

**IN THE HIGH COURT OF TANZANIA  
(LAND DIVISION)  
AT DAR ES SALAAM**

**MISC. LAND APPEAL NO.187 OF 2022**

(Arising from the District Land and Housing Tribunal for Kinondoni in Misc.  
Land Application No.779 of 2021)

**ABDALLAH JUMA HENRY ..... APPELLANT**

**VERSUS**

**JULLYAN MMARY ..... RESPONDENT**

**RULING**

*Date of Last order: 10.02.2023*

*Date of Judgment: 14.02.2023*

**A.Z.MGEYEKWA, J**

This appeal stems from the decision of the District Land and Housing Tribunal for Kinondoni in Misc.Land Application No. 779 of 2021. The material background facts to the dispute are briefly as follows; the appellant instituted a suit at the District Land and Housing Tribunal for Kinondoni at Mwananyamala in Application No. 29 of 2017 against the respondent. The parties decided to settle the dispute by recording the

Deed of Settlement. However, it seems parties did not abide to the agreed termism in the Deed of Settlement, hence, the appellant lodged an application for execution vide Misc. Application No. 779 of 2021 at the District Land and Housing Tribunal for Kinondoni at Mwananyamala. The tribunal determined the matter and dismissed the appellant's application. The tribunal's decision did not amuse the appellant, hence, he decided to challenge it by way of appeal before this court on four grounds as follows:-

1. That the trial tribunal erred in law and in fact in determining and making orders in a dispute that were not in the application for execution which was before it.
2. That the trial tribunal erred in law and in fact when it ordered the Appellant to give the Respondent a lease agreement without considering that the Respondent already occupied the suit premises for four years and five months which was as agreed by the parties.
3. That the trial tribunal erred in law and in fact in holding that the settlement and decree were not executed without taking into account that the Respondent occupied the suit premises for gain for four years and five months and only refused to vacate after the said agreed period.

4. That the trial tribunal erred in law and in fact when it made orders that were contrary to the intention of the parties as contained in the Deed of Settlement.

When the appeal was called for mention on 31<sup>st</sup> November, 2022 before me, the appellant enjoyed the legal service of Mr. Godfrey Namoto, learned counsel, and the respondent enlisted the legal service of Mr. Seni Malimi, learned counsel. This court issued an order to the parties to argue the appeal by way of written submissions. However, the respondent delayed to file his reply. The Court decided to extend the time to the respondent to file his reply on 6<sup>th</sup> February, 2023 and the appellant to file his rejoinder on 10<sup>th</sup> February, 2023. Both counsels complied with the Court order.

Before embarking on the determination of the grounds of appeal, I noted that Mr. Malimi, learned counsel for the respondent in his reply has raised points of law. As the practice of the Court, I had to determine the preliminary objections first before going into the merits or demerits of the appeal. That is the practice of the Court founded upon prudence which I could not overlook. I am also guided by the decision of the Court of Appeal of Tanzania in the case of **Adelina Koku Anifa & Another v Byarugaba Alex**, Civil Appeal No. 46 of 2019, the Court of Appeal of Tanzania held that:-

“ The court had a duty to take judicial notice of matter relevant to the case even when the matter is not raised in the memorandum of appeal. “

Similarly, in the case of **Marwa Mahende v Republic** (1998) TLR 249, the court is reminded of its duty to ensure the proper application of the laws by the courts below. The Court of Appeal of Tanzania in the case of **Adelina Koku Anifa** (supra) went on to state that:-

*“ ..the court cannot justifiably close its eyes on such glaring illegality because it has a duty to ensure proper application of the laws by the subordinate courts and/or tribunals..”*

Guided by the above authorities of the law, this court could, even in the absence of the grounds of appeal would be obliged to address the vivid defect. I think it is a forethought to address the points of law, the same will save the time of the court and the time of the parties. I am saying this because in case the points of law could not have been raised now, the same could have been raised in a later stage.

On the first objection, the learned counsel for the respondent submitted that the appeal should be struck out because it is brought under the wrong name. Mr. Malimi contended that the Applicant earlier filed an Application No. 29 of 2017 as an administrator of the estate of the late Juma Hasan Herry and the dispute was over a lease agreement related to commercial

premises located at Plot No. 1412, Block 'B' Coca Cola Road, Dar es Salaam. The learned counsel for the respondent went on to argue that in the instant appeal, the appellant is prosecuting the appeal in his own name while the matter originates from the same proceedings.

Mr. Malimi stated that the parties before the Tribunal were Abdallah Juma Herry (suing as Administrator of the estate of the late Juma Hasan Herry v Jullyan Mmari. He added that the Appellant applied for execution of the decree and further appealed to this Court in his own name and capacity. He stressed that the anomaly is fatal hence the respondent's counsel urged this Court to strike out the appeal for being preferred by the wrong party. To buttress his contention he cited the case of MIC Tanzania Limited v Hamisi Mwinyijuma & 2 Others, Civil Appeal No. 64 of 2016, High Court of Tanzania (Dar es Salaam District Registry).

Arguing for the second objection, the learned counsel for the respondent contended that the appeal is bad in law for being made from an order which is not appealable. Mr. Malimi valiantly contended that this appeal has been wrongly preferred by the appellant because the order which is being appealed against is not appealable. To support his submission he referred this Court to section 74 and Order XL of the Civil Procedure Code, Cap 33 [R.E 2019] and cited the case of **Chacha Nyokorongo v Ndege Kiseke**, Misc. Civil Appeal No. 145 of 2020, HC at Musoma (unreported).

He went on to submit that the appeal process against orders arising from execution like the one at hand is not subjected to appeal as they are likely to call for new evidence to be adduced as to whether the decree has been executed and/or satisfied and by whom. This cannot be achieved at the appeal stage where the court has no room for new evidence. Fortifying his submission he cited the case of **Chacha Nyokorongo v Ndege Kiseke** (supra). The learned counsel for the respondent submitted that the proper recourse to a person aggrieved by the said order is to file an application for revision of the execution proceedings and litigate the questions relating to execution under section 38 of the Civil Procedure Code Cap.33 [R.E 2019].

On the strength of the above submission, the learned counsel for the respondent beckoned upon this Court to strike out with costs.

Responding to the objection, on the first objection, the learned counsel for the appellant admitted that the parties in this case and Misc. Application No. 779 of 2021 are the same. Mr. Namoto argued that the respondent was aware that the appellant used his name in the proceedings but the respondent never pointed it out. He added that the same parties have signed the Settlement Deed that formed the judgment and decree of the tribunal in Application No. 29 of 2017 which formed the basis of Miscellaneous Application No. 779 of 2021.

The learned counsel for the appellant continued to submit that the Deed of Settlement was drawn and filed by the same advocates who are representing the respondent in this appeal. He stated that the difference in the names of the parties is not fatal and the same can be corrected by amending the names of the parties by invoking sections 3A and 3B of the Civil Procedure Code, Cap.33 [R.E. 2019].

Submitting on the second objection, the learned counsel for the appellant contended that the manner in which the tribunal heard and determined Misc. Application No. 779 of 2021 was as if it was a normal application, it was not heard as an execution application. He continued to submit that the orders issued by the tribunal had the effect of reopening the judgment and decree. He added that it is the law and practice once it delivered its judgment and decree the tribunal became *functus officio*. He submitted that the only way to vary the impugned judgment and decree was through an appeal by a superior court.

In conclusion, the learned counsel for the appellant urged this Court to overrule the preliminary objections raised by the respondent's counsel.

Having heard the learned counsels' submissions in support and against the appeal and the raised preliminary objection raised by the learned counsel for the respondent, I find it prudent to satisfy myself on the propriety or otherwise of the appeal before this court since this court has

a duty to take judicial notice of matters relevant to the case even when the matter is not raised in a proper forum. The Court of Appeal of Tanzania in the case of **Adelina Koku Anifa & another v Byarugaba Alex**, Civil Appeal No. 46 of 2019 (unreported) that:-

*“...the court cannot justifiably close its eyes on such glaring illegality because it is his duty to ensure proper application of the laws by the subordinate courts and/or tribunals.”*

The facts of the instant application correspond very well with the authority above and in case the point of law could not have been raised by the learned counsel for the respondent then this court could have raised or the same could have been raised in a later stage.

Regarding the first objection, the respondent's counsel argued that the appellant has brought the appeal under the wrong name. I have read the record of the District Land and Housing Tribunal for Temeke and noted that the matter originated from the Application No. 29 of 2017 whereas in Abdallah Juma Henry lodged the Application as an Administratrix of the estate of the late Juma Hasan Herry, however, the trial tribunal recorded the Deed of Settlement in the name of Abdallah Juma Herry instead of Abdallah Juma Herry (Suing as Administratrix of the estate of the late Juma Hasan Herry). In Land Application No. 779 of 2021, the parties were the same as appears in the instant appeal.



As rightly pointed out by the appellant's counsel that the respondent's counsel represented the respondent at the tribunal, thus, he had an opportunity to raise his concern at the trial tribunal but that was not the case, instead, they have opted to raise the same in this appeal. Therefore, I find that the omission is not fatal the same can be rectified by ordering the tribunal to put its records clear. Therefore, this objection is overruled.

Next for consideration is the second objection, Mr. Malimi argued that the appeal is bad in law for being made from an order which is not appealable. I find it appropriate to point out the matters which are not in dispute. Reading the records it undisputed fact that the instant appeal emanates from the orders arising from an application for execution in Application No. 779 of 2021, the same was lodged by the appellant and the appellant was praying for eviction of the judgment debtor from the two shops premises, order for attachment and sale of judgment debtors' items for recovering of three months' rent arrears and the sum of money for the period which the respondent overstayed. It is also an undisputed fact that the executing tribunal dismissed the application.

Dissatisfied, the applicant was prompted to appeal to this court. In his appeal, the learned counsel for the appellant raised four grounds of appeal and in his rejoinder, Mr. Namoto argued that the main reason for lodging the instant appeal is because they are not pleased with the

manner the executing tribunal heard and determined Misc. Application No. 779 of 2021 was as if it was a normal application.

In my considered view, I find that since the impugned order emanates from an execution application then the same is not appealable. As rightly pointed out by Mr. Malimi that the impugned order is not appealable. Pursuant to Order XL of the Civil Procedure Code, Cap. 33 [R.E 2019] which specify appealable orders, an order arising from execution proceedings is not among them.

In case the appellant is aggrieved by the decision of the executing tribunal then the proper avenue to challenge the execution tribunal decision is by way of revision. See the cases of **Kalebu Kuboja Mjinja v Shadrack Daniel Tembe**, Civil Appeal No. 24 of 2020 HC at **Musoma**, and **Chacha Nyokongoro v Ndege Kiseke**, Misc. Land Appeal No. 145 of 2020 HC at **Musoma** (both unreported).

For the aforesaid findings and position of the law, I find that the appeal is incompetent before this Court. It is, therefore, my respectful view that there is considerable merit in the second objection raised by the respondent's counsel.

Having reached the above finding, I deem it superfluous to address the grounds of appeal since the second objection suffices to move this Court to strike out the appeal.

In the upshot, I proceed to strike out the instant appeal. No order as to costs.

Order accordingly.

Dated at Dar es Salaam this date 14<sup>th</sup> February, 2023.

 A.Z.MGEYEKWA  
JUDGE  
14.02.2023

Judgment was delivered on 14<sup>th</sup> February, 2023 via video conferencing whereas Ms. Caroline Mumba, counsel for the appellant, and Mr. Seni Malimi, counsel for the respondent.

 A.Z.MGEYEKWA  
JUDGE  
14.02.2023

Right of Appeal fully explained.