

IN THE HIGH COURT OF THE UNITED REPUBLIC OF TANZANIA
IN THE SUB-REGISTRY OF DAR ES SALAAM
AT DAR ES SALAAM

CIVIL REFERENCE NO. 6 OF 2022

NURDIN MOHAMED CHINGO APPLICANT

VERSUS

SALUM SAID MTIWE 1ST RESPONDENT

HADIJA SAID MTIWE 2ND RESPONDENT

(Arising from Execution No. 7 of 2021)

RULING

6th and 15th July, 2022

KISANYA, J.:

By way of chamber summons made under Order XLI, rule 1 and section 95 of the Civil Procedure Code [Cap. 33, R.E., 2019] (henceforth "the CPC"), the applicant, Nurdin Mohamed Chingo filed an application praying for the following orders: -

- 1. That this Honourable Court be pleased to examine and satisfy itself as to the legality, proprietary and correctness of all the proceedings and orders in Execution No. 7 of 2021, Hon. V. M. Nongwa, DR and proceed to quash them and set aside the orders for being procured fraudulently, by misrepresentation and in total disregard to the orders of the Court of Appeal of Tanzania.*
- 2. That the costs of this application be provided for.*

3. Any other relief (s) this Honourable court may deem fit and just to grant.

The facts giving rise to this application are that; on 21st December, 2020, this Court (Mlacha, J) in PC Civil Appeal No. 129 of 2019 declared the respondents to be the lawful owners of house No. 49, Plot No. 18, Agrey Street, Dar es Salaam. The said decision aggrieved the applicant. Apart from lodging the notice of appeal to the Court of Appeal, he applied to this Court in Misc. Civil Application No. 66 of 2022 praying for a certificate on the points of law involved in the intended appeal to the Court of Appeal. Subsequently, he applied in the Court of Appeal, for an order of stay of execution.

On 4th February, 2022, the application for a certificate on point of law was struck out with leave to refile. He complied with the said order by filing another application which is pending in this Court. With regard to the application for stay of execution, it was granted by the Court of Appeal on 18th March, 2022 vide Civil Application No. 60/81 of 2021.

At the same time, the respondents were not asleep. They filed an application for execution of the judgement and decree of this Court in PC Civil Appeal No. 129 of 2019. Their application was filed in this Court and registered as Execution No. 7 of 2021. It was granted by the Deputy Registrar on 19th April, 2022 after considering the counsel for respondents'

submission that the order for stay of execution was no longer in force as the application for certificate on point of law had been struck out by this Court. The Hon. Deputy Registrar went on appointing a court broker who evicted the applicant from the suit premises.

In view of the foregoing, on 10th June, 2022, the applicant's counsel informed this Court about the Court of Appeal's order for stay of execution that had been issued on 18th March, 2021. He prayed the Court to rescind its previous order and issue an order of maintaining the *status quo*. In her order dated 21st June, 2022, the Hon. Deputy Registrar held the view that the Court was *functus officio* to rescind the eviction order. That decision aggrieved the applicant who found it apt to file the instant application for the orders stated herein.

Against this application, the respondent filed a counter affidavit together with a notice of preliminary objection on the points of law to the effect that-

1. That the application is time barred.
2. That this Court has not been moved properly to determine the application.
3. That the application is misconceived.

When the application came up for hearing, the applicant was represented by Mr. Thadei Hyera, learned advocate assisted by Ms Pendo Ngowi. On the other side, the respondent had the legal services of Mr. Fancis Makota, learned advocate.

As is the practice where a notice of preliminary objection is raised in any case, I allowed the parties to address me on the point of preliminary objection before embarking on the hearing of the application on merit. I also asked them to address me on whether this Court has jurisdiction to determine the present application based on the decision made by the Deputy Registrar of this Court.

In the course of arguing the preliminary objections, Mr. Makota abandoned the third limb of objection.

Submitting in support of the first limb of objection, the learned counsel argued that the application is time barred. His argument was based on the contention that the decision subject to this application was made on 19th April, 2022. He went on to submit that the CPC does not specify the time within which to file an application for reference. Therefore, referring to item 21, Part III of the First Schedule to the Law of Limitation Act [Cap. 89, R.E. 2019) (the LLA), the learned counsel argued that the application ought to

have been filed within 60 days from 19th April, 2021. That said, he was of the firm view that the application filed on 24th June, 2022.

On the second limb of objection, Mr. Makota submitted that Order XL referred in the Chamber Summon empowers this Court to give opinion when there is a doubt in execution proceedings. However, he was of the view that the applicant was challenging the decision of the Deputy Registrar of this Court. Given that the cited provision does not empower this Court to determine application aiming at challenging the decision of the Deputy Registrar, Mr. Makota argued that the Court has not been properly moved. He was of the view that the issue raised by the Court had been raised in his submission in support of the application.

Responding to the first limb of objection, Mr. Hyera submitted that the application is not time barred. He contended that the application is based on the decision made by this Court on 21st June, 2022. That being the case, he was of the firm view that the application was filed within 60 days set out by the LLA.

As regards the second limb of objection, the learned counsel argued that the Court has been properly moved. He contended that the provision cited in the chamber summons empowers this Court to determine the application at hand. The learned counsel further submitted that the decision

subject to reference was made by the Deputy Registrar in the exercise of her statutory duties under Order XLIII of the CPC. In that regard, it was his submission that the Court is enjoined to determine the matter.

In addition to Mr. Hyera's submission, Ms. Pendo argued that the Court has mandate to determine the application because the Deputy Registrar did not give the decree and that Order XLI, Rule 1 of the CPC requires the issues arising from execution to be referred to the judge of the High Court.

When Mr. Makota rose to rejoin, he reiterated his submission in chief on second limb of objection. He further submitted that the fact that Order XLI Rule 1 of the CPC deals with reference to the High Court implies that the matter subject to reference must come from the lower courts. He, therefore, reiterated his stance that the cited provision does not empower this Court to determine reference on the matter decided upon by the Deputy Registrar.

After considering the rival submission from the counsel for the parties, court record and applicable law, I find the issue to be determined is whether the preliminary objections raised by the respondents' counsel are meritorious. This is because the issue raised by the court was argued together with the second limb of objection.

In the first limb of objection, the respondents' counsel contends that the application is time barred. It is common ground that this is an application

for reference and that the time within which to apply for it is not provided for under the CPC. That being the case, I agree with the learned counsel for the parties that, in view of item 21, Part III of the Schedule to the LLA, the time to apply for revision is sixty (60) days.

Mr. Makota's contention that the application is time barred is based on the ground that the decision subject to this application was issued on 19th April, 2022 while the present application was filed on 24 June, 2022. However, in terms of the chamber summons, the applicant did not state that he was challenging the decision dated 19th April, 2022. As indicated earlier, the chamber summons shows that all proceedings and orders in Execution No. 7 of 2021 are subject to the reference at hand. The affidavit in support of the application displays that the order which gave rise to the matter at hand was issued on 21st June, 2022. Considering that this application was filed three days later on 24th June, 2022, I agree with Mr. Hyera that it is not time barred. Thus, the first ground is hereby overruled for want of merit.

Moving to the second limb of objection, it not disputed that the provision of Order XLI, Rule 1 cited in the chamber summons suggests this is an application for reference. However, the wording of the chamber summons suggests that the applicant is applying for revision of the proceedings and orders of this Court in Execution No. 7 of 2021. Since the

decisions subject to the application were given by the Deputy Registrar of this Court, the issue is whether this Court has mandate to determine application for reference or revision made by the Deputy Registrar.

At this juncture, I find it appropriate to reproduce Order XLI, Rule 1 of the CPC as hereunder: -

"Where before or on the hearing of a suit in which the decree is not subject to appeal or where 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 facts of the case and point on which doubt is entertained and refer such statement with its own opinion on the point for the decision of the High Court."

Reading from the above provision, it is my considered view that reference is made in the following circumstances. *One*, the application is made to the High Court from the court trying the suit or appeal or executing the decree. *Two*, the application for reference is made where the question arises before or on hearing the suit or executing the decree. *Three*, the respective court or any of the parties refers to the High Court a statement of facts and point on which doubt arises together with their opinion on each point for decision of the High Court.

Although rule 5 of Order XLI was not cited, I am of the view that it is relevant to the issue under consideration. It provides on the mandate of the High Court after receiving the matter referred to it under rule 1. The said rule 5 is states:

"Where a case is referred to the High Court under rule 1, the High court may return the case for amendment and may either cancel or set aside any decree or order which the court making reference has passed or made in the case of out of which the reference arose and make such orders as it thinks fit."

Therefore, flowing from Order XLI rule 1 and 5 of the CPC, the issue that arises is whether the decision of the Deputy Registrar of the High Court can be considered as a decision or order of a lower court. It is my humble opinion that such opinion is answered not in affirmative. The established position is to the effect that the decision made by the Deputy Registrar of the High Court is deemed to be the decision of the High Court. It is therefore, challenged way of an appeal, reference and/or revision to the Court of Appeal. Another recourse against such decision is to file an application for review to the High Court which made the impugned decree. This stance was taken in the case of **Sogea Satom Company vs Barclays Bank Tanzania and Two Others**, Misc. Civil Reference No. 15 of 2021 (Unreported) when my senior brother Mruma, Judge held as follows: -

"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.

It follows, therefore, that Order XLI, rule 1 of the CPC cited in the chamber summons does not empower the High Court to call its own records and examine them as prayed by the applicant. Reference from the decision of the Deputy Registrar can only arise from the decision made by the Deputy Registrar as taxing officer under Rule 7 (1) of the Advocates Remuneration Orders, 2015. Apart from the case of **Sogea Satom Company** (supra), this position was stated in the case of **Philipo Joseph Lukonde vs Faraji Ally Saidi**, Land Reference No. 01 of 2020, High Court of Tanzania at Dodoma (unreported) where it was held as follows:

"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.

Being guided by the above position of law, I agree with the learned counsel for the respondent that this Court has not been properly moved to examine and satisfy itself as to the legality, propriety and correctness of all the proceedings and orders of the Deputy Registrar in Execution No. 7 of 2021. Although I find arguable issues including whether this Court had jurisdiction to determine the application for execution and or issue an eviction order while the Court of Appeal's order for stay of execution was in force, I am of the view that this Court has no mandate to determine that issue by way of reference or revision. Such power can be exercised by the Court of Appeal. In that regard, I find merit in the second limb of objection and sustain it.

In the upshot of the above, this application is hereby struck out for being incompetent. As the matter arises from probate, each party is ordered to bear its own costs.

DATED at DAR ES SALAAM this 15th day of July, 2022.



S.E. Kisanya
JUDGE