

**IN THE HIGH COURT OF THE UNITED REPUBLIC OF TANZANIA**

**(DODOMA DISTRICT REGISTRY)**

**AT DODOMA**

**LAND REFERENCE NO. 01 OF 2020**

*(Originating from Execution No. 2/2019 of the High Court of Tanzania at Dodoma)*

**PHILIPO JOSEPH LUKONDE ..... APPLICANT**

**VERSUS**

**FARAJI ALLY SAIDI..... RESPONDENT**

**RULING**

27/04/2022 & 26/05/2022

**KAGOMBA, J**

This ruling is pursuant to the application for reference made before this Court by the applicant, PHILIPO JOSEPH LUKONDE. The applicant's application is filed by the way of Chamber Summons and supported by an affidavit sworn by the applicant himself. The respondent, FARAJI ALLY SAIDI to contest the application, filed a counter affidavit which was also sworn by himself.

A brief background on this matter is that, the applicant herein is a judgment debtor in Execution No. 2 of 2019 pending before this Court (the execution Court) where the respondent is a Decree holder. The applicant

had entered into an agreement with the respondent to sell a parcel of land situated at Plot No. 60 Block 14 Chinangali West with an agreed purchase price of Tshs. 165,000,000/= . The respondent fulfilled his contractual obligation by paying Tshs. 134,200,000/= as they agreed that the remaining sum shall be paid after the Certificate of Title was handed to the respondent. However, the applicant failed to hand over the title as agreed. Hence the respondent filed a case before this Court (Kalombola, J.) which is Land Case No. 14 of 2016. The respondent, among other things, sought enforcement of their contract whereby the Court ordered the applicant to receive the remaining sum of Tshs. 30,800,000/= for the title to pass to the respondent.

The applicant was not satisfied with the above decision; hence he filed an appeal to the Court of Appeal of Tanzania at Dodoma which is Civil Appeal No. 74 of 2019. The appeal was not successful as the Court of Appeal upheld the decision of this Court. At that juncture, the respondent filed execution proceedings in this Court, being the execution Court vide Execution No.2 of 2019 which is still pending before Deputy Registrar who stayed it awaiting determination of this reference.

In determination of the said execution matter, the Deputy Registrar among other things, ordered the respondent to pay the sum of Tshs. 30,800,000/= to the applicant and the applicant to sign all documents for transfer of title in order to satisfy the decree awarded by this Court, which was accordingly upheld by the Court of Appeal.

It was during implementation of the directives made by the Deputy Registrar, the applicant filed this application for reference asking this Court to resolve two questions of law; (i) whether it was proper for the execution Court to order execution of decree in Land Case No. 14 of 2016 by ordering forceful eviction to the applicant after being paid the outstanding amount of the sale price while it was known to the Court that there was a case between Christina Francis Mdengede against the applicant and the respondent on the same suit premise and (ii) whether it was proper for the execution Court to order execution while there is an application for extension of time to file review to challenge the decision of the Court of Appeal in Civil Appeal No. 74 of 2019, which is pending before the Court of Appeal.

During hearing of this application both parties were represented by learned advocates, whereby the applicant was represented by Mr. Francis and the respondent was represented by Mr. Godfrey Wasonga.

Mr. Kesanta contended that since the applicant was dissatisfied with the decision of the Court of Appeal and has lodged an application for extension of time to file review in that respect, it was for the interest of justice that the parties should maintain *status quo*. However, to his dismay, the application for maintenance of *status quo* was rejected by the Deputy Registrar, hence this reference.

To justify the need for review and stay of execution, Mr. Kesanta submitted that, the applicant's wife never consented to the purported sale, therefore she had filed a suit against the applicant and the respondent praying that the transfer of the suit premise should not be effected till the matter is determined. He lamented that the Registrar, despite of being told this fact, has proceeded with execution.

It is under those circumstances this application for reference is made by the applicant for this Court to review the proceedings and order(s) made

by the Deputy Registrar to see if he was right in doing so. Mr. Kesanta prayed this application be allowed with costs.

Mr. Wasonga in his reply faulted the use of S. 68(e) of the Civil Procedure Code [ Cap 33 R. E 2019] (henceforth "CPC") by the applicant to bring this application, arguing that the said provision deals with supplemental proceedings. It was his argument that among the supplemental proceedings. It was his argument that, since execution is not among the supplemental applications, the provision was wrongly applied by the applicant.

On other hand, Mr. Wasonga argued that this Court lacks jurisdiction to entertain the application of this nature. He cited the case of **Grofin Africa Fund Limited V. Happy English Medium School Limited And 4 Others, Commercial Case No. 79 of 2017 High Court, Commercial Division at page 2** where the Court stated that where a decree has not been challenged or where it is challenged and determined as is the case in this matter, the Court has no Jurisdiction to entertain such matter.

Mr. Wasonga also cited the case of **Sogea Satom Company V. Barclays Bank Tanzania and 2 Others, Misc Civil Reference No.15 of 2021**, the High Court at Dar es Salaam, at page 8 stated that;

*"Except where the law clearly states otherwise, a decision or order rendered by the Deputy Registrar of the High Court is a decision of the High Court and may be challenged by way of an appeal, reference and or revision to the Court of Appeal or by way of review to the same High Court".*

Backed by the above cited decisions, Mr. Wasonga submitted that, the only way to stay execution of the decision of the Court of Appeal is to file an application for stay of execution in the Court of Appeal under Rule 11(2)(b) of the Court of Appeal Rules. The learned advocate added that existence of a case is not a bar to execution and that a mere intention to file review is not a bar either.

Having made the above submission, Mr. Wasonga prayed the Court to dismiss the application to and urged the applicant to follow the proper procedures.

In his rejoinder Mr. Kesanta submitted that even if S. 68 of CPC is not applicable, the application cannot turn to be untenable because Order XLI is relevant to support it. He added that Mr. Wasonga was supposed to raise a preliminary objection if he found that the provision cited was inapplicable.

Mr. Kesanta further rejoined that the case laws cited by Mr. Wasonga are distinguishable because in this application the applicant does not challenge a decree but invites this Court to review the order of the Registrar. He said that Rule 11(2)(b) of the Court of Appeal Rules is not applicable since it deals with **appeals** from the High Court to the Court of Appeal and therefore it does not cater for **reviews**.

With regards to staying the execution, Mr. Kesanta stated that the applicant has not ended with having intention to file an application for extension of time to file review, but he has actually filed the said application.

Mr. Kesanta concluded by reiterating his prayer that this application be allowed with costs.



From the above submissions, the respondent has raised a crucial issue for priority determination. The issue is whether this Court has jurisdiction to entertain this application. It is after being satisfied with the existence of jurisdiction, I shall proceed to determine whether the application has merit.

This application for reference is made under S. 68(e), S. 95 and Order XLI of the CPC. A glance at these provisions applied by the applicant, immediately reveals that S. 68(e) is wrongly applied, as it was submitted by Mr. Wasonga. This is because neither the execution case nor this application is supplemental proceedings. In that case, it is the provision of Order XLI of the CPC which is a relevant provision to move the Court, as far as application for reference is generally concerned. Regarding S. 95 of the CPC, being a provision on inherent powers it also not applicable where the law has availed provisions to govern such particular matter.

The crux of the matter, however is that Order XLI of the CPC is to be read together with S. 77 of the CPC which, in my view both provisions were couched for compliance by subordinate Courts and not the High Court itself. The aim behind these provisions it is to enable parties or lower Courts to



seek High Court opinion on matter of law that arose during or before hearing of any matter before the Court. Rule 1 of Order XL1 reads;

1. *"Where, before or on the hearing of a suit in which the decree is not subject to appeal or where, in the execution of any such decree, **any question of law or usage having the force of law arises, on which the Court trying the suit or appeal, or executing the decree, entertains reasonable doubt, the Court may, either of its own motion or on the application of any of the parties, draw up a statement of the facts of the case and the point on which doubt is entertained and refer such statement with its own opinion on the point for the decision of the High Court"***  
[Emphasis added]

Section 77 also reads;

77. *"Subject to such conditions and limitations as may be prescribed, **any court may state a case and refer the same for the opinion of the High Court and the High Court may make such order thereon as it thinks fit"***. [Emphasis added]

From the above cited provisions, it is apparent the reference provided for by the law thereunder is from lower Courts to the High Court. It is also apparent that the High Court cannot seek opinion from itself. Since the Deputy Registrar is entertaining Execution No.2 of 2019 in this Court as the execution Court, his decision cannot be subjected to this kind of application.

For the reason stated above, the application before this Court for reference on the order(s) made by the Deputy Registrar is incompetent since the law does not provide so. Unlike in taxation matters where the law under Order 9 of the Advocates Remuneration Order, 2015 clearly provides for reference of any matter in dispute, arising out of the taxation of a bill for the opinion of the High Court, Order XLI of the CPC does not apply in a way the applicant has applied it.

In **Nizar Abdallah Hirji V. Rehema Salumu Abdallah, Misc. Civil Application No. 34 of 2020**, the High Court at Dodoma (this Court) when encountered an issue of this nature, had the following to say;

*"It is my view that, unlike in taxation matters, **the decision of the Deputy Registrar being a decision made in execution of a decree by a Court which***

***passed the same, is a decision of this Court.....***

*It is my further view that unlike in taxation matters where a reference on a decision of a Taxing Master could lie to a Judge of the same Court, **the Deputy Registrar who presides over execution matter in the executing Court is deemed to have concurrent jurisdiction with a Judge of the same executing Court**”.*

**[Emphasis Added]**

Similarly, in **Sogea Satom Company (supra)** cited by Mr. Wasonga, this Court had the same views where it stated;

*“Except where the law clearly states otherwise, the decision or order rendered by the Deputy Registrar of the High Court is the decision of the High Court.”*

That being the case as correctly argued by the respondent’s advocate, this Court finds that it has no jurisdiction to entertain this application. Having found so, it will be inconsequential to discuss the remaining issue as to whether the application has merit or not. Energy is therefore conserved for other pending matters.

Accordingly, the application is dismissed. No order to costs.

It is so ordered.

**DATED at Dodoma this 26<sup>th</sup>, Day of MAY, 2022.**



A handwritten signature in blue ink, appearing to read "Abdi S. Kagomba".

**ABDI S. KAGOMBA**

**JUDGE**