

**IN THE HIGH COURT OF THE UNITED REPUBLIC OF TANZANIA  
IN THE SUB- REGISTRY OF DAR ES SALAAM**

**AT DAR ES SALAAM**

**CIVIL APPEAL NO. 45 OF 2021**

**ALLIANCE FINANCE CORPORATION LIMITED ..... APPELLANT**

***VERSUS***

**MARTIN MATIKU NYETITA ..... RESPONDENT**

**(Appeal from the ruling and drawn order of the Resident Magistrate Court  
of Ilala at Kinyerezi in Execution No. 38 of 2020)**

**RULING**

8<sup>th</sup> and 8<sup>th</sup> April, 2022

**KISANYA, J.:**

The appellant, Alliance Finance Corporation Limited through the legal services of Juventus Katikiro of Apex Attorneys Advocates filed an appeal against the ruling and drawn order of the District Court of Ilala at Kinyerezi in Execution No. 38 of 2020.

The facts leading to this appeal can be stated as follows. On 12<sup>th</sup> March 2020, the trial court recorded the deed of settlement signed by the appellant and respondent to form part of judgment and decree of that court in Civil Case No. 25 of 2019. In terms of the said deed of settlement, it was decreed, among others, that the respondent would pay the appellant Tshs.

90,972,130 and Tshs 58,283,802.51 at an interest of 10% per annum and 23% per annum in 33 monthly installments of not less than Tshs. 3,164,532 and Tshs 2,399,547 respectively.

As the respondent defaulted to pay the monthly installment, the appellant filed an application for execution of the settlement order and decree. In its ruling dated 30<sup>th</sup> November, 2020, the trial court held the view that the application for execution was premature.

Not amused, the appellant lodged the present appeal. For the reasons to be detected in this ruling, I will not reproduce the grounds of appeal advanced in the memorandum of appeal.

When the matter was placed before me for hearing, the appellant was represented by Ms. Ruqaiya Al-Harthy, learned advocate, while the respondent defaulted to appear.

In view of the above background facts, I asked the appellant's counsel to address me on the competence of the appeal, specifically, whether the ruling and drawn order arising from the execution proceedings are appealable.

Ms. Ruqaiya conceded that the appeal was incompetent. She therefore prayed to withdraw the appeal with leave to file a competent application for revision.

I agree with her on that point. It is settled law that right of appeal is a creature of a statute. This position was stated in the case of **Paul A. Kweka & Hillary P. Kweka vs Ngorika Bus Services and Transport Company Limited**, Civil Appeal No. 129 of 2002, CAT at Arusha (unreported) in which the Court of Appeal held as follows:-

*"It should also be recalled that the right of appeal is a creation of a statute. There is therefore no automatic right of appeal to this Court. Whenever there is an appeal to this Court there is a law behind which gave the right to appeal."*

As indicated earlier, the ruling and drawn order subject to this appeal were issued by the District Court. In that regard, an appeal before this court is governed by section 74 and Order XL of the Civil Procedure Code, Cap. 33, R.E. [Cap. 33, R.E. 2019] which set out the appealable orders. However, an order arising from the execution proceedings is not listed in the above stated provisions. Therefore, such order is not appealable.

In the case of **Ignasio Ignas vs Rose Hanselem Mpangala and Another**, Civil Appeal No. 65 of 2017, HCT at Dar es Salaam (unreported), this Court held the view that the proper recourse against the execution order is to file an application for revision of the execution proceedings, litigate the questions relating to execution under section 38 of the CPC or filing reference to this Court under Order XLI, Rule 1 of the CPC. The court held as follows:

*“The remedies available to a person aggrieved by the execution order or proceedings include, applying for revision of the execution proceedings, litigate the questions relating to execution under section 38 of the CPC or make use of Order XLI, Rule 1 of the CPC.”*

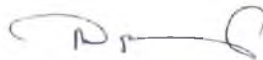
In the light of the foresaid position of law, I agree with Ms. Ruqaiya that the present appeal is incompetent before this court. It seeks to challenge an execution order which is not listed under section 74 and Order XL, Rule 1 of the CPC.

I have also considered the prayer to withdraw the appeal. The law is settled that an incompetent matter cannot be withdrawn, amended or adjourned. See the decision of the Court of in **Edward Bachwa & Three Others vs The Attorney General**, Civil Application No.128 of 2006 and

**Ghati Methusela vs Matiko w/o Marwa Mariba**, Civil Application No. 6 of 2006 (both unreported).

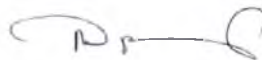
In the upshot, the appeal is struck out for being incompetent. I make no order to costs because the appeal is disposed of basing on the issue raised by the Court *suo muto*. The appellant is at liberty to file a competent matter before this Court. For the interest of justice, it is ordered that the matter should not be subjected to the law of limitation during the time which this appeal was pending in this Court if it is filed within thirty (30) from the date of this order.

DATED at DAR ES SALAAM this 8<sup>th</sup> day of April, 2022.



S.E. Kisanya  
JUDGE

Court: Ruling delivered this 8<sup>th</sup> day of April, 2022 in the presence of Ms. Ruqaiya Al-Harthy, learned advocate for the appellant and in the absence of the respondent.



S.E. Kisanya  
JUDGE  
08/04/2022

