

IN THE HIGH COURT OF THE UNITED REPUBLIC OF TANZANIA
(MWANZA SUB- REGISTRY)
AT MWANZA

LAND APPEAL No. 11 OF 2023

(Arising from Misc. Application No. 45C of 2021 before the District Land and Housing Tribunal for Mwanza at Mwanza originating from Land Appeal No. 45 of 2020, High Court Mwanza)

RACHEL ZEPHANIA----- APPELLANT

VERSUS

MARY JOSEPH----- RESPONDENT

RULING

Last Order date: 01.06.2023

Ruling Date: 23.06.2023

M. MNYUKWA, J.

The Appellant, Rachel Zephania appealed against the decision of the District Land and Housing Tribunal (DLHT) of Mwanza at Mwanza in Misc. Application No. 45C of 2022 which is the decision in regards to the Execution in Land Appeal No 45 of 2020 delivered by this Court.

In order to appreciate the merits or otherwise of the appeal, the following background is crucial. The appellant (the then applicant) instituted an Application No 43 of 2016 at Pamba ward tribunal claiming payment of of Tsh 1,500,000/- being an outstanding rental sum for the



year 2016 and the unsatisfied sum that arises from the balance of the amount half of which was paid upfront by the respondent.

After hearing both parties, the appellant's application partly succeeded where the ward tribunal ordered the respondent to pay the sum owing within two days and to continue paying the sum of Tsh 500,000 annually being the annual rent of the premises rented out. The said sum was to be paid for the remainder of the lease period for a period of 9 years and six months. The above decision was not happily received by the appellant. As she finds that justice was not done in her part, she appealed to the District Land and Housing Tribunal (DLHT) for Mwanza by advancing four grounds of appeal. Lucky to her, the appeal was allowed for it was unchallenged for non-appearance of the respondent.

As the 1st appellate Tribunal, the DLHT gave the following orders:

- i. That having breached the contract, the respondent has to pay Tsh 1,500,000 due to the appellant and*
- ii. To vacate the suit premises within 30 days from the date of the impugned decision*

The legal battles between the parties continued as the order of the DLHT aggrieved the respondent who preferred an appeal to this Court by advancing two grounds of appeal. After hearing both parties, the appeal was partly succeeded. The decision of the DLHT was reversed and the



decision of the ward tribunal was restored with the following variation and orders:

- i. That the sum of Tsh 1,500,000 due to the appellant should be paid within 30 days from the date thereof*
- ii. That a valuation of the costs of construction should be carried out, at the respondent's cost to determine the actual sum spent on the construction. If the value is in excess of the sum of Tsh 9,000,000/- agreed by the parties, then the parties should agree on how the excess sum is to be recovered by the appellant, less costs (if any) due to the appellant. This may include amortization through extension of the lease period at a rent to be agreed by the parties;*
- iii. That the appellant should enjoy the remainder of the lease period that covers the sum that was initially agreed for construction of the premises*
- iv. Parties to bear their own costs.*

In the way of executing the decision of this Court, the respondent filed Misc. Application No. 45C of 2021 before the DLHT to execute the decision of this Court. At the hearing of the above application, both parties enjoyed the legal representation. After hearing the counsel for both parties, the DLHT which sits as an executing court ordered the appellant to pay the respondent Tsh 35,000,000 and in case of failure to pay, that amount should be regarded as payment for rent and the



respondent should continue to enjoy lease in the suit premises for a period of 2 years and three months. The said execution has to be done within 14 days from the date of the decision.

Aggrieved by the above decision of the DLHT which sits as an executing court, the appellant brought the present appeal advanced only one ground of appeal which are:

"That the Chairman of the DLHT erred in law and fact to give out the decision in execution which is contrary to the Award of the Land Appeal No 45 of 2020."

During the hearing of the appeal, the appellant was represented by Lucas Bundala while the respondent enjoyed the legal representation of Idrissa Juma. The appeal was argued orally.

Arguing in support of the appeal, the appellant's counsel submitted that, in its decision in Land Appeal No 45 of 2020, this Court ordered the valuation of the construction of the disputed premises be carried out and the parties to review the period of tenancy agreement. He elaborated that, the above order aimed to establish whether the respondent was still entitled to stay in the disputed premises or not. He added that, after doing calculation, it was revealed that the respondent had extended the time to stay in the disputed premises for one year and three months.



He further submitted that, they have filed the present appeal due to the following; First, the Hon. Chairman did not consider the time extended by the respondent to stay on the disputed premises and yet gave her more time to stay. Second, the order of the DLHT to require the appellant to pay the respondent Tsh 35,000,000/- is contrary to the award of this Court. He therefore prayed the appeal to be allowed and the respondent to incur the costs of the appeal.

Opposing, the respondent's counsel submitted that, executing court enjoying exclusive jurisdiction to deal with any question relating to execution and satisfaction of the decree as it is provided for under section 38(1) of the Civil Procedure Code, Cap 33 R.E 2019 and stated in the case of **Hassan Twaib Ngonyani v Tanzania Pipeline Limited**, Civil Appeal No 201 of 2018.

He went on to clarify the decision of this Court in Land Appeal No 45 of 2020 about the valuation of the costs of construction should be carried out. He added that, the Court ordered the excess of Tsh 9,000,000/- to be recovered by the respondent. The Court also suggested the same can be recovered by paying in installments by extending the lease period at the rent agreed by the parties. He added that, the other relief granted by the Court is for the respondent to enjoy the remainder



of the lease period that covers the sum that was initially agreed for construction of the suit premises.

He further submitted that, to enjoy the fruits of the award, the respondent filed the application for execution and prayed the respondent to be given access to the suit premises to enjoy the remained two years and three months of the lease period agreed. Therefore, the prayer was not contrary to the decision of this Court.

Going to the records, he averred that, the initial lease agreement between the parties was for 4 years and 5 months from 2014 to 2018. That unfortunately, the respondent was disturbed to enjoy the suit premises for 2 years in the agreed period. He added that, the executing court did not error to order the respondent to enjoy the period of 2 years and 3 months as the order was constructively captured from the Judgment and Decree of this court.

Further to that, he contest the submissions of the appellant's counsel on the issue of the extension of the lease period to recover construction costs or the appellant to pay excess costs in the construction to be contrary to the Award. He submitted that, the court ordered the excess amount to be recovered by payments or by renting.



He retires by stating that the order issued by the executing court for payments of Tsh 35,000,000 which is excess, was the correct decision of the executing court because valuation costs was Tsh 45,000,000 and when Tsh 9,000,000 is deducted, the remaining is Tsh 35,000,000/-. He thus prayed the appeal to be dismissed since what was done by the executing court was in line with the Award of this court.

In a brief rejoinder, the appellant's counsel averred that, executing court is not allowed to go contrary with the Award. Thus, the order of the DLHT of payment Tsh 35,000,000/- to respondent is contrary to the award and it is a new terms of payments. He finalized by submitted that, the respondent enjoyed the use of the property as she overstay for a period of I year and 5 months and that the DLHT misconceived the decree for ordering the respondent to continue to stay in the disputed lease premises. He thus insisted the appeal be allowed.

When composing Judgment, this Court faced with a legal issue on the competency of appeal. Consequently, parties were summoned to address the Court on the competency of appeal particularly on the remedy of a party aggrieved by the decision of the executing court

It was the appellant's counsel who kicked the ball rolling. He quickly submitted that, a party aggrieved by the decision of the DLHT when sitting as executing court is to lodge an appeal as it is provided for



under the provision of Regulation 24 of the Land Disputes Courts (The District Land and Housing Tribunal), Regulations, 2002 which provides the remedy for a party who is not satisfied with the execution is to appeal and to that end section 43 of the Land Disputes Courts Act, Cap 216 R.E 2019 does not apply.

He went on that the right to revision applies only when the court invoked its supervisory power. He referred to the decision of this Court in **Malendeja Mango'mbe v Nyazobe Lutema and Another**, Misc. Land Application No 61 of 2020 and the case of **Enock Marwa Chacha v Yahaya Joseph Giliama**, Land Appeal No 18 of 2021 where the Court entertained the appeal and held that right to revision is not there.

He added that, the proviso of Regulation 24 of the Land Disputes Courts (The District Land and Housing Tribunal), Regulations, 2002 is a general provision which does not bar the execution to proceed. He thus prayed the Court to determine the appeal on merit.

Responding on the issue raised by the court, the respondent's counsel submitted that, the appellate jurisdiction of the High Court against the decision of the DLHT in exercising its original, provisional or appellate power is derived from section 43(1) of the Land Disputes Courts Act, Cap 216 R.E 2019 which is the parent Act on the procedures of handling land matters as per the decision of **Augustino Lyatonga Mrema v AG** 2003



TLR 6. He averred that, in the case of **Augustino Lyatonga Mrema v AG** (supra) it was held that, appeal is a creature of statute and the Court can only exercise power conferred upon it by statute and has no inherent power to assume jurisdiction.

He clarified that, for the court to exercise its appellate jurisdiction, there must be clear provision provides the right of appeal against the impugned decision. He submitted that, Regulation 24 of the Land Disputes Courts (The District Land and Housing Tribunal), Regulations, 2002 is a subsidiary legislation which supplement the parent Act and does not provide the procedure for appeal for the same is not applicable in the High Court and the High Court can only exercise its power under the Land Disputes Courts Act, Cap 216 R.E 2019.

On the provision of Regulation 24 of the Land Disputes Courts (The District Land and Housing Tribunal), Regulations, 2002 he was of the view that the same was meant to the Judgment and Decree issued by the DLHT in exercising its original, appellate or revision jurisdiction in land disputes and does not cover Ruling or Order emanating from Execution.

He further averred that the proviso of Regulation 24 of the Land Disputes Courts (The District Land and Housing Tribunal), Regulations, 2002 states that an appeal is not a bar to execution of decree which simply means that it declares the rights of the parties to appeal. He went on that,



that is the reason Regulation 25 of the Land Disputes Courts (The District Land and Housing Tribunal), Regulations, 2002 gives power of the DLHT to stay its own decision and what can be stayed is a decree.

He amplified that, Regulation 24 and 25 of the Land Disputes Courts (The District Land and Housing Tribunal), Regulations, 2002 covers only the Judgment and Decree issued by the DLHT which is capable of being stayed or executed. He referred to the case of **Kalebu Kuboja Mjinja v Shadrack Daniel Tembe**, Civil Appeal No 24 of 2020 and the case of **Chacha Nikongolo v Ndege Kiseke**, Misc. Land Appeal No 145 of 2020 which state that the remedy of the party dissatisfied with execution order is to file Revision.

He concluded that, the right of appeal must be exclusively provided by the law and if the execution order is appealable, the law could have provided for it. He therefore prayed the court to struck out the appeal with costs because it is incompetent.

Rejoining. The appellant's counsel agreed that, it is true that the right to appeal is a creature of statute. However, he went on that, the other laws like the Civil Procedure Code, Cap 33 R,E 2019 is applicable if the Land Disputes Courts (The District Land and Housing Tribunal), Regulations, 2002 does not cover the particular circumstances and in our case at hand, the appeal is the proper remedy.



After hearing the parties' submissions on the sole ground of appeal as well as parties' submissions on the issue raised by the Court suo moto, this Court will first determine the issue raised by the Court *suo moto* since it touched the jurisdiction of this Court. If the issue raised by the court will be answered in the negative, then I will proceed to determine the appeal on merit.

To begin with, it is undisputed that the decision in which the appellant preferred an appeal emanates from the Execution Proceedings in Misc. Land Application No 45C of 2021. It is also undisputed that when the DLHT entertained the above application, it was sitting as an executing court which executes the decision of this Court. The question which is pertinent for determination is whether an appeal is the proper remedy if the executing court wrongly interpreted what is awarded in the decree.

As agreed by both parties, an appeal is a creature of statute. And, therefore, there must be a legal basis for a party to appeal. In other words, it is not in every circumstances the losing party have an automatic right of appeal, there must be a specific law which allows a party to appeal. In contrast, if the right to appeal is not specifically stated, the aggrieved party is supposed to go for other remedy provided by the law depending on the nature and circumstances of each and every case.



The contesting issue on the question raised by the court *suo moto* is whether the aggrieved party in execution proceedings in the DLHT may lodge an appeal to this Court. The counsel for the appellant averred that, the remedy is for a person aggrieved by the decision of the DLHT is to appeal to the High Court. For him, it does not matter the type of the decision. According to his view, the basis of the appeal on any decision of the DLHT is found on the provision of Regulation 24 of the Land Disputes Courts (The District Land and Housing Tribunal), Regulations, 2002.

On the other hand, the respondent's counsel strongly opposed that conception and he was of the view that, the appellant's counsel misconceived the meaning of Regulation 24 of the Land Disputes Courts (The District Land and Housing Tribunal), Regulations, 2002. He was of the view that, the above provision refers to the decision of the DLHT when exercising its original, appellate or revisionary jurisdiction and does not meant that a party aggrieved by an order of execution in the DLHT to appeal to this Court since appeal is a creature of statute and the law governing appeal to this Court from the decision of the DLHT is the Land Disputes Courts Act, Cap 216.R.E 2019.

Before I determine the issue raised by the Court *suo moto*, I find it worthy to state that, Execution is the final act which aimed at enforcement of a decree or order by the process of the court as a means of satisfaction



of the judgment to the decree holder so as to realize the fruits of the decree.

To my understanding, a party who applies for a decree to be executed is the one who is satisfied with the decision of the Court on merit which issued the decree. On the other hand, if the party is dissatisfied with the decision on merit, had a chance to appeal to the higher court in hierarchy. That is why, it is settled that, execution cannot operate as a bar to an appeal.

From the competing submissions of the parties, it is clear that both of them referred to Regulation 24 of the Land Disputes Courts (The District Land and Housing Tribunal), Regulations, 2002 as a provision which allow or disallow the appeal. For that reason, I find it pertinent to reproduce the above cited provision which reads as hereunder:

*"Any party who is aggrieved by the decision of the Tribunal **shall subject to the provisions of the Act, have the right to appeal to the High Court.** (Land Division).*

Provided that, an appeal shall not in any case be a bar to the execution of decree or order of the Tribunal."
(emphasis is mine).

As it was submitted by the respondent's counsel, the above Regulations is a supplement to a parent Act. The provision of Regulation



2 of the Land Disputes Courts (The District Land and Housing Tribunal), Regulations, 2002 defines, Act to be the Land Disputes Courts Act, Cap 216 R.E 2019. That is to say, an appeal shall lie if only the provision of the Land Disputes Act, Cap 216 R.E 2019 provides. Therefore, it is not correct for the appellant's counsel to state that, the right of appeal on execution is provided for under Regulation 24 of the Land Disputes Courts (The District Land and Housing Tribunal), Regulations, 2002.

Reading the proviso of the above cited Regulation, it is clear that an appeal which is envisaged there, have to originate from the decision of the DLHT when exercising its original, appellate or revision jurisdiction as it is provided under section 43 of the Land Disputes Courts Act, Cap 216 R. E 2019. That is why, the proviso clearly states that an appeal is not a bar in execution of a decree.

Furthermore, Regulation 25(1) of the Land Disputes Courts (The District Land and Housing Tribunal), Regulations, 2002 provides that:

"Notwithstanding regulation 24 a judgment debtor who intends to appeal to the High Court (Land Division) may at any time before the decree or order of the Tribunal is executed, apply to the Tribunal for stay of execution."

Again, the above Regulation provides a remedy to a judgment debtor who intends to appeal against the decree of the DLHT to this Court



stay an execution. The stay of execution to my understanding is done pending the determination of the appeal on merit.

It has to be noted that, the appellant had already exercised his right to appeal on merit against the decision of the DLHT vide Land Appeal No 45 of 2020 in which the decision of this Court was intended to be executed through Misc. Application No 45C of 2022. For that reason, it is not the requirement of the law for a party to come back again to this Court to appeal against an order which is not appealable as there is no specific provision which mandated him to appeal.

This Court in the case of **General Tyre (E.A) Ltd v Amenyisa Macha and oThers**, Civil Appeal No 21 of 2003 observed that:

"In the light of the aforesaid, apparently 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."

It is my considered view that a party who is not satisfied with the decision of the DLHT in execution Order may apply for revision to this Court as it is provided for under section 43 of the Land Disputes Courts Act, Cap 216 R.E 2019. As the order sought to be appealed by the appellant is not appealable under the Land Disputes Courts Act, Cap 216 R.E 2019 resort has to be made to the Civil Procedure Code, Cap 33 R.E




2019 which list down the orders which are subject to appeal as it is provided for under Order XL Rule 1.

Reading with an eye of caution the above Order, I am satisfied that one cannot appeal against the execution order. All said and considered, I am of the considered view that the present appeal is incompetent and I hereby struck it out with no order as to costs since the matter is raised by the court *suo moto*.

It is so ordered.




M. MNYUKWA
JUDGE
23/06/2023

Court: Ruling delivered on 23/06/2023 in the presence of parties' counsel


M. MNYUKWA
JUDGE
23/06/2023