

**IN THE HIGH COURT OF TANZANIA
MOROGORO SUB-REGISTRY
AT IJC MOROGORO**

CIVIL APPEAL NO.13 OF 2023

(Arising out of Misc. Civil Application Case No. 03/2023 in District Court of Kilombero Ifakara which originated on Civil Case No. 03/2016 in the District Court of Kilombero at Ifakara)

HILARY PIUS MASIMA APPELLANT

VERSUS

CHEULA CHIFILWA..... 1ST RESPONDENT

PROPERTY MASTERS LTD

AUCTIONER AND COUNTRY

BROKER.....2ND RESPONDENT

RULING

26th of March, 2024.

MANSOOR, J.

Before me is an appeal within which the appellant seeks to challenge the decision of the District Court of Kilombero in Misc. Civil Application No.03 of 2023 which originated from Civil Case No. 03 of 2023 in the same court. In response to the appellant's memorandum of Appeal, the 2nd Respondent filed the reply thereto coupled with one point of preliminary objection as reproduced here under:

1. The appeal is incompetent in the eyes of law and untenable in law for being non appealable.



In order to appreciate what is involved in the instant appeal I find it proper to start by giving a detailed history of the matter. The 1st respondent herein sued the appellant in the District Court of Kilombero at Ifakara vide Civil Case No. 03 of 2016 demanding payment of Tshs. 50,000,000/= as damages for breach of contract. At the conclusion of trial, the court entered exparte decision in favor of the 1st respondent awarding him Tshs. 1,010,000/= as specific damages and Tshs. 500,000/= as general damages against the appellant. Following the appellant's nonpayment of the said damages ordered by the trial court, the 1st respondent was prompted to institute execution proceedings via Civil Application No. 69/2019 which awakened the appellant upon being served with notice by the 2nd Respondent notifying him of the demolishing of his property located at Mchombe Mngeta due to his default in the payment of the decreed amount as ordered by the trial court. Countering the notice, the appellant unsuccessfully applied for Mareva Injunction against the respondents via Misc. Civil Application No.03/2023. Dissatisfied, the appellant filed instant appeal to challenge the ruling and orders emanated from Misc. Civil Application No.03/2023 which was unfortunately slapped with the notice of preliminary objection from the 2nd respondent as hinted earlier on above.

I had to firstly determine the preliminary objection before embarking into the merits or otherwise of the Appeal as it now is trite law that a preliminary objection once has been established as such, must be heard first because it has a legal effect of disposing the whole matter. The Court of Appeal of Tanzania instructively aired this position of the law in the case of **Shahida Abdul Hassanali v. Mahed M.G. Karji T**, Civil Application No. 42 of 1999 (CAT).

With the leave of the Court, the hearing of the preliminary objection was canvassed by way of written submission by the order of this Court dated 14th of February, 2024. Both parties were legally represented, while the appellant was represented by Mr. Eric Chale the learned advocate, the 2nd respondent on his part enjoyed the representation of Jackson Liwewa the learned counsel.

Submitting in support of the preliminary objection the 2nd respondent started by re-stating the settled principle that courts' appellate jurisdiction emanates from the statutes. He further referred this court to the case of **Austino Lyatonga Mrema v. Republic** (2003) TLR 6 CA where the court of appeal categorically held that;

"appeal is the creature of a statute, it can only be conferred upon it by statute and has no inherent powers to assume jurisdiction. The right of appeal must be provided by the

statute, in absence of which, there is no inherent right to appeal.

Connecting the above precedents with the instant appeal the 2nd respondent argued that appeals from orders are creatures of section 74 of the Civil Procedure Code (Cap 33 R. E 2019). He demonstrated further that the provision is amplified by Order XL Rule 1 which categorically narrated all appealable orders. He maintained that any order which is not included in section 74 and Order XL Rule 1 cannot be appealed against. He reasoned that the order sought to be appealed is not found on the stated provision of law and thus cannot be subjected to an appeal.

At the end he argued this court to find the point of preliminary objection meritorious.

Responding to the 2nd respondent's submissions, the learned Advocate for the appellant right way conceded to the 2nd respondent's preliminary objection for a reason that, the appeal was mistakenly filed in this court as per the laws of the land. He demonstrated further that since the decision from the district court of Kilombero was in respect of objection or stay of execution process the same cannot be appealed against. At the end the learned counsel urged this court to allow him to withdraw the appeal without costs.

I have summarized the submissions made by both parties, the applicable laws and carefully scanned the pleadings and court records as well. Despite the fact that the raised point of objection has been conceded by the appellant, I find myself duty bound to make a deliberation as to whether the instant appeal is competent before this court for not being appealable or otherwise.

Notably, it seems to me that the only thing that stirred the appellant to concede to the preliminary objection as depicted from his submission is his understanding that an injunction of an execution process and a stay of execution are one and the same thing, as they both result in a temporary stoppage of the execution process. It is on the basis of such an understanding that he found himself caught under the feeling that the order that emanated from the impugned decision was an execution order which cannot be appealed against according to section 74 and Order XL of the Civil Procedure Code. While I would agree that there is a grain of truth in that observation, I think it is not wholly correct.

Demonstrating the difference between the two the Court of Appeal in the case of **National Housing Corporation v. Peter Kassidi and 4 others** Civil Application No. 243 of 2016 had the following to state ;

"Injunctive remedy is in the nature of a prohibitory order granted at the discretion of the court against a party. On the other hand, while an order of stay of execution is also in the nature of prohibitory order, it is addressed to the court carrying out the execution to suspend or delay the enforcement of the decree concerned pending hearing and determination of a proceeding, most certainly an appeal. What a stay of execution does, therefore, is to prohibit the Court from proceeding with the execution further".

From the above authority, taking into account the difference between the two orders in terms of their respective object as well as the party against whom each one may be made, It is my objective judgement that they constitute two distinct and exclusive judicial processes which cannot be invoked interchangeably or in the alternative.

In the present matter, it is not in dispute that, the appellant unsuccessfully applied for an order of mareva injunction while preparing to file an application to set aside exparte judgement. The question to be addressed is whether or not the impugned decision is appealable which takes me to the provisions regulating appeals against the interlocutory orders, which in this case is section 74(2) of the Civil Procedure Code (supra) as rightly submitted by the 2nd respondent. The said section stipulates as follows:

(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.

In the light of the cited provision of the law what comes to my mind is that, an interlocutory decision or order shall be appealable only if it has the effect of finally determining the charge or suit.

At this juncture it is undisputable that the impugned ruling is interlocutory. However, in order to deliberate as to whether the same is appealable or not, I am enjoined to make an assessment of the said order so that I can safely land into findings as to whether the impugned order had the effect of finally determining the rights of the parties for the same to qualify for an appeal.

In so doing, I will be guided by the case of **Bozson vs Artincham Urban District Council** (1903) 1 KB 547 wherein Lord Alverston stated as follows:

"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 final order; but if it does not, it is then, in my opinion, an interlocutory order"

Guided by the above authority and considering the intention of the appellant was to stop execution process I am not inclined to find the impugned ruling as final since the doors for the parties to apply for the order of stay of execution which is not only proper but also more efficacious to the case are not closed. That being said and done the impugned order being interlocutory order which had no effect to determine the suit, it is wrong for the appellant to seek remedy against the said order by way of appeal.

In the upshot, for the reasons epitomized above, I proceed to sustain the objection raised by the 2nd Respondents' counsel and strike out the Civil Appeal No.13 of 2023 with costs.

It is so ordered.

**DATED AND DELIVERED AT MOROGORO THIS 26TH DAY OF
MARCH 2024**


(L. MANSOOR, J.)
JUDGE
26.03.2024

