

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

**BUKOB A DISTRICT REGISTRY**

**AT BUKOB A**

**CIVIL REFERENCE NO. 04 OF 2022**

*(Arising from the decision of Deputy Registrar of this Court in Execution of Land Appeal No. 111 of 2020)*

**DAVID NESTORY KITANDALA.....APPLICANT**

**VERSUS**

**LEONIDAS LUBAGUMYA LWEHUMBIZA.....1<sup>ST</sup> RESPONDENT**

**MAJEMAJE AUCTION MART & COURT BROKER....2<sup>ND</sup> RESPONDENT**

**RULING**

*24/08/2022 & 21/09/2022*

*E. L. NGIGWANA, J.*

This is an application for Reference arising from the decision of the Deputy Registrar in Execution of Labour Appeal No. 111 of 2022 dated 25/5/2022 was brought by way of chamber summons made under Order XLI Rule 1, Order XLIII rule 2 and section 95 of the Civil Procedure Code Cap. 33 R: E 2019.

Brief facts giving rise to this application is to the effect that; on 02/05/2019, the applicant and the 1<sup>st</sup> respondent entered into a loan agreement whereby the applicant David Nestory Kitandala secured his house and a farm for a loan of **Tshs 21,700,000/=** which was to be repaid on or before 2/10/2019. The Applicant defaulted, thus he was sued in the DLHT for Kagera at Bukoba in Application No.102 of 2019.

Since the applicant David Nestory Kitandala defaulted to repay the loan, 1<sup>st</sup> respondent Leonidas Lugabumya Lwhumbiza was given possession of the

suit premises (A house and a farm) which were mortgaged by the applicant.

The applicant was aggrieved by the decision of the DLHT, therefore appealed to this court vide Land Appeal No. 111 of 2020, which later ended being settled out of court. Instead of marking the matter settled, Land Appeal No. 111 of 2020 marked withdrawn. The order was followed by an order showing that the Deed of Settlement was registered. Both orders were dated 08/06/2022. The orders appear to conflict each other but, I have no mandate to address them because this is not an application for review. It was agreed in the Deed of Settlement that the applicant would pay the 1<sup>st</sup> respondent a sum of **Tshs. 30,000,000/=** (TZS Thirty Million) between 07/06/2021 and 07/12/2021.

Following the fact that the said money was not paid by the applicant as per Deed of Settlement, the execution process was commenced by the 1<sup>st</sup> respondent and finally, the applicant's farm and house were attached by the 2<sup>nd</sup> respondent under the instruction of this court, however, the Deputy Registrar wrote the case as **Labour Appeal No. 111 of 2020** instead of **Land Appeal Case No. 111 of 2020** but also the Applicant was referred as the **Decree Holder** while the 1<sup>st</sup> respondent who was claiming a sum of **Tshs 30,000,000/=** from the applicant was referred as the **Judgment Debtor**, hence this application.

Though there was no objection raised by the respondent, upon reading the chamber summons and an affidavit of the applicant's advocate, Mr. Niyikiza Seth, this court in its own motion, raised the issue on the competence of this application.

Parties were invited to address the court on the issue whereas Mr. Niyikiza Seth, learned advocate for the applicant, and Ms Salome Kagoa, advocate for the respondent, submitted that, upon careful perusal of the law under which this application was made, it goes without saying that this application is incompetent, hence ought to be struck out. However, Ms Salome asked the court to award costs to the respondents.

Having heard submissions by the learned advocates, it is now pertinent to determine whether the issue raised ***suo motu*** is meritorious or otherwise.

Order XLI rule 1 of the Civil Procedure Code, [Cap. 33 R.E 2019] provides that;

*" 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."*

Order XLI rule 3 provide that;

*The High Court, after hearing the parties if they appear and desire to be heard, shall decide the point so referred and shall transmit a copy of its judgment under the signature of the Registrar to the court by which the reference was made and such court shall, on the receipt thereof, proceed*

to dispose of the case in conformity with the decision of the High Court."

**Order XLI rule 5** provides that;

*"Where a case is referred to the High Court under rule 1, the High Court may return the case for amendment and may alter, cancel or set aside any decree or order which the court making the reference has passed or made"*

Reading Order XLI rule 1 of the Civil Procedure Code Cap. 33 R.E 2019, one can easily discover that it is coached for compliance by subordinate courts and not the High Court itself. The rationale behind is to enable parties or lower courts to seek the opinion or direction of the High Court on matters of law that arise during or before hearing of any matter before the court. See, the case of **Shekhe salim Rajbn Sima versus Abdala Mohamed Njega**, Reference No. 14 of 2020, HC – DSM (unreported).

All said and done, I find that this application is not properly before the court owing to the reason that it is incompetent. Consequently, I strike it out accordingly. Having regard to the nature of this application, and the fact that the issue was raised by the court in its own motion, I make no order as to costs. It is so ordered.

Dated at Bukoba this 21<sup>st</sup> day of September, 2022.



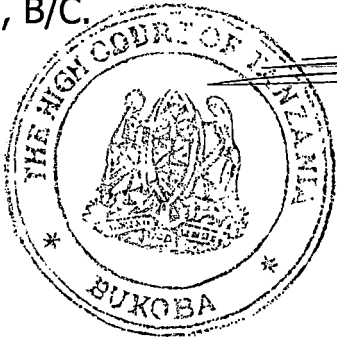
E. L. NGIGWANA

JUDGE

21/09/2022

Judgment delivered this 16<sup>th</sup> day of September, 2022 in the presence of the applicant and his Mr. Niyikiza, learned Advocate, Ms. Salome Kagoa,

learned Advocate represented the 1<sup>st</sup> and 2<sup>nd</sup> respondents who are  
absence, Hon. E.M. Kamaleki, Judges Law Assistant and Ms. Tumaini  
Hamidu, B/C.



E. L. NGIGWANA

JUDGE

21/09/2022