

IN THE HIGH COURT OF THE UNITED REPUBLIC OF TANZANIA
IN THE SUB-REGISTRY OF MANYARA
AT BABATI

MISC. LAND APPLICATION NO. 28 OF 2023

*(Arising from Misc Land Application No.236 of 2022 and Misc. Land Application No. 196 of 2022 before
the DLHT of Babati at Babati)*

HELLENA GEORGEAPPLICANT

VERSUS

EMMANUEL IKKAMA MAISHARA..... 1ST RESPONDENT

AUGUSTINO IKKA MAISHARA 2ND RESPONDENT

RULING

6th & 15th June, 2023

Kahyoza, J.:

Hellena George applied for execution of a decree seeking an eviction order against Samwel Ikkamashara, the judgment debtor. The judgment debtor did not contest. The tribunal issued the eviction order, which the tribunal court broker executed and handed over the suit land to Hellena. Later, **Emmanuel Ikkama Maishara** and **Augustino Ikka Maishara** (the respondents) knocked the door of the tribunal praying for stay of execution and investigation of the claim under rule 57(1) of Order XXI of the Civil Procedure Code, [Cap. 33 R.E. 2019] (the **CPC**).

Before the tribunal heard the application, the respondents' advocate Mr. Chami raised a preliminary objection that Hellena's advocate, Mr. Kim, filed the counter affidavit out of time. While replying to the oral objection, Mr. Kim, Hellena's advocate, raised another objection that the respondents' application had been overtaken by events. He submitted that Hellena, his client, had already been given possession of the land and that she had a customary right of occupancy. Mr. Kim, learned advocate, added that the respondents' application was bad in law as it was an omnibus application.

The tribunal considered the preliminary objections and decided in favour of the respondents that Hellena's advocate filed the counter in contravention to the order given on 28.9.2022. The tribunal did not determine the points of preliminary objection Mr. Kim raised.

Aggrieved by the tribunal's failure to determine her points of preliminary objection, Hellena instituted the application for revision. Before hearing the application for revision, I became apprehensive as to the competence of the application. I suspected the application for revision was not against an interlocutory order. Consequently, I invited the parties' advocate to address me on the competence of the application.

Is the application not against an interlocutory order?

Hellena's advocate, Mr. Kim took the floor first and argued that the application was not premature or against an interlocutory order. He submitted they filed the application after the chairman of the tribunal abdicated to determine the preliminary points of law he raised. He contended vehemently that the preliminary points of law they had raised were so basic that had the chairman considered them that ought to have been the end of the matter. For that reason, he could not wait the application to be heard on merit. He instituted the instant application.

He concluded that the application was properly instituted and that the application was grounded under section 78(2) and 79 of the **CPC**. He concluded that the **CPC** permits an appeal or revision to be instituted against an order which would have disposed the proceedings.

The respondents' advocate Mr. Chami averred that Hellena instituted the application for revision prematurely, since the main application is pending for determination before the tribunal. He submitted that the order under consideration did not determine the parties' right. He refuted the contention that Hellena's advocate filed a notice of preliminary objection. He stated that the issue before the tribunal was whether Hellena filed the reply

within the schedule. He added that the section referred to by Hellena's advocate refers to application for revision or review and that the application before this court is neither for revision nor for review. He concluded that since Hellena was occupying the land in dispute she is applying delaying tactics.

In his rejoinder, Hellena's advocate was emphatic that section 79(2) of the **CPC** allows an application for revision to be instituted. He prayed the court to wave costs.

Indisputably, the application before this court is against the tribunal's ruling and order on preliminary objections. The tribunal's failure to uphold her points of preliminary objection aggrieved Hellena, the applicant. The substantive application the respondents instituted before the tribunal is still pending. As pointed out, the respondents were seeking the tribunal to stay execution and investigate title.

It is beyond dispute that Hellena applied to this Court to revise an interlocutory order. An interlocutory order as defined by Halsbury's Laws of England (4th Ed.) vol. 26 para. 506 is-

*"an order which does not deal with **the final rights of the parties**, but either (1) is made before judgment, and gives no final decision on the matters in dispute, but is merely on a matter of procedure;*

or (2) is made after judgment, and merely directs how the declarations of right already given in the final judgment are to be worked out, is termed interlocutory." (emphasis is added).

It is settled law that no appeal or revision lies against any interlocutory order as provided by section 74(2) of the CPC. It states-

"(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."

The Court of Appeal and this Court have held in cases without number that an order which **does not finally disposes of the right of the parties in the suit** or **finally determines the criminal charge** is not subject to appeal or revision. Thus, a court may revise an interlocutory order if that order has a final and conclusive effect. The issue is whether the tribunal's order was final and conclusive in effect. The Court of Appeal in **Junaco T. Ltd & Another vs Harel Mallac Tanzania Ltd** (Misc. Civil Application No. 473 of 2016) [2018] TZCA 290 (15 October 2018) considered circumstance under which an interlocutory order may have a final and conclusive effect. It reiterated its position in the **Tanzania Motor Services Ltd and Another**

v. Mehar Singh t/a Thaker Singh, Civil Appeal No. 115 of 2005 (CAT unreported) by quoting Lord Alverston in **Bozson v Altrincham Urban District Council** [1903]1 KB 574 at 548, thus-

"It seems to me that the real test for determining this question ought to be this: Does the judgment or order, as made, finally dispose of the rights of the parties? If it does, then I think it ought to be treated as a final order; but if it does not, it is then, in my opinion, an interlocutory order"

The Court of Appeal, then concluded in **JUNACO (T)** that –

*"In view of the above authorities it is therefore apparent that in order to know whether **the order is interlocutory or not** one has to apply **"the nature of the order test"**. That is, to ask oneself whether the judgment or order complained of finally disposed of the rights of the parties. If the answer is in affirmative, then it must be treated as a final order. However, if it does not, it is then an interlocutory order."*

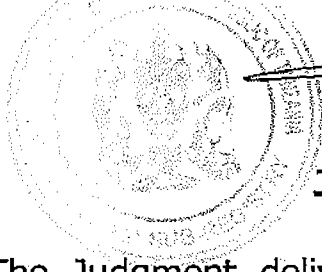
The ruling of the tribunal upholding a preliminary point of law that Hellena filed her reply out the provided schedule and which did not consider and uphold Hellena's points of preliminary objection, did not determine the parties' rights. There is still pending an application which will determine issues central to the application, which are whether to stay execution and

investigate claim before the tribunal. Thus, an application which will determine the parties' right is still pending.

In the upshot, I find that the order Hellena seeks to challenge by way of revision is an interlocutory one, for that reason not revisable. Thus, Hellena filed an application for revision prematurely. I strike it out.

The appellant's advocate prayed costs to be waived. It is settled law that costs follow the event. However, I will not grant costs as it is the Court, which raised the legal point *suo mottu* and the respondents' advocate did not press for costs.

Dated at Babati this 15th day of June, 2023.



**John R. Kahyoza,
Judge**

Court: The Judgment delivered in the presence of appellant and her advocate Mr. Kim and holding Mr. Chami's brief for the respondents. B/C Ms. Fatina present. Right to appeal explained.

**John R. Kahyoza,
Judge**