

IN THE HIGH COURT OF TANZANIA

(LAND DIVISION)

AT DAR ES SALAAM

LAND APPEAL NO. 307 OF 2023

(Originating from of Kinondoni
Land and Housing Tribunal in Misc. Land Application No. 134 of 2023)

MARTHA BONIFACE MACHELA (Administratrix of Estate of the Late
BONIFACE MCHELA).....**1ST APPELLANT**

MARTHA BONIFACE MACHELA.....**2ND APPELLANT**

VERSUS

JOSEPH SWILA.....**RESPONDENT**

JUDGMENT

28/09/2023 to 06/10/2023

E.B. LUVANDA, J

The Appellants above mentioned are protesting an order of the District Tribunal which sanctioned execution proceedings to proceed by way of demolition and issued warrant to that. In the memorandum of appeal, the Appellants grounded that; One, the Chairman erred in law and fact to determine Misc. Application No. 134/2023 without making decision of prayers for an adjournment of the case made by the advocate for the Appellant; Two, the Tribunal erred in law and fact by dying (sic, denying) the Appellant's right to show cause.

Mr. Nehemiah Gabo learned Counsel for the Appellant submitted that after an application for stay Misc. Application No. 186/2023 was struckout on 25/07/2023, the Counsel for Respondent herein pressed for hearing of Misc. Application No. 134/2023 subject of this appeal, in reply the learned Counsel made a prayer for adjournment to enable his client to file application for stay of execution in the Court of Appeal where the Tribunal fixed on 26/07/2023 for delivery of the ruling regarding a prayer for adjournment. He submitted that he was surprised for the Tribunal declined to deliver the ruling on a prayers for adjourning hearing Misc. Application No. 134/2023 instead it illegally granted Misc. Application No. 134/2023. He submitted that the Tribunal failed to exercise powers under regulation 22(c) of the Land Disputes Courts Regulation GN. 173 of 2003, arguing which empower the Tribunal to determine prayers made by the advocate for the Appellant.

Ground number two, the learned Counsel submitted that the Tribunal had to afford the Appellant same opportunity to show cause in execution of Misc. Application No. 134/2023 emanating from judgment in Land Application No. 155 of 2011 as to why the Tribunal should not order satisfaction of the said decree, arguing failure of which curtailed right to be heard of the Appellants. He cited the case **of Khalifa Seleman Saddot vs. Yahya Jumbe & Four Others**, Civil Application No. 20/2003.

In reply, Mr. Mrindoko Rajabu learned Counsel for Respondent submitted that the appeal is incompetent because it has been preferred against execution order which is not specified in section 74 and Order XL of the Civil Procedure Code, 33 R.E. 2019, as appealable orders. He submitted that the execution order is not appealable. He cited the case of **Chacha Nyikongoro vs. Ndege Kiseke**, Misc. Land Appeal No. 145/2020; **Tatu Mgetta & Another vs. Mwanza Sattelite Cable**, Civil Appeal No. 142/2019 CAT.

For ground number one, the learned Counsel submitted that it is now settled legal position that the court can only stop to grant execution order on two main grounds: One, if the decree has been satisfied; Two, if there is stay of execution order from the court with competent jurisdiction. He cited the case of **Ongujo Wakibira Nyamarwa vs. Prime Catch (Export) Co. Ltd**, Commercial Case No. 80/2016. He submitted that the Appellant prayer for adjournment is not among the reason to stop the Tribunal from granting execution orders because the decree was not satisfied and there is no valid stay of execution from the Court of Appeal or any application for stay pending in the Court of Appeal.

Ground number two, the learned Counsel submitted that the Appellant was given right to show cause by the Tribunal, where she filed an application for

stay of execution, arguing she had neither valid stay order from the Court of Appeal as a result the application for stay was struckout and the Tribunal proceeded to grant the execution. He submitted that having been served with notice to show cause and given right to show cause, he wonder which right to show cause the Appellant wanted after filing the incompetent application for stay. He submitted that the Tribunal was correct to grant the execution.

On rejoinder, the learned Counsel for Appellant submitted that execution of decree and orders of the Tribunal are appellable, citing regulation 24 of the Land Disputes Court Regulations 2003 also a case of **Enock Marwa Chacha vs. Yahya Joseph Giriama**, Land Appeal No. 18/2021.

He submitted that the Tribunal ought to rule out whether a prayer for adjournment made by the Counsel for Appellant was granted or denied, as to why the Tribunal could not grant application for execution No. 134/2023. He submitted that the Tribunal granted the execution on 26/07/2023 without affording the Appellants right to show cause for detriment of the Appellant.

Going by the lower Tribunal records depict that on 03/04/2023 the learned Counsel for Judgment Debtor (Appellant herein) appeared before the Tribunal requested for an adjournment where the Tribunal adjourned to 19/04/2023, then 20/04/2023, thereafter 08/05/2023, next 14/06/2023, then 25/07/2023 where on the last session the learned Counsel for Decree Holder (Respondent herein) pressed for an order for execution to be granted and the learned Counsel for Judgment Debtor (Appellant herein) argued the Tribunal to stop hearing an application for execution to pave way for him to file an application for stay at the Court of Appeal. The Tribunal reserved its ruling till on 26/07/2023 where it granted the application for execution to proceed.

Therefore a complaint by the Counsel for Appellant that the Tribunal refused to adjourn the matter, is unrealistic, because the Tribunal had granted five adjournments as depicted above. Equally to say the Tribunal did not rule on his prayer for adjournment instead granted execution, is misleading. Because on the last session to wit on 25/07/2023 the Respondent staged a prayer for execution and the Appellant was resisting, indeed on invalid reasons. In the case of **Ongujo Nyamarwa** (supra), at page 10, this court had this to say; I quote, and I bold a portion of my interest,

*"The essence of executing a decree is to let the decree holder enjoy the fruits of the judgment and decree in her favour without much hustle. Therefore, once the judgment is pronounced, **it is the obligation of the judgment debtor to either to comply by satisfying the decree or to process the appeal proceedings including seeking an order for stay of execution.** Short of that this Court is bound to act by granting the application for execution as prayed".*

Herein, the Appellant did not satisfy the decree neither processed an appeal nor sought an order for stay of execution. Therefore, there was no tenable grounds upon which the Tribunal could entertain further request for adjournments.

Ground number two, the Appellant complained that the Tribunal denied them a chance to show cause. This complaint is without substance, the records of the Tribunal reveal that after receiving an application for execution, the Tribunal directed summons to be issued to the Appellant to appear before the Tribunal, and upon his first appearance on 03/04/2023, the learned Counsel for Respondent (decree holder at the Tribunal) requested for execution to proceed, inturn the learned Counsel for Appellant (Judgment

Debtor) requested for an adjournment for reasons that they have initiated process to register an appeal and intend to file a stay of execution. Thereafter the matter kept adjourned on several occasions as indicated on ground number one above. To my view, the Appellant were given ample time to show cause, indeed their reasons as to why the execution should not proceed were entertained and eventually the Tribunal ruled for execution to proceed. It would appear the learned Counsel for Appellant was of the view that in so far as they were not served with summons with the wording of the approved forms that "notice to show cause why execution should not issue" that is Farm No. ^F /6 made under rule 2 of G.N. No. 388 of 2017. According to [^] him that is a defect upon which the argument that they were not accorded chance to show cause, is hinged. To my view, the defect is curable under overriding objective which require courts to handle matters in a manner which facilitate the just, and proportionate resolution of civil disputes, see section 3A and 3B Civil Procedure Code, Cap 33 R. E 2019.

There was an argument from the learned Counsel for the Respondent that this appeal is incompetent for reason that execution order is not appealable, cited section 74 and Order XL Cap 33 (supra), including a case of **Chacha Nyikongoro** (supra). But to my understanding execution proceedings before the Tribunal are governed by rule 23 of the Land Disputes (The

District Land and Housing Tribunal) Regulations G.N. 173 of 2003.

Immediately after rule 23, is followed by rule 24, which provide, I quote,

"Any person who is aggrieved by the decision of the Tribunal shall subject to the provisions of the Act, have the right to appeal to the High Court (Land Division).

"Provided that, an appeal shall not in any case be a bar to the execution of the decree or order of Tribunal"

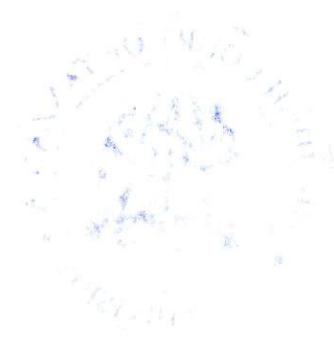
Both rules 23 and 24 fall under Part V of G.N. 173 of 2003 (supra), captioned execution of decree and orders. Therefore to my respective view, execution orders are appealable under the above said rule, as also the position in **Enock Marwa Chacha** (supra).

Therefore, **Chacha Nyikongoro** (supra) is not a good law and is distinguishable in that respect.

The Appeal is dismissed with costs.



E.B. LUVANDA
JUDGE
06/10/2023



Judgment delivered through virtual court attended by Mr. Emmanuel Hayuka
learned Counsel for Respondent and in the absence of the Appellant.



E.B. LUVANDA
JUDGE
06/10/2023