

IN THE HIGH COURT OF THE UNITED REPUBLIC OF TANZANIA

IN THE DISTRICT REGISTRY OF BUKOBA

AT BUKOBA

CIVIL APPEAL NO. 01 OF 2023

*(Arising from Misc. Civil Application No. 12 of 2022; Originating from Civil Case No. 01 of 2022
Bukoba District Court)*

ESTHER BERNARD..... 1ST APPELLANT

LIVINGSTONE TIBENDA..... 2ND APPELLANT

LAMECK JOHN ERASTO..... 3RD APPELLANT

VERSUS

MATHIAS RWEYEMAMU..... RESPONDENT

RULING

13th and 31st July, 2023

BANZI, J.:

The respondent instituted a suit before the District Court of Bukoba ("the trial court) claiming Tshs.200,000,000/= against the appellants for breaching the order of the District Land and Housing Tribunal for Bukoba in Misc. Land Application No. 225 of 2019 prohibiting them from entering and conducting any activity in the suit land until the dispute between them is determined to its finality.

After duly served with the plaint, the appellants failed to file the Written Statement of Defence (WSD) within 21 days of the service as a result, they applied for extension of time vide Misc. Application No. 12 of 2022. However, the application was dismissed following preliminary point of objection on the reasons that; it was not brought under Order VIII, Rule 1 (1) of the Civil

Procedure Code [Cap. 33 R.E. 2019] ("the CPC") and that, the applicants have failed to file their WSD according to the cited Order. After dismissing their application, the trial court proceeded to order the suit to be heard *ex-parte*. Aggrieved with that decision, the appellants filed this appeal on three grounds. On the other hand, the respondent raised preliminary points of objection challenging the competence of the appeal arising from interlocutory order.

Before this court, the appellants had the services of Mr. Alli Chamani, learned counsel while the respondent who is also an advocate, appeared in person unrepresented. The preliminary objection was heard by way of written submissions.

Submitting in support of the objections, the respondent contended that, the ruling for dismissal of application for extension of time is interlocutory and hence, non appealable pursuant to section 74 (1) and Order XL, Rule 1 of the CPC because, it did not determine the suit to its finality. He cited the cases of **East African Development Bank v. Khalfan Transport Co. Limited**, Civil Appeal No. 68 of 2003 CAT (unreported) and **Augustino Masonda v. Windmel Mushi** (Civil Application No. 383 of 2018) [2020] TZCA 203 TanzLII to support his submission. He further submitted that, the appeal against such dismissal is not in the list of appealable orders under section 74 (1) (a) - (i) of the CPC. According to him,

the appellants should wait until the main suit is determined in order to apply to set aside *ex-parte* judgment and decree so that the main suit may be heard inter parties. Otherwise, they will have a right to appeal to this court against refusal to set aside *ex-parte* judgment. He concluded his submission by stating that, the appeal before this court is premature and the appellants are using delaying techniques to prevent him to prove the case *ex-parte*. He therefore urged the court to strike out the appeal with costs.

In response, Mr. Chamani submitted that, section 74 (1) and Order XL, Rule 1 of the CPC cited by the respondent was a misconception of the matter that is appealed against. He stated that, the dismissal order is appealable because the said decision has a finality effect to the appellants. It was his contention that, after dismissing the application and by applying the nature of order test, the only remedy for the appellants was to appeal to the higher court. To support his argument, he cited the case of **Samueli Kobelo Muhulo v. National Housing Corporation** (Civil Application No. 442 of 2018) [2022] TZCA 559 TanzLII. He added that, the conclusion made by the trial Magistrate that "*right of appeal explained*" is a clear indication that, even the trial Magistrate had knowledge of the right of the appellants to appeal against that decision. He further contended that, the cited case of **East African Development Bank v. Khalfan Transport Co. Limited** (*supra*) is distinguishable and cannot be applicable in the circumstances of this case.

He finally urged the court to dismiss the raised preliminary objection and order the appeal to be heard on merit.

In his rejoinder, the respondent insisted that, the dismissal order is non appealable for being interlocutory, therefore, they had to wait until *ex-parte* hearing is determined that is when they would appeal against that judgment. He further responded that, the words "*right of appeal explained*" concluded by trial Magistrate do not give the appellants automatic right of appeal in total disregard of the law. He also contended that, the cited case of **Samueli Kobelo Muhulo v. National Housing Corporation** (*supra*) is distinguishable because it was about revision on confusion created by High Court.

Having considered the submissions of both parties, the issue for determination is whether, the appeal is competent.

It is settled position of the law that, right of appeal in our legal system is a creature of statute. This was stated in the cited case of **East African Development Bank v. Khalfan Transport Co. Limited** (*supra*). Section 74 (2) of CPC provides that:

*"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.”(Emphasis is added).

What I gathered from the extract above is that, not every decision of the District Courts and Resident Magistrate's Courts is appealable. The law bars interlocutory orders *i.e.*, those orders that relate to some intermediate matter in the suit. However, interlocutory orders or decisions are appealable if they have effect of finally determining the suit. In the case of **Commissioner General Tanzania Revenue Authority and Another v. Milambo Limited** (Civil Appeal 62 of 2022) [2022] TZCA 348 TanzLII, it was stated that:

"What constitutes an interlocutory order is the decision of the Court which does not deal with the finality of the case but settles subordinate issues relating to the main subject matter which may be necessary to decide during the pendency of the case to time sensitivity of those issues."

So far as the principle of the "nature of order test" is concerned, it was stated in the case of **Peter Noel Kingamkono v. Tropical Pesticides**, Civil Application No. 2 of 2009 CAT (unreported) that:

"...it is therefore apparent that in order to know whether the order is interlocutory or not, one has to apply "the nature of order test". That is, to ask oneself whether the judgment or order complained of finally disposes of the rights of the parties. If the answer is in the affirmative,

then it must be treated as a final order. However, if it does not, it is then an interlocutory order."

Reverting to the instant case, the record of the trial court reveals that, after the appellants had failed to file their WSD according to the requirement of the law, the respondent raised preliminary point of objection praying to be allowed to prove the case *ex-parte*. However, the objection was dismissed and the appellants were allowed to apply for extension of time to file WSD and they did so through Misc. Civil Application No. 12 of 2022. Unfortunately, their application was dismissed after the trial court upheld the preliminary point of objection on two reasons that; the application was not made under Order VIII rule 1 (1) of the CPC and that, the applicants failed to file their WSD according to that Order. As a result, the suit was ordered to be proved *ex-parte*. Until 22/03/2023 when this Court called for the records of the trial court, three witnesses had already testified for the respondent/plaintiff.

Under the prevailing circumstances, it is evident that, the ruling subject matter of this appeal is interlocutory decision and hence, under the provision of section 74 (2) of the CPC, is not appealable unless it had effect of finally determining the suit. Now, the next question to be answered is whether such ruling finally determined the suit before the trial court. My answer to this question is definitely NO! because, first and foremost, whether the decision was wrong or right, that ruling had not finally determined the rights of parties in the suit which is still pending before the trial court. Secondly, the

appellants can still apply for setting aside the *ex-parte* judgment if the suit will be finally determined against them. Thirdly, at the end, the appellants will still have right of appeal against the final decision of the trial court. Besides, the fact that, the appellants were informed by the trial court to have a right of appeal immediately upon delivery of ruling, does not in itself confer this Court with jurisdiction to entertain unappealable decision. See also the case of **East African Development Bank v. Khalfan Transport Co. Limited** (*supra*) where the decision which rejected extension of time to file WSD was held to be unappealable as it did not finally determine the suit between parties.

In that regard, since the suit is still pending and rights of parties in the suit are not yet finally determined, it is the finding of this Court that, the decision subject matter of this appeal is interlocutory decision and hence, not appealable. Thus, this appeal is incompetent for being emanating from unappealable interlocutory decision. Consequently, it is hereby struck out and the file is remitted to the trial court for continuation of *ex-parte* hearing. Each party shall bear its own costs. It is accordingly ordered.



A handwritten signature in blue ink, appearing to read "I. K. Banzi", is written over a horizontal line.

I. K. BANZI
JUDGE
31/07/2023

Delivered this 31st day of July, 2023 in the presence of Mr. Alli Chamani,
learned counsel for the appellants and the respondent in person.



A handwritten signature in blue ink, appearing to be "I. K. Banzi". The signature is fluid and stylized, with a large loop at the beginning and a wavy line at the end.

I. K. BANZI
JUDGE
31/07/2023