

**IN THE HIGH COURT OF THE UNITED REPUBLIC OF TANZANIA
IN THE SUB- REGISTRY OF SONGEA**

AT SONGEA

CIVIL APPEAL NO. 5 OF 2023

LEONARD MYALE APPELLANT

VERSUS

THE REGISTERED BOARD OF TRUSTEES OF LUTHERAN

CHURCH SOUTHERN DIOCESE 1ST RESPONDENT

NASHON KIKALAO 2ND RESPONDENT

**(Appeal from the decision of the District Court of Mbinga
in Execution Cause No. 2 of 2023)**

RULING

18th and 26th September, 2023

KISANYA, J.:

This ruling is in respect of a preliminary objection raised by the respondents against the appeal lodged in this Court to challenge the ruling and drawn order of the District Court of Mbinga at Mbinga (the District court) in Execution Cause No. 2 of 2023.

For the purpose of appreciating the essence of this appeal, I find it apt to state its background facts. It all started with Civil Case No. 1 of 2017 before the District Court in which the respondents were ordered to pay the appellant general damages of TZS 15,000,000/= arising from tort of defamation, interest of 8% from the date of judgment to date of its full settlement and costs of the case.

Aggrieved, the respondents lodged an appeal to this Court through DC Civil Appeal No. 08 of 2017. Unfortunately, on 15th May, 2018, the said appeal was struck out for being incompetent on the ground that it was accompanied with the copies of decree and judgment which were not signed.

Still determined to challenge the decision of the District Court, the respondents lodged another appeal to this Court through DC Civil Appeal No. 8 of 2019. On 8th December, 2018, this Court struck the said appeal for being incompetent on the reason that it was accompanied with unsigned judgment. The case file was remitted to the District Court for it to supply certified copies of the handwritten judgment to the parties. It was also held that, any interested party was at liberty to file a fresh appeal and append a certified copy of the handwritten judgment.

It turned out that, none of the parties lodged an appeal to this Court. Therefore, on 1st March, 2023, the appellant filed an application for execution of the judgment of the District Court in Civil Case No. 1 of 2017. His application was accompanied with a copy of decree duly signed by the trial magistrate. The District Court sustained the respondent's preliminary objection on a point of law that, the application defeated the orders given by this Court in DC Civil Appeal No. 8 of 2019. It went on holding that the application cannot be executed under the provision of Order XXI, Rules 9, 10(2) and 28 of the Civil Procedure Code, Cap. 33, R.E. 2019 (the CPC). The application was accordingly struck out with costs.

The appellant has now appealed to this Court to challenge the said decision of the executing court.

In objecting the appeal, the respondents raised a preliminary objection consisting of one ground that:

- 1. The appeal is incompetent for being originating from the order which is not appealable in law.*

When the appeal was called for hearing, the appellant had the services of Mr. Dickson Ndungu, learned advocate, while the respondents enjoyed the services of Messrs. Eliseus Ndunguru and Lazaro Simba, both learned counsel.

In view of the practice of this Court, I was inclined to invite the parties to address me on the preliminary objection first.

Arguing in support of the preliminary objection, Mr. Eliseus submitted that the decision or order subject to this appeal is not in the least of appealable orders listed in section 74(1) and Order XL of the CPC. It was therefore his argument that the appeal is incompetent for being preferred against an appealable order under section 74(1) and (2) of the CPC. On that account, he implored this Court to strike out the appeal with costs.

In response, Mr. Dickson submitted that the impugned order determined the matter to its finality and thus, appealable under section 74(2) of the CPC. The learned counsel further expounded that the appellant was not challenging the

legality of the decision of the executing court, but the decision which struck out the application for execution for being incompetent. It was his contention that the application for execution was not entertained. He referred me to the case of **Yahya Khamis vs Hamida Haji and Another**, Civil Appeal No. 225 of 2018 (unreported) in which the Court of Appeal entertained an appeal which arose from the decision that struck out an application. In conclusion, he prayed for the preliminary objection to be dismissed with costs.

Rejoining, Mr. Eliseus argued that the impugned decision did not finally determine the matter and thus, not appealable as the decree was left intact. He further contended that the authority relied upon by the respondent's counsel is not applicable to this case on the ground that it dealt with an interlocutory order.

Having considered the submissions from the counsel for both parties, the issue for determination is whether the decision or order subject to this appeal is appealable.

The issue whether a decision or order is appealable or otherwise is a question of law. It is settled position that, an order is appealable if the law expressly provides so. In other words, appeals cannot lie unless the law stipulates to that effect. This stance was taken in the case of **Ignasio Ignas vs Rose Hanselem Mpangala**, Civil Appeal No. 65 of 2017, HCT at Dar es Salaam (unreported) when this Court (Siyani, J, as he then was) held that:

"An Order is appealable if the law says so and not otherwise. This means where the law doesn't say so, a person who wishes to challenge that decision has to look for other alternative such as initiating Revision Proceedings or whatever the law provides."

As rightly submitted by Mr. Eliseus, the decisions of which orders are appealable to this Court are listed in section 74 of the CPC read together with Order XL, Rule 1 of the CPC. For the sake of clarity, the provision of section 74 (1) of the CPC provides that:

74. (1) An appeal shall lie to the High Court from the following orders of the courts of resident magistrates and district courts and, save as otherwise expressly provided in this Code or by any law for the time being in force, from no other orders—

- (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.*

The above cited provision is amplified by rule 1 of Order XL, Rule 1 of the CPC which provides:

"An appeal shall lie from the following orders under the provisions of section 74, namely–

- (a) an order under rule 10 of Order VII returning a plaint to be presented to the proper court;*
- (b) an order under rule 14 of Order VIII pronouncing judgment against a party;*
- (c) an order under rule 9 of Order IX rejecting an application (in a case open to appeal) for an order to set aside the dismissal of a suit;*
- (d) an order under rule 13 of Order IX rejection an application (in a case open to appeal) for an order to set aside a decree or judgment passed ex parte;*
- (e) an order under rule 4 or Order X pronouncing*

judgment against a party;

- (f) an order under rule 18 of Order XI;*
- (g) an order under rule 10 of Order XVI for the attachment of property;*
- (h) an order under rule 20 of Order XVI pronouncing judgment against a party;*
- (i) an order under rule 34 of Order XXI on an objection to the draft of a document or of an endorsement;*
- (j) an order under rule 72 or rule 92 of Order XXI setting aside or refusing to set aside a sale;*
- (k) an order under rule 9 of Order XXII refusing to set aside the abatement of dismissal of a suit;*
- (l) an order under rule 10 of Order XXII giving or refusing to give leave;*
- (m) an order under rule 3 of Order XXIII recording or refusing to record an agreement, compromise or satisfaction;*
- (n) an order under rule 2 of Order XXV rejecting an application for an order to set aside the dismissal of a suit;*
- (o) an order under rule 3 or rule 8 of Order XXXII refusing to extend the time for the payment of mortgage-money;*
- (p) orders in interpleader-suits under rule 3, rule 4 or rule 6 of Order XXXIII;*
- (q) an order under rule 3, rule 4 or rule 7 of Order XXXVI;*
- (r) an order under rule 1, rule 2, rule 4 or rule 9 of Order XXXVII;*

- (s) an order under rule 1 or rule 4 of Order XXXVIII;*
- (t) an order of refusal under rule 19 of Order XXXIX to re-admit, or under rule 21 of Order XXXIX to re-hear, an appeal;*
- (u) an order under rule 23 of Order XXXIX remanding a case, where an appeal would lie from the decree of the High Court;*
- (v) an order under rule 4 of Order XLII granting an application for review.”*

In the light of the above position of law, it is clear that, an appeal cannot lie against an order that is not listed in section 74 (1) and Order XL, Rule 1 of the CPC, unless expressly stated so in the CPC Code or any law for the time being in force.

In the instant appeal, it is not disputed that the impugned decision struck out the appellant’s application for execution of decree. That being the case, I agree with Mr. Dickson that the decision sought to be challenged had the effect of finally determining the matter that was lodged before the District Court. However, for an appeal to lie against any interlocutory decision or order which has the effect of finally determining the matter, the impugned decision or order must be appealable.

The record reveals that the appellant’s application, before the District Court, was made Order XX1, Rules 10(2) and 28 of the CPC. As stated earlier, the said application was struck out on the ground that it could not be executed under Order

XXI, Rules 9, 10(2) and 28 of the CPC. Now, neither section 74 nor Order XL, Rule 1 of the CPC provides that an order under rules 9, 10(2) or 28 of Order XI of the CPC is appealable. As far as orders under Order XX1 of the CPC are concerned, only an order under rules 34, 72 or 92 thereto is appealable. They are listed in Order XL, rule 1(i) and (j) of the CPC. Given that the decision or order subject to this appeal is not in the list of appealable orders, I am at one with Mr. Eliseus that, the appeal is incompetent.

The above said, I uphold the preliminary objection raised by the respondents. We accordingly strike out this appeal with costs.

DATED at **SONGEA** this 26th day of September, 2023.



S.E. KISANYA
JUDGE
26/09/2023