

IN THE HIGH COURT OF THE UNITED REPUBLIC OF TANZANIA

ARUSHA SUB-REGISTRY

AT ARUSHA

MISC LAND APPEAL NO. 05 OF 2023

(Arising out of Land Appeal No. 48 of 2019 before the District Land & Housing Tribunal for Arusha at Arusha, emanating from Application No. 12 of 2018 from Unga Limited Ward Tribunal)

FLORA NIHEYA _____ **APPELLANT**

VERSUS

YUSTA ROMAN _____ **RESPONDENT**

JUDGMENT

07/11/2023 & 15/03/2024

BADE, J.

This Appeal emanated from a Ruling on the Application for Execution delivered on 07/11/2022 before Hon. G. Kagaruki. The said Ruling was made after the Respondent filed an Application for Execution of Decree arising from Land Appeal No. 48 of 2019. In the said decree, the Appellant was ordered to pay the Respondent TZS 2,060,00. Having heard both parties, Hon. Kagaruki ordered the Appellant to pay to the Respondent the said amount of money within 14 days from the date of the Ruling or in default, the Tribunal would have appointed a broker to execute the said order through attachment and sale by auction, of the



Appellant's house which is located at Sakina Moravian. The Appellant was aggrieved by this decision preferring an appeal to this court on the grounds:

- i) That the Trial Chairperson erred in law and in fact by basing her ruling on the weakness of the respondent side and not on the strength of the applicant's case.
- ii) That the Trial Chairperson erred in law and fact in ordering execution of the Tribunal's Decree in which Decree holder did not show any sufficient proof or exhibit for the said execution to be done and there were no any evidence or proof of the claim of the Decree Holder, which among other, is the basis of the appeal.
- iii) That Trial Chairperson erred in law and fact as she did not properly evaluate the evidence of the Appellant stating how she paid the Respondent every day, and stated the amount paid and the one remaining, but the Trial Chairperson did not properly evaluate this evidence and eventually reached an unfair and unjust decision.

This Appeal is disposed of by way of written submissions after the court granted the parties leave to so argue. Both the Appellant and

the Respondent appeared in person unrepresented, but the Respondent's submissions were drafted by Mr. Ekael Michael, an Advocate providing legal aid from Tanzania Women Lawyers Association.

Arguing the 1st ground of appeal, the Appellant submitted that it is an undisputed fact that the Respondent was a decree holder in the Application for Execution while she was the judgment debtor. She wonders why the tribunal favored the Respondent based on the weakness of Appellant's case, which in her view, is contrary to the law that requires the judgment/ruling be based on the strength of the one who alleges and not based on the weakness of the other party. To support her position, she cited the case of **R vs Kerstin Cameron [2003] TLR 84.**

The Appellant further submitted that the Respondent was not certain as to which mode of execution she moved the tribunal while in the due process of filing her application for execution, hence her application confused the tribunal, arguing the purported application for execution was hopelessly incompetent as it violated Regulation 23 (2) of the Land Disputes Court (the District Land and Housing Tribunal) Regulations 2002. The Respondent contends that the

purported application for execution was incompetent since the same was ambiguous for want of specification as to which exact mode of execution that the Respondent was seeking before the tribunal. On further argument, since the Respondent asked the tribunal to order the Appellant to pay TZS 2,060,000 and at the same time, she asked the tribunal to attach the Appellant's house and sell it, which was wrong, and the tribunal misdirected itself for entertaining an incompetent application.

On the 2nd ground of appeal, the Appellant submitted that the *disputed Ruling is untenable* since the tribunal erred in law for failing to consider the evidence adduced by the Appellant predicated it on the principle of law that the court must consider and evaluate evidence of each witness and make finding thereto. To the contrary, she laments that the Appellant was condemned without her evidence be considered particularly the testimony that she owes the Respondent only TZS 360,000 and not TZS 2,060,000 as alleged by the Respondent.

Regarding the 3rd ground of appeal, the Appellant submitted that tribunal failed to properly evaluate the evidence on how the Appellant

paid the Respondent every day, every amount and stated the remaining amount.

Opposing the appeal, the Respondent first raised a point of preliminary objection that this appeal is incompetent for being time barred as it is brought out of time as per the requirements under section 38 (1) of the Land Disputes Courts Act, Cap 216 R.E 2019. Elaborating, he contends that the judgment and decree on Land Appeal No. 48 of 2019 was delivered on the 24/07/2020, however the present Land Appeal No. 05 of 2022 was lodged on 22/11/2022, a year and three months passed after the order, which is out of 60 the days as provided by the law. To cement this position, he cited the case of **Deonisia Onesmo Muyoga & Others vs Emmanuel Jumanne Luhahul**, Civil Appeal No. 219 of 2020.

In the alternative, Mr. Ekael responds to the first ground of appeal, submitting that the Appellant confused two decisions that came out on the same time, that is the Judgment and Ruling of the appellate tribunal. Mr. Ekael further submitted that the Appellant did not explain in legal context what makes the Respondent's evidence to be considered weak and / or what makes her evidence to be considered strong.

Moreover, he submitted that the mode of execution was specifically explained in the prescribed form as required by the law, and these same documents form part of records of this case for reference. In his view, the Chairperson of the tribunal could not have entertained an application which was not filed out of a proper procedure, contending that since the Appellant did not show any intention of paying the debt of TZS 2,060,000 the Respondent filed an application for execution and described a specific mode that is attachment and sale of the Appellant's house located at Sakina Moravian. He also insists that all these facts were so admitted by the Appellant as she submitted, adding that a judgment of the court cannot be quashed in an execution proceeding. To buttress his position, he cited the case of **Hossea Kihwelo & Others vs Abdallah Ramadhan Mkumba & Another**, Civil Revision No. 347 of 2018.

Responding to the 2nd and 3rd grounds of appeal, Mr. Ekael submitted that the tribunal well considered the weight of evidence adduced by the Appellant and every testimony was recorded and evaluated, adding that the court records and judgment are not only genuine in nature but also self explanatory. To support his position, he cited the case of **Halfani Sudi vs Abieza Chichili** [1998] TLR 527.

She criticized the Appellant's move to attach documents to prove her case in the first appeal as well as in the second appeal in this court, arguing that the Appellant's arguments and the attached documents are without legal basis since it is not legally supported as there is no room to challenge or raise a new fact at the appeal stage. He cites the case of **Joel Mwangambako vs Republic**, Criminal Appeal No. 519 of 2017 as well as the case of **Halfani Rajabu Mohamed vs Republic**, Criminal Appeal No. 34 of 2020 where it was held that the matters not raised in the trial court cannot be raised in execution stage or in the appellate court.

Mr. Ekael insists that it is undisputed fact that the chairperson of the tribunal considered and evaluated well the evidence adduced by both parties and reached a just decision.

In rejoinder, the Appellant reiterated her submission in chief, adding that the point of preliminary objection as raised by the counsel for Respondent is untenable since he misdirected himself in law and fact as this appeal is rather challenging the proceedings and ruling of the tribunal when exercised its execution jurisdiction, not an appeal from the judgment of the said tribunal when it exercised its appellate jurisdiction, hence in her view, the Respondent's counsel grossly

misdirected himself. Also, she further rejoined that this appeal challenging execution proceedings was filed within the prescribed time and in accordance with the law. She also argued that the cases cited by Mr. Eikael, the counsel for the Respondent are all quite distinguishable from this case.

After perusing the court's record and the rival submission by both parties, the task before me is to determine the issues whether the Appellant had paid her debt as alleged, and secondly, whether the Application is incompetent for not being filed in a prescribed form as required by the law.

But before addressing the above framed issues, I would start with the preliminary objection as raised by Mr. Eikael in his reply submission, where he submitted that this Appeal is time barred as it was filed out of time since the judgment and decree of the tribunal was delivered on 24/07/2020 while this appeal was lodged on 22/11/2022 which is a lapse of a year and three months after the said order and judgment. I must agree with the Appellant in thinking Mr. Eikael has misdirected himself and is thus confused simply due to the reason that the application for execution bore the same number as the Appeal that it came from.

The application for execution resulted from Appeal No. 48 of 2019 which was delivered on 24/07/2020 before Hon. F. Mdachi, while the Ruling that is subject of the present Appeal bears the same number that is Appeal No. 48 of 2019 delivered on 07/11/2022 before Hon. G. Kagaruki. Going through the pleadings and submissions made by the Appellant, one will realize that she is appealing against the Ruling issued by Hon. G. Kagaruki which was filed quite on time, and not against Judgment which was delivered by Hon. F. Mdachi. In that case, I overrule the preliminary objection as it is without merits.

Addressing the first issue, the whole appeal is centered on the argument that, Hon. Kagaruki erred in her Ruling by ordering the Appellant to pay her debt within 14 days, or in default, her house located at Sakina Moravian would be attached and sold on an auction while the Appellant had already paid the majority of that debt.

The Appellant contends that the tribunal neither considered nor evaluated her evidence over the fact that she had already paid much of the debt owing, and that the remaining amount that is still outstanding is only TZS 360,000 and certainly not TZS 2,060,000 as she ruled.

This fact had me go through the record of the file and I could not find anywhere on the record that she had proved the fact that she had already paid much of the debt owing. The Appellant has not attached any proof of payment in her pleadings before the tribunal where this matter was being ruled upon. She is precluded from so attaching the proof now as she did in her Petition of Appeal, claiming that she proves the payment.

Conversely, the argument by the Appellant that the tribunal based its Ruling on the weakness of the Appellant's evidence, or that the tribunal did not properly consider and evaluate the evidence is unmerited on the simple reason that what was required was for the Appellant to prove her claim that she had already paid most of her debt as she had alleged, which she utterly failed to do. I do not think the tribunal cannot be faulted for giving her time to pay and make good of the debt, which was the 14 days time period, or in default, her house be attached and sold in an auction bearing in mind that one year had already lapsed after the Judgment against her had ordered her to pay the Respondent. In any case, the Appellant did not appeal against the said judgment nor did she honor the decree of that Judgment by paying the Respondent.

This said I find the ground of appeal without any merit as I have answered the issue in the negative.

Deliberating the second issue, I found it prudent to look closely on the said provision, which I reproduced herewith for ease of reference. Regulations 23 (1) and (2) of the Land Disputes Courts (The District Land and Housing Tribunal) Regulations, 2003 is prescriptive as it provides:

"23 (1) A decree holder may, as soon as practicable after the pronouncement of the judgment or ruling apply for execution of the decree or order as the case may be.

(2) An application for execution of orders and decree under sub-regulation (1) shall be made in the appropriate forms prescribed in the Second Schedule to these Regulations; and shall indicate the mode in which the execution is sought to be carried out."

As I examined the court file, it is my finding that the Respondent did not meet out this fundamental requirement of the law. Instead, she simply filed her application on the ordinary legal paper contrary to law (which had stated a prescribed form to be used) and the tribunal

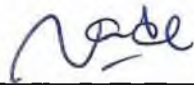
was oblivious and unmindful of the situation. The argument by the Respondent that she filed her application on the prescribed form hold no water as it is clear from the record that she did not.

I must say at this juncture that the observance of the rules of procedure is fundamental to the course of litigation for they provide the necessary framework for both parties in achieving justice. Even though it is not an end on itself, but it is the means to an end, and its adherence is geared towards serving the parties unnecessary expense by directing a proper course and creating certainty and expediency by simplifying matters; so that no party can be unjustly deprived of its right.

Having said so this appeal is allowed based on the finding of the second issue, whose scrutiny made me found for the Appellant. Consequently, the Application for Execution is struck out for being incompetent for failure to file it in the prescribed form as required by the law. All Orders resulted from the Ruling of that Application are hereby set aside.

It is so ordered.

DATED at ARUSHA this 15th day of March 2024



A. Z. Bade
Judge
15/03/2024

Judgment delivered in the presence of the Parties in chambers on the
15th day of **March 2024**. The right of Appeal is explained.



A. Z. BADE
JUDGE
15/03/2024