

**IN THE HIGH COURT OF THE UNITED REPUBLIC OF TANZANIA**

**(DAR ES SALAAM SUB-REGISTRY)**

**CIVIL APPEAL NO. 1299 OF 2024**

Ref No 20240123000001299

[Appeal from the ruling and drawn order of the Resident Magistrate Court at Kisutu (Hon. A.M Lyamuya- PRM), dated the 27th December 2023 in Misc. Civil application no. 161 of 2023]

**FLORA SHAURI..... APPELLANT.**

**VERSUS**

**SOSTHENES BRUNO..... 1ST RESPONDENT**

**JOHN FRANK KIONI.....2ND RESPONDENT**

**BENSON YEKONIA SWAI T/A KISHE AUCTION MART.....3RD RESPONDENT**

**RULING**

**7th & 17th May 2024**

**KIREKIANO; J,**

In civil application no. 161 of 2023, before the resident Magistrate Court of Dar Es Salaam at Kisutu, the court granted the first respondent prayers by extending time to lodge objection proceedings against the execution proceeding in civil case no. Civil Case No. 286 of 2000.

Following the order, the first respondent eventually filed the objection proceeding in Misc Civil Application No. 334 of 2024, pending determination in the subordinate court. On the other hand, the appellant had other ideas, so she

presented this appeal challenging the order and ruling of the Resident Magistrate Court of Kisumu in Misc Civil Appeal No. 161 of 2023, which granted an extension of time.

The 1st respondent has raised a preliminary point of objection, contending that the Ruling and Order are not appealable under Section 74(2) of the Civil Procedure Code Cap 33 [R.E 2019].

The hearing was conducted through written submissions. The appellant was represented by Mr Felix Mutaki, a learned advocate, and Mr Paschal Kamala, a learned Advocate, represented the 1st respondent. It is noted here that the 2nd and third respondents did not attend; efforts to serve them by substituted mode proved futile.

In support of the objection, Mr Kamala argued that the appellant's appeal is not included in the list of appealable orders mentioned in Order XL of the Civil Procedure Code Cap 33 RE 2019. He argued that, according to section 74 (2) of the Civil Procedure Code Cap 33 [RE 2019] an appeal cannot be made against a preliminary order or an interlocutory decision unless such decision or order has the effect of finally determining the suit.

With this view, the order made in respect of application no 161 of 2023 was an interlocutory order intended to determine the execution proceedings in respect of Civil Case No. 286 of 2000 **Zamzam Yusuf Mushi V Abubakari**

**Khalid Hajj Gemaco Auction Mart International Limited Frank Lionel Marialle. Civil Application No. 55 Of 2020**, where the court of appeal citing **Bozson v Artincham Urban District Council (1903) I KB 547** applied a test to determine whether a decision is interlocutory or final, thus, whether the judgment or order, as made, finally dispose of the rights of the parties and if it does, then it ought to be treated as a final order, but if it does not it is then it is an interlocutory order

He argued that this court should consider the execution proceeding in civil Case no. 286 of 2000, upon which the misc. Civil application 161 of 2023 emanated is still pending.

The counsel for the appellant, Mr Felix Mutaki, did not subscribe to the view taken by counsel for the first respondent that the order appealed against in Misc. Civil Application No. 161 of 2023 was an interlocutory order.

He was on the same page as the 1st respondent regarding the need to apply the test; he argued that the test nature ought to be used as elucidated in the decisions in **Tanzania Posts Corporation vs Jeremiah Mwandu (Civil Appeal 474 of 2020)** and **Commissioner General Tanzania Revenue Authority & Another vs Milambo Limited**. He submitted that the appellant possessed the right and remedy to challenge the grant of extension of time sought by the 1st respondent. In his contemplation, the order was final and

conclusive because, so far, the parties cannot go before the same court on the same matter or object to that decision.

He supported his view by the case of the **Commissioner General Tanzania** Revenue Authority. Since the application for extension was wound up, the respective ruling is not an interlocutory order by any stretch of the imagination.”

As such, the appellant submitted that the order granting the extension of time was followed by a stay of the execution proceeding, which denied the appellant an opportunity to respond to the new issue of stay of execution.

In his rejoinder, Mr Kamala maintained the submission in chief, adding that the order is conclusive as the appellant will still be heard and may challenge the final result of the pending proceeding. He also concluded that the respondent's submission tends to address issues that can be dealt with on appeal.

I have carefully read the parties' submissions. The common ground is that an interlocutory order is not appealable unless the exemption is presented if it finally concludes the determination of the parties' rights. To put it differently, an appeal against an order not in the list of appealable orders under section 74 of the Civil Procedure Code, [Cap 33 R.E.2019] (the CPC) read together with Order XL Rule 1 (a)-(v) of the CPC such appeal becomes incompetent before the court is liable to strike out. This was the position this court took in **Nyikongoro Vs**

**Ndege Kiseke Misc. Land Application No.145 of 2020** High Court at Musoma (unreported) where it was held that. See also in **Martha John Temba Versus Mwanga Hakika & 2 Others (Land Appeal No. 246 Of 2023) [2023] Tanzilii.**

The significant point is whether the order at issue is interlocutory. In answering this, a big picture should be drawn from the matter in court consideration at Kisutu Resident Magistrate Court. I have read the petition of appeal and the submission made. It is clear that in the subordinate court, there is a pending execution proceeding. In the process, a move was made to challenge the property at issue, and objection proceedings came to the mix following the grant of extension of time.

What is clear is that the Resident Magistrate Court at Kisutu's exercise of discretion to grant an extension of time to the respondent did not finally determine the parties' rights in execution proceedings and, significantly, in the objection proceeding, to be precise, of the issue of the property subject to execution.

The spirit behind objection proceedings is to accord a person who may be affected by the execution process the right to be heard on his interest in the property, the subject of execution. It will be different if this right is refused as it will affect the personal right on the property. Considering what rights are at

issue, it is worth noting that the bigger picture of the will determines the parties' rights in the execution proceeding.

In so doing, as long as the execution proceeding is under court consideration, the procedure to address any issue of the property remains the trial court's sole power. The undertaking in execution, including objection proceedings and grant of extension of time to that effect under the circumstance, becomes interlocutory.

I have considered the CAT decision in **Commissioner General Tanzania Revenue Authority**, having reflected the same. I am of the view that the same is distinguishable here. The proceedings at issue are still pending in the subordinate court. As such, I do not contemplate that it meant that all court decisions in enlarging or extending time would culminate in appealable decrees.

In passing, it is also worth noting here that when the court's decision on the objection proceedings is reached, under rule 62 of order XXI CPC, it is final and not appealable. See **Thomas Joseph Kimaro v. Apaisaria Martin Carl Mkumbo and Another [2002] T.L.R. 369**, cited by the court of appeal in the case between the parties here in **Sosthenes Bruno & Another vs. Flora Shauri (Civil Appeal 249 of 2020) [2022] TZCA 350 (14 June 2022)**. Instead, a party aggrieved by the decision on objection proceeding under 62 of Order XXI,

that is, objection proceedings, is not advantaged to appeal; instead, he may lodge a suit in the court of competent jurisdiction.

All said, and on the reasons stated the objection is sustained. The appeal lodged is misconceived. The same is struck out with costs.



**A.J. KIREKIANO**

**JUDGE**

**17.05.2024**

**COURT:**

The ruling was delivered in the chamber in the presence of Mr Sabas Shayo, counsel for the first respondent, who also held the brief of Mr Felix Mutaki, counsel for the appellant, and in the absence of the 2nd and 3rd respondents.



**A.J. KIREKIANO**

**JUDGE**

**17/05/2024**