

Original

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

**LAND APPEAL NO. 408 OF 2023**

(Originating from Ilala District Land and Housing Tribunal  
Misc. Civ. Appl No. 237 of 2023)

**HAJI ALLY MLENGE.....APPELLANT**

***VERSUS***

**HABIB NASSER HABIB.....1<sup>ST</sup> RESPONDENT**

**NZIGE AUCTION MART.....2<sup>ND</sup> RESPONDENT**

**KONDO ATHUMAN MOHAMED.....3<sup>RD</sup> RESPONDENT**

**RULING**

01<sup>st</sup> to <sup>19<sup>th</sup></sup>20<sup>th</sup> December, 2023.

**E.B. LUVANDA, J**

This appeal is in respect of an interlocutory order dated 19/09/2023 where the trial Chairman Honourable A. R. Kirumbi refused a prayer by the Appellant for recusal to preside over an objection proceedings for an attachment of execution of a decree.

Lizzy Paul Minja learned Counsel for the First and third Respondent raised an objection embedded into a notice filed on 08/11/2023, that the appeal before this Court is incompetent as it contravenes section 5(2)(d) of the Appellate Jurisdiction Act, Cap 141 R.E. 2019.

The learned Counsel for the First and Third Respondent submitted that this appeal is based on the chairman's decision to refuse to refuse (sic, recuse) himself from the determination of Misc. Application No. 237/2023. She submitted that section 5(2) (d) of Cap 141 (supra), strictly prohibits courts from entertaining appeals or application for revision arising from any preliminary or interlocutory decision or order of the High Court unless such decision or order has the effect of finally determining the suit. She cited **Rev. Asumwisye Mwafongo Masiabila & Evangelistic Assemblies of God Tanzania**, Misc. Civil Application No. 69/2022; **Jitesh Jayantilal Ladwa & Another vs. Dhirajlal Walji & Others**, Civil Appeal No. 435/2020, CAT.

In reply, Mr. Hezron Jimson Mwakenja, learned Counsel for Appellant submitted that, the provision of section 5(2) (d) Cap 141(supra) cited by the learned Counsel for First and Third Respondents is superfluous, irrelevant and un-enabling provision, arguing the matter before this Court is neither subordinate court with extended jurisdiction, nor the High Court of Tanzania. He cited the case of **Registered Trustees of Social Action Fund & Another vs. Messrs. Happy Sausages Ltd & 11 Others**, Civil Appeal No. 70/2002, CAT on the test and law relating to disqualification. He made two prayers: withdrawing the appeal without costs, at the same time inviting this Court to exercise its

revisional jurisdiction sue (sic, suo) motto to determine if the impugned decision was determined in accordance to the principle laid by the Court of Appeal.

On rejoinder, the learned Counsel for First and Third Respondent submitted that Cap 141 applies for all appeals and it strictly excludes appeal which originates from preliminary or interlocutory decision. She submitted that, the Appellant cannot withdraw an incompetent appeal, arguing the best that can be done by the Applicant (sic, Appellant) is to concede to the preliminary objection and allow for the matter to be struck out with costs, citing **Action Fund** (supra).

Essentially the learned Counsel for Appellant concede to the preliminary objection, this is because he made no comment even to the decision and precedent cited by the Counsel for First and Third Respondent, which invariably bar generally and preclude an appeal or revision arising from preliminary or interlocutory decision or order, like the instant one.

Arguably, the provisions of section 5(2) (d) Cap 141(supra) is inapplicable to the situation at hand. However, that alone does not venter the entire notice on preliminary objection to be crippled off and worthless, as suggested by the learned Counsel for Appellant. This is because section 5(2)(d) Cap 141 (Supra) is in parimateria to the provision of rule 22 of the Land Disputes Courts (The District Land and housing Tribunal) Regulations G.N. 174 of 2003, which provide,

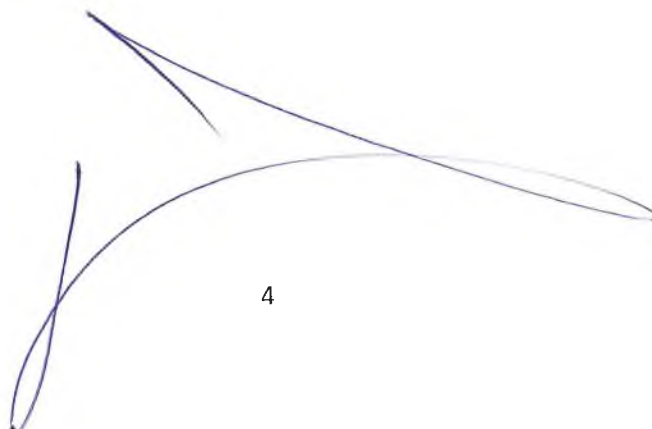
*'The chairman shall have powers to determine:-*

- a) Preliminary objections based on points of laws;*
- b) Application for execution of orders and decrees;*
- c) Objections arising out of execution of orders and decrees;*
- d) Interlocutory applications;*

*Provided that a ruling on a preliminary point of law or on any interlocutory application which have no effect of finally deciding the case shall not be appellable'*

Therefore, a cause taken by the learned Counsel for Appellant alleging to have been instructed by his client to withdrawal the appeal without costs, and at the same time inviting this Court to act *proprio motu* on deliberating whether the ruling of the learned Chairman refusing recusal, as to whether meet the test in **Social Action Fund** (supra), is a misplaced idea and has long been over due and overtaken by events. This to my view, ought to have been done at the earliest possible opportune, upon being served by a notice of objection. And not to await the objection to be argued and seek withdrawal at the verge of or after assessing to have nothing to respond on reply.

Therefore, the Appellant cannot escape a liability for costs of this appeal. To this end, I am guided by the obiter dicta in **Social Action Fund** (supra), the apex Court ruled,

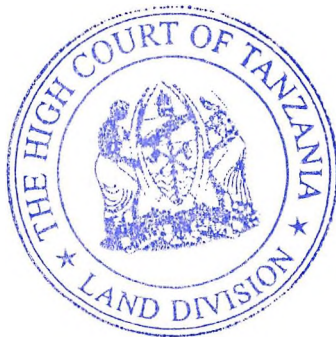


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*'Secondly the issue of costs is also resolved in favour of the respondent. It is ordered that the respondent shall have the costs because he had filed a notice of preliminary objection since August 2020 yet the applicant did not take any immediate step until March, 2021'*

I have subbed and disregarded a letter Ref. No. CLC/12/2023/5 dated 05/12/2023 being a call by the learned Counsel for Appellant inviting the Court to expunge a rejoinder for reasons of non service to them. The learned Counsel did not say if at all he was entitled to make a further response subsequent to a rejoinder. At any rate, a letter was nothing other than misconception.

The appeal is struck out with costs.



E. B. LUVANDA  
**JUDGE**  
20/12/2023

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