

TANZANIA / JUDGMENT

LAND APPEAL NO

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TANZLIIDECIDED
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THE JUDICIARY OF TANZANIA IN THE HIGH COURT OF UNITED REPUBLIC OF TANZANIA
LAND DIVISION AT DAR ES SALAAM LAND APPEAL NO. 22189 OF 2024 (Arising from the ruling
of Kigamboni District Land and Housing Tribunal delivered on 23rd August 2024 in Misc. Land
Application No. 14 of 2024 ©f 2024 HALFAN ALLY MASAWILA.....1st
APPELLANT ISTMAKA rmSSAM BAKAL. ,0B=. APPELLANT Versus TIJJAN
TIJJAN MAHUNGUHUNGU..... RESPONDENT

RULING

17/12/2024 & 20/02/2025 GWAE, J The respondent one Tijjan Tijjan Mahunguhungu in 2022 filed an application (Application No. 19 of 2022) against the appellants herein before Pembamnazi Ward Tribunal, which finally successfully mediated the parties' dispute on 14th December 2022. In the year 2024, the respondent filed an application for execution of the consent decree through Misc. Application No. 14 of 2024) in the Ilala District Land and Housing Tribunal (DLHT). Seeming i the appellants objected the respondent's application for the enforcement of the consent decree so sought by the respondent by filing their joint counter affidavit. The executing tribunal heard the parties and in its ruling dated 23rd August 2024 found that, the consent decree issued by the Ward Tribunal could not be varied or modified or quashed in the application for execution unless in an appeal or revision application. It therefore proceeded granting the application for execution and appointed the court broker one Foster and Company Ltd. Dissatisfied with the decision of the District Land and Housing Tribunal, the appellants have preferred this appeal to the Court, armed with the following grounds of appeal.■-

1. That, the DLHT erred in law by declaring that there was consent decree entered y the ward tribunal
2. That, the DLHT's chairperson erred in law by deciding and declaring that, the appellants signed the consent decree
3. That, the DLHT erred in law by holding that, the record of the ward tribunal dated 14th December 2022 shows that the appellants signed the agreement 2
4. That, the DLHT's chairperson erred in law in holding that the division of surveyed plots despite the decision of the ward tribunal being objected

5. That, the DLHT's chairperson erred in law for its failure to discharge its duty of hearing the parties on the disputed issues/facts
6. That, DLHT's chairperson erred in law for its failure to consider the appellants' counter affidavit disputing an existence of the consent of decree on the division of the plots Upon service of the appellants' copy of the Memorandum of Appeal and appearance of the respondent's advocate (Dr. Abdon Rwegasira), there was a preliminary objection raised on three points, to wit:-
 1. That, this court lacks jurisdiction to hear this appeal since the decision of the DLHT vide Misc. Application No. 14 of 2024 has been enforced since 8th October 2024. Therefore, this appeal is overtaken by event
 2. That, the appellants have no right to object the consent decree entered by the Ward tribunal as per section 70 (3) of the Civil Procedure Code, Cap 33, Revised Edition, 2019 (CPC)
 3. That, this appeal is incompetent since the signature purporting to be of the second appellant is forged and dissimilar to that 3 appearing in the counter affidavit filed in respect of the Misc. Application No. 14 of 2024 Before the Court, the appellants and respondent were represented by Mr. Benitho Mandele and Dr. Abdon Rwegasira respectively (both learned advocates). However, the hearing of the respondent's preliminary objection proceeded by way of written submission. Arguing the PO, Dr. Rwegasira opted to abandon first point of law, which in essence. He submitted in respect of the first point of law by stating that, section 70 (3) of the CPC prohibits a party to the consent judgment and its decree to object them by way of an appeal or revision. He buttressed his argument by a decision of this Court in Barrick Gold Mine Limited and Augustino Nestory, Land Appeal No. 60 of 2022) [2024] TZHC 423 (22 February 2024) and Sweetbert Mathias Kutaga vs. Eugenia Rutatora and others, Civil Appeal No. 565 of 2023 (unreported), a decision of the Court of Appeal. In the 3rd point of law, the respondent's learned counsel was of the view that, this appeal is incompetent since the signature appearing in the Memorandum of Appeal purporting to be of the second appellant is a forged one since it differs from the one appearing in the appellants' joint counter 4 affidavit duly filed before DLHT in respect of the Misc. Application No. 14 of 2024 as well as in the Probate and Administration Cause No. 63 of 2022 filed in the Mkuranga Primary Court. He urged this court to compare the signatures of the second appellant appearing in the documents so annexed to this appeal so that this court may be satisfied of the alleged forgery. He also referred the Court to the following precedents; State of Gujarat vs. Vinaya Chandra Chhotlal Pathi, Air 1967 SC 778 where it was stated that, the Court is competent to compare disputed writings of a person with others which are admitted or proved to be his or her writing and decision of the Court of Appeal of Tanzania in the case of Thabitha Muhondwa vs. Mwangi Ramadhani Maimbo and others, Civil Appeal No. 28 of 2012 (unreported). In his response, the appellants' advocate argued that, both points of law raised and argued by Dr. Rwegasira are not pure points of law since the same require ascertainment of some facts or evidence or both. He urged this Court to make reference to Mukisa Manufacturing Co. Ltd vs. West Distributors (1969) EA 696 and Sundra Weiler

(Executor of Elifadhili Wilson Msuya) vs. Lightness Mlay (Civil Application No. 499/05 of 2024) 5

[2024] TZCA 1074 (8 November 2024) where it was held as quoted herein under;- "That a preliminary objection on point of law should such of disposing of the suit without proof of facts or evidence..... At the outset, we showed that it is trite law that a point of preliminary objection cannot be raised if any fact has to be ascertained in the course of deciding." Nonetheless, the appellants' counsel argued the second point of law by stating that, section 73 (3) of the CPC is not applicable in the instant matter since the appellants are seriously disputing to have reached such agreement nor did they sign the consent decree allegedly made or entered by the parties before the Ward Tribunal. He further argued that, the facts of the case in Barick Gold Mine Limited (supra) are distinguishable from the present matter where the consent decree is questionable. According to the appellants' advocate, there might be an appeal or revision against the consent decree where it is noted that, the same was obtained by way of fraud as the case in the parties' present dispute. As to the third limb of objection, the counsel for the appellants submitted that, as long as the second appellant does not dispute the signature appearing in the Memorandum of Appeal filed in Court and the one 6 appearing in the counter affidavit, it cannot therefore be said this court is competent to compare the signature. He therefore submitted that section 75 of TEA and case of Thabitha Muhondwa (supra) not applicable in the circumstances of this case. In his brief rejoinder, Dr. Rwegasira stated that both points of law that he raised are pure points of law, which do not call for ascertainment of any fact or evidence. He also rejoined the arguments by the appellants' counsel on the second point by stating, the DLHT was merely executing the consent decree. Henceforth, any objection by the appellants was barred by section 70 (3) of the CPC. He finally, stated that the second appellant could not be allowed by the court to use different signatures in two or three documents in courts. To emphasis his stance, he reiteratedly cited the case of Barick Gold Mine Ltd (Supra). Now to the court's determination on two points of objection raised by the respondent's advocate and argued by the parties' advocates. From the outset, I am of the firm view that, the right to appeal against a decision or an order of the court or quasi-judicial body is a constitutional right (See Article 13 (6) (a) of the Constitution, Part VII and Order XXXIX of the CPC). Part X of the Criminal Procedure Act, Cap 20, Revised Edition, 2019, Part III 7 of CMA and provisions of Land Dispute Courts Act, Cap 216, R. E., 2019). However, in the second point of law, the advocate for the respondent is found to have based his line of argument in section 70 (3) of the CPC, which reads and I quote:- "70 (3) No appeal shall He from a decree passed by the court with the consent of the parties." According to the unambiguous wording of the statutory provision, it is goes without saying that no appeal which lies against a consent decree mutually reached by the parties and passed by the court or any quasi-judicial body. This provision of the law denotes a preclusion of filing an appeal or revision against a consent judgment and its decree as opposed to the stance by the learned counsel for the appellant who argued that, there may be an appeal against consent decree where fraud or misrepresentation is alleged. It is

clear from the record that, the respondent filed an application for execution vide Application No. 14 of 2024 and the appellants filed their joint affidavit showing cause in respect of the intended execution. I am of the view that, since an appeal against the consent decree is statutorily prohibited, it follows therefore, if at all the appellants were and are still alleging fraud or misrepresentation in the said consent decree, the avenue available is to challenge the same through a fresh suit since provisions of the CPC 8 are silent on remedy to an aggrieved party by a consent decree. This position was rightly articulated in *Mohamed Enterprises (Tanzania) Limited vs. Masoud Mohamed Nasser* Civil Application No. 33 of 2012 (unreported), whose ruling was delivered on 27th August 2012, where the Court of Appeal of Tanzania had these to say; "We must state at this stage that we do agree with both counsel that Cap 33 has no provision which provides for setting aside a decree that is being challenged. In that situation, as stated in *Tanzania Electric Supply Company vs. Independent Power (T) Limited (IPTL)*

- (2000) TLR 324, "The Civil Procedure Code cannot be said to be exhaustive. It is legitimate therefore, to apply under section 2 (2) of the Judicature and Application of Laws Ordinance, relevant rules of Common Law and Statutes of General Application in force in England on the 22nd July 1920, where the Code is silent..... Should a new fact arise which should have been brought to the attention of the court during trial, then Cap 33 provides for procedures for Review (Order XLII) and where appropriate, Revision before a higher court, i.e. this Court (Section 4 of Cap 141). An aggrieved party may, if he so wishes, institute a new suit challenging the findings in the earlier one. Our views are fortified by Muia on the 9 Code of Civil Procedure Code (16th Ed. Vol. 1 PP. 299, 653 and 1066). It is provided therein thus:- P.299, 15 "Unless all the parties agree, an application cannot be made to the court of first instance in the original suit to set aside a decree, though it may be done in the case of an interlocutory order...." P.653, "... the only remedy of a person who wishes to challenge a compromise decree on the ground of fraud is to file a suit for setting aside the said decree.. " Guided by the above judicial authority, a consent decree can be set aside on any ground including misrepresentation, fraud or mistake through institution of a suit and not an appeal, or review or on motion. However, only an interlocutory consent order, which is not final can be set aside. Presently, the learned tribunal chairperson was sitting as an executing court of the respondent's decree and not an appellate or revisional tribunal. Thus, he was not entitled to interfere with the consent decree recorded by the ward tribunal on 14th December 2022. I am verily made to believe that the facts of the parties' dispute are similar to the position stressed by the Court of Appeal in *Hossea Kihwelo & Others vs. AbdaOah Ramadhani Mkumba*, Civil Revision No.347 of 2018 (Civil Revision 347 of 2018) [2022] TZCA 549 (30 August 2022) where it was stated io "Though we agree with the applicants that, the second appellate court would not, in the absence of the record of the first complaint and its related execution proceeding, confirm the decision in the first complaint and hold that it was not irregularly procured, in principle, the finding of the second appellate court on the validity of the order of the first appellate tribunal quashing the decision in the first complaint is correct in effect. The

reason being that a judgment of a court cannot be quashed in an execution proceeding. There should be an appeal or revision before the higher tribunal." See also Hossea Kihwelo & Others vs. Abdallah Ramadhani Mkumba, Civil Revision No.347 of 2018 (Civil Revision 347 of 2018) [2022] TZCA 549 (30 August 2022) and Barrick Gold Mine Limited and Augustino Nestory (supra). One may apprehends the determination of the second point of objection as going into the root of the appeal as argued by the appellants' counsel but in my view, that is not the position here as all grounds of appeal are found challenging the legality or correctness of the consent decree presented to DLHT for execution by the respondent. Before this Court and DLHT, the appellants are found seriously contending to have not signed the li impugned consent decree recorded on 14th December 2022 and that, the respondent has not paid the purchase price. Equally, when I look at the holding of the learned chairperson of the DLHT, it sounds to me clearly that, he essentially dealt with the question on, whether the appellants' complaints were entertainable at the juncture of execution of the consent decree. Hence, the DLHT's chairperson dealt with the legal issue at length as the case here where the respondent's advocate has raised the jurisdictional issue. Therefore, in my view, dealing with second limb of the objection is equal to dealing with the competency of the appellants' application before DLHT or appeal or revision and competency of this appeal before this court, the appeal resulting from the finding of the chairperson of the DLHT is to the effect that, he could not validly set aside the consent decree as he was just an executing officer who is only mandated to give effect reliefs already granted by the ward tribunal through the parties' mutual agreement by way of mediation. Having deliberated as herein, the second limb of the respondent's objection is sustained. Coming to the third point of law on the alleged forgery of the second appellant's signature. Although it is trite law under section 75 of TEA and judicial authorities including those cited by the respondent's counsel that, 12 the court may, although it is not an expert of handwritings, compare disputed signatures from those admitted signatures. I have attempted to compare the signatures purporting to be of the second appellant both in the Memorandum of Appeal filed before this court and that in appellants' joint affidavit filed in the DLHT and observed the same to be quite different. Similarly, signature purporting to be of the second appellant as appearing in the letters of administration of estate of late Isihaka Hassan Mchanya granted in favour of him issued on 12th December 2022 is different from the one appearing in the Memorandum of Appeal. However, the circumstances of this case is distinguishable as rightly argued by the learned counsel for the appellants since the second appellant has admitted that, both signatures appearing in the MA and in the joint affidavit showing cause to the respondent's application for execution to be his own signatures. In that premise, I find it difficult to suitably proceed determining this type of point of law so raised without ascertaining certain facts or evidence in that regard. My holding herein is fortified by the decision of the Court of Appeal in the case cited by the appellants' advocate of Sundra Weiler (Executor of Elifadhili Wilson Msuya) vs. Lightness Mlay (supra). 13 Perhaps it is advisable if the respondent or counsel or both feel like ascertaining the correctness or otherwise of the signature appearing in the Memorandum of Appeal purporting to be that

of the second appellant, they should report the matter to police for further investigation so that the accusation may be properly dealt with. That said and done, the second point of law raised by the counsel for respondent is hereby sustained as opposed to the third point, which is overruled. The appellants' appeal is therefore incompetent and unjustifiable and the District Land and Housing Tribunal was well founded. The appellants shall bear the costs of this appeal. It is so ordered. DATED at DAR ES SALAAM this 20th day of February 2025 Right of appeal explained Court: Ruling delivered in the presence of the parties and their advocates as appearing in the Coram. , _ - JUDGED— 20/02/2025 14

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