

IN THE HIGH COURT OF TANZANIA

(LAND DIVISION)

AT DAR ES SALAAM

LAND APPEAL NO.152 OF 2021

(Arising from the District Land and Housing Tribunal for Kinondoni in Misc.
Land Application No.196 of 2021)

ELIZABETH T. BALALI APPELLANT

VERSUS

PETER AMO 1st RESPONDENT

TITI PONSIAN NSABI 2nd RESPONDENT

JUDGMENT

Date of the last Order: 28.09.2021

Date of Judgment: 29.09.2021

A.Z.MGEYEKWA, J

This appeal stems from the decision of the District Land and Housing Tribunal for Kinondoni in Misc. Land Application No. 196 of 2021. The material background facts to the dispute are briefly as follows; in the Land Application No. 196 of 2021 the District Land and Housing Tribunal for Kinondoni, Peter Amo applied for execution against Elizabeth T. Balali

and Titi Ponsian Nsabi. He applied for the attachment and sale of a small house of the 1st respondent situated at Boko Dovy Kinondoni Municipality to satisfy the decretal sum in a tune of Tshs. 15,000,000/=. The respondents' Advocate prayed to settle the matter with the appellant to pay the said amount in a tune of Tshs. 15,000,000/=. A deed of settlement was filed on 12th October, 2020 and a decree was drawn on 15th October, 2020. Thereafter, the appellant lodged a Misc. Land Application No. 196 of 2021 whereas the appellant came up with the same prayers of execution of the tribunal award. The Tribunal stated that the 1st respondent is obliged to pay Tshs. 15,000,000/= therefore the application for execution was granted and the 1st respondent was ordered to execute the tribunal's order within 14 days and Adili Auction Mart was appointed to execute the court order.

Dissatisfied, the appellant filed a memorandum of appeal before this court on the following grounds:-

- 1. That the District Land and Housing Tribunals erred in law and fact for failure to consider the appellant prayer.*
- 2. That the District Land and Housing Tribunal erred in law and fact for allowing the execution which is contrary with the decree.*
- 3. The appellant prayed for this court to quash the Tribunal decision.*

When the appeal was called for hearing on 9th September, 2021, by the Court order the appeal was argued by way of written submissions whereas, the appellant filed his submission in chief on 16th September, 2021 and the respondent filed his reply on 23rd September, 2021 and the appellant waived his right to file a rejoinder.

The appellant's Advocate was the first ones to kick the ball rolling. He submitted that the appeal is in respect to Execution ruling of the District Land and Housing Tribunal delivered on 22nd July, 2021. He went on to state that the decree in respect to Land Application No. 349 of 2017 resulted in Execution No.196 of 2021 between Titi Ponsian Nsabi Elizabeth Balal and Bernard Balenzako and Peter Amo. He went on to submit that the parties in Execution processing the parties were Peter Amo v Titi Ponsian Nsabi Elizabeth Balal and Titi Ponsian Nsabi. He further added that in the decree, one Berna Balenzeko was missing hence the parties are not the same. The learned counsel for the appellant complained that it is a mandatory principle of the law that the decree must be compatible and agree with the judgment. Since execution is the process of enforcing or giving effects to the court orders and decree. To support his submission he cited Order XX Rule 6 (1) of the Civil Procedure

Case, Cap.33 [R.E 2019]. He urged this court to quash and nullify the ruling of execution proceedings of the District Land and Housing Tribunal for Kinondoni for being inconsistent with the decree of the court.

The learned counsel for the appellant went on to submit that in the execution, the landed property which was attached was not the property of the judgment debtors. Fortifying his submission he referred this court to paragraph 4 of the execution form. He went on to submit that according to the execution form filed before the tribunal it is obvious that the respondent was intending to execute a decree against the appellant by attaching the property of the deceased while the said property was never been owned by the appellant in her own capacity. He added that the attached property belongs to the beneficiaries of the deceased estate namely Daud Balali. He did not end there, he submitted that a person in her own capacity and a person as an administratrix of the estate are distinct people. To fortify his position he referred this court to the case of **Suzan Warioba v SHija Dalawa**, Civil Appeal No.44 of 2019 CAT.

He continued to argue that the judgment and decree of the tribunal reflect the name of the appellant in her own capacity and not as administratrix of the estate of the late deceased. He went on to submit that

the law requires the administrators to sue or been sued in respect of the capacity of the administrator of the deceased. Supporting his position he cited the case of **Abdullatif Mohamed Hamis v Mehbook Yusuf Osman & Another**, Civil Revision No. 6 of 2017, CAT. He urged this court to nullify the ruling of the tribunal for attaching the deceased's property.

On the first ground, the learned counsel for the appellant submitted that the tribunal. He contended that the appellant did not dispute the execution, he prayed to the tribunal to accord time to consult a decree-holder and arrange the terms and modality of enforcing the decree, his prayer was not considered instead the tribunal proceeded to appoint a broker to enforce the decree.

On the strength of the above submissions, the learned counsel for the appellant beckoned upon this court to quash the tribunal decision since it went beyond the principle of natural justice and allow the appeal with costs.

Resisting the appeal, Ms. Majamba started with a brief background of the facts which led to the instant application which I am not going to reproduce in this application. She valiantly submitted that there is no any error in the tribunal's ruling. She argued that the decree emerged from the

settlement which clearly set out that the appellant would discharge all liabilities in respect to the respondents' claims. The learned counsel for the respondents went on to submit that one Bernad Belanzako signed the deed mere party to the case, he had no dispute as against the appellant's decision of discharging all the liabilities set therein. He went on to state that the respondent filed an application for execution against the appellant in exclusion of Bernad Belanzako.

The learned counsel for the respondents continued to submit that the issue whether the property belongs to the appellant or not, this was not raised in the memorandum of appeal as a ground, never was raised at the tribunal. It was her view that this ground cannot be sneaked into the submission. He went on to submit that the issue of execution that it was granted against a subject matter which is not the property of the decree debtor is another attempt to push under the nose of the court, it was never raised at the tribunal and the same is not among the grounds of appeal.

The learned counsel for the respondents complained that the memorandum of appeal filed by the appellant has not been accompanied by the ruling of the tribunal and drawn order contrary to Order XXXIX Rule 1 and Order XL Rule 1 of the Civil Procedure Code, Cap. 33 [R.E 2019].

FORTIFYING his submission he referred this court to the cases of **Juma Ibrahim Mtale v K.G.Karmal** [1983] TLR 50 and **Liningstone Sillay Haru v Collinfred Temu** [2002] TLR 268.

She went on to state that it is the principle of law under section 70 (3) of the Civil Procedure Code Cap. 33 [R.E 2019] that no appeal shall lie from a decree passed by the court with the consent of the parties. She also referred this court to section 74 (1) of the Civil Procedure Code Cap. 33 [R.E 2019] which provides for orders from which appeals lie. Insisting, he urged that sections 70 (3) and 74 (1),(i), (2) of the Civil Procedure Code Cap. 33 [R.E 2019] has not expressly allowed an appeal to be a remedy from a decree passed by the court with the consent of the parties and since the order granted by the tribunal had no effect of finally determining the matter at hand, thus no appeal lies against it.

On the strength of the above submission, the learned counsel for the respondents beckoned upon this court to dismiss the appeal with costs.

After a careful perusal of the record of the case and the submissions submitted by both parties. In determining the appeal, the central issue is *whether the appellant is meritorious.*

I have opted to argue all three grounds of appeal together. I have perused the trial tribunal records; and found that the appellant was ordered to execute the tribunal order. However, instead of complying with the court order to pay the 1st respondent Tshs. 15,000,000/= she opted to file an application complaining that the District Land and Housing Tribunal erred in law for not considering her prayers and allowing the execution which is contrary to the decree.

The records reveal that the execution was already been issued. In such a situation, I fully subscribe to the respondents' Advocate's contentious that the appellant was not required to file an appeal against an execution order. Since an execution order is not appealable. Even if the deed of settlement did not include the required property, a consent settlement is inapplicable. In the matter at hand, parties already had an agreement. Section 70 (3) of the Civil Procedure Code Cap.33 [R.E 2019] provides that:-

“70.-(3) No appeal shall lie from a decree passed by the court with the consent of the parties”.

Applying the above provision of law, it is clear that the appellant cannot lodge an appeal against an execution order.

Following the above findings and analysis, I refrain from deciding the appeal since the same is misplaced before this court. I think any result out of it will have no useful effect on this appeal. It will be an academic endeavour with which I do not want to associate with at this moment. I proceed to dismiss the appeal in its entirety without costs.

Order accordingly.

Dated at Dar es Salaam this date 29th September, 2021.




A.Z.MGEYEKWA

JUDGE

29.09.2021

Judgment delivered on 29th September, 2021 in the presence of Mr. Frank Michael, learned counsel holding brief for Mr. Wilson, learned counsel for the appellant in the absence of the respondents.




A.Z.MGEYEKWA

JUDGE

29.09.2021

Right of Appeal fully explained.