstly,** it promotes an expeditious administration of justice, that it ensures timely justice, at the same time making access to justice affordable that is less costly. **Secondly,** and more importantly, it affords both parties in the case, equal opportunity to be heard at the full trial".*

Having so analysed and give the position of the law as above, it follows therefore that, since the ruling and order in Execution Case No.59

19.

Of 2019 Kisumu RM's Court delivered on 16<sup>th</sup> August, 2022 did not determine the execution case to its finality then it is an order which is not appealable.

In the end, the preliminary objection raised by the Respondent against this appeal is hereby upheld. I therefore declare the appeal to be incompetent before the court on the ground that this court has no jurisdiction to hear and determine it, and as such , I hereby struck it out. Each party shall bear its own costs. It is so ordered

Right of Appeal explained


Dated at Dar es Salaam this 8<sup>th</sup> day of November, 2022




  
Musa K. Pomo

Judge

Ruling is delivered on this 8<sup>th</sup> November, 2022 in presence of Mr. Jerome Joseph Msemwa, the learned counsel for the Appellant also holding brief of Ms Maryan Saleh Msean, the learned advocate for the Respondent.



  
Musa K. Pomo

Judge

8/11/2022