

**IN THE HIGH COURT OF THE UNITED REPUBLIC OF TANZANIA  
MWANZA DISTRICT REGISTRY  
AT MWANZA**

**LAND REFERENCE NO. 03 OF 2022**

**REGISTERED TRUSTEE OF TAQWA**

**PRIVATE SECONDARY SCHOOL -----APPLICANT**

**VERSUS**

**REGISTERED TRUSTEE OF BAKWATA----- RESPONDENT**

**RULING**

*Last Order: 06.12.2022*

*Ruling Date: 08.12.2022*

**M. MNYUKWA, J.**

When the matter came for hearing, the applicant afforded the service of Mr. Akram, learned counsel and the respondent was serviced by Mr. Nasmire, learned counsel. Following the parties' prayer that, the matter to proceed by the way of written submissions vide the court order dated 26.09.2022, parties complied.

In brief, the respondent herein filed Civil Execution No. 7 of 2022 before this Court (the High Court) prayed for the Garnishee Order to be executed against the Judgment debtor's account in order to realize in



full the decretal sum in the amount of Tshs. 78,000,000/=, together with the interest on the principal sum and the costs of the application. After hearing the application, the Deputy Registrar of this Court granted the application by issuance of the Garnishee Order Nisi. Aggrieved by the said decision, the applicant filed the present application for Reference brought under Order XL1 Rule 1, 3 and 5 of the Civil Procedure Code, Cap 33 R.E 2019, for this Court to make Reference on the Proceedings of the Civil Execution No. 7 of 2022 and the decision delivered by the Hon. Deputy Registrar thereto.

In support of the application, Mr. Akram Adam learned counsel prayed this court to adopt his chamber summons and the contents of the affidavit deponed by the principal officer of the applicant one Shija Magera. He also prayed this court to make reference on paragraphs 1, 2 3, 4, 5 and 6 of the affidavit and alerts that, his submissions will revolve around a statement of issues drawn under paragraph 8 of the affidavit.

It was his submission on paragraph 8(iv) that, the order purported to be executed is not capable of being enforced as a decree as per the requirement of Order XXIII Rule 3 of the Civil Procedure Code Cap. 33 RE: 2019, which require the court after recording the settlement agreement as it did in our present case, to extract decree thereto. He



insisted that, the order that was enforced by the Registrar as executing court was not a decree or order capable of being executed in term of Order XX Rule 6 (1) of the Civil Procedure Code Cap.33 R.E 2019. He, therefore, invites this court to make reference over the requirement of what a decree should appear.

Supporting his argument, he cited the decision of this court at pages 6, 7, 8 and 9 in the case of **Harel Mallac (Tanzania) Ltd v. Junaco (T) Limited and 2 Others**, Commercial case No. 159/2014 HC Dar es Salaam.

Submitting in regards to paragraph 8(iii) of the applicant affidavit, he avers that, Deputy Registrar did grant an order to attach the accounts of the applicant for payment of Tshs 78,000,000/= contrary to what is provided in the order recording the settlement agreement (the so-called executed decree). That, the executing court did execute the amount that never provided for in the decree by the Honourable Judge. He referred this court at page 6 in the case of **National Insurance Corporation of Tanzania Limited v. Steven Zakaria Kiteu and 2 Others**, Civil Reference No. 07 of 2020, HC at Arusha (unreported) where it was held that, the executing court has no power to alter or add what is in the decree.



He claims that, the honourable Deputy Registrar's decision did not consider the affidavit to show cause as sworn by the officer of the applicant and filed in court showing why the same should not be granted. Referring to the case of **Omary Abdallah Kilua v. Joseph Rashid Mtunguja**, Civil Appeal No. 178 of 2019 CAT at Tanga (Unreported) he insisted that, the court was of the view that ignoring the evidence of the witness in reaching the judgment, that is not a judgment in the eyes of law. He prays this court that, orders granting execution be quashed and set aside and the order granting garnishee nisi be lifted against the applicant and costs be awarded to the applicant.

Replying to the applicant's learned counsel submissions, Mr. Nasmire avers that, the order and the Ruling that provided for the same are proper and maintainable before this court. He cited Order XXIII Rule 3 of the Civil Procedure Code [CAP. 33 R.E 2019] which provides that, any lawful compromise between the parties with respect to the whole or part of the subject matter of the suit and upon the Court recording of such compromise, the recording of the said compromise shall be deemed to be or pass as a decree. He went on that, the provision of Order XXIII Rule 4 of the Civil Procedure Code [CAP. 33 RE: 2019]



delivers that the Order shall be sustained and is pertinent in any proceedings with regard to execution.

Submitting on the issue of the total amount of Tshs 78,000,000/= charged during the execution of the decree, he insisted that, the amount was valid for it is an accumulation of the amount due as per the Court Order dated the 12<sup>th</sup> day of October 2017. Referring to the court order dated 12<sup>th</sup> October 2017, he avers that it was agreed by the parties that the Applicant has to pay a sum of Tshs. 1,500,000/= monthly to the Respondent and the applicant defaulted to pay.

Submitting on the claim that, the Applicant's affidavit to show cause was not considered by the executing officer, he opposed the said assertion and claimed that, it is baseless. Referring to the records, he insisted that, on the hearing date neither the Applicant nor his Counsel was present and their absence compelled the Executing Officer to proceed ex-parte. He went on that for the reason that the execution proceedings was determined ex- parte, the Applicant ought to have sought to set aside the said ex-parte order before resorting to a reference.

He went on that, even if the reference was a proper remedy, the Application does not meet the threshold of Order XLI of the Civil



Procedure Code [Cap 33 RE 2019], under which it has been preferred not accompanied with a statement of the facts of the case and the points on which a doubt has been entertained as well as the opinion on the point for decision of this court as required for under Rule 1 of Order XLI. He, therefore, prays that the issues raised by the respondent be overruled with costs.

Re-joining, Mr Akram maintained that, the order that was executed was not a decree rather an order recording settlement or compromise and the contention by counsel that the same was proper and maintainable. Insisting he referred to Order XXII Rule 3 of the CPC Cap. 33 RE: 2019 which require that, after the recording of settlement a court has to pass a decree therefrom. He maintains that the order recording settlement is not executable unless the decree was extracted thereto.

Submitting on the issue of the executing court to order for payment of Tshs. 78,000,000/= he maintains that, the amount is not reflected on the decree and the counsel's argument that it was an accumulation of Tshs. 1,500,000/= monthly ordered by the court which were not paid, require proof and the executing court cannot entertain evidence during the execution stage as it turns itself to be trial court.



Reacting on the respondent counsel's argument that, the court was correct not to consider the affidavit, he insisted that affidavit is evidence and the executing court was supposed to consider the same when delivering its ruling.

Submitting on the issue that, the applicant ought to set aside ex-parte order, he avers that the argument is baseless for the applicant does not complain on the right to be heard but on legality of the order issued. He insisted that, there is no law that bars the applicant to refer this matter for reference on the reasons that, the order was issued ex-parte and the application meets the threshold of Order XLI of the CPC Cap. 33 RE 2019 as the order of garnishee absolute is pending to be issued. He insisted that, this reference application be granted.

After the submissions for and against the application, what is tasking me now is the determination of this application. When composing the Ruling, this Court faced with a legal issue as to whether the Court has been properly moved in the sense that, if the enabling provision can move this Court to challenge the decision of the Deputy Registrar in Execution Proceedings filed in this Court.

In order to give parties the right to be heard as it was stated in the case of **Mbeya-Rukwa Autoparts Limited v Jestina George**



**Mwakyoma** [2003] TLR 251 that, a cardinal principle of natural justice is that a person should not be condemned unheard as the fair procedure demands both sides should be heard. This Court called the counsel of both parties who were connected through audio teleconference in their respective mobile number and they were asked to address the Court on the above legal issue raised by the Court suo moto.

When responding, both counsels prayed the matter to be adjourned until the next day for them to appear physically and address the Court on the issue raised by it suo moto. Addressing first, the counsel for applicant, Mr. Akram Adam submitted that, the present application is proper by way of Reference as the Execution done by the Deputy Registrar was a Garnishee which has two steps. The Garnishee Order Nisi and Garnishee Order Absolute which is yet to be done.

He went on to refer Order XL1 Rule 1 of the Civil Procedure Code, Cap 33 R.E 2019, which gives this court mandate to make Reference on the decision given by the Deputy Registrar. To bolster his position, he referred to the case of **St. Joseph University of Tanzania v Jeffrey Industries & Another**, Misc. Commercial No 64 od 2021, that this Court is not functus officio to do Reference when Garnishee Order Absolute is not issued.





He further submitted by referring to the decision of this Court in the case of **National Insurance Corporation of Tanzania Limited v Steven Zakaria Kiteu and 2 Others**, Civil Reference No. 7 of 2020 in which the Court decided through a Reference Application brought to challenge the decree nisi of the Deputy Registrar. He retires on his submission in chief by insisting that, this Court is properly moved and has power to make decision on the Garnishee Nisi complained of by the applicant.

Responding, the counsel for respondent opposed the submissions made by the applicant's counsel and stated that this Court was not properly moved. He submitted that, this application challenges the Execution Application filed in this Court from the decree which is also originated from this Court. He went on to refer the case of **Iron and Steel Limited v Martin Kumaliya and 117 Others**, Labour Revision No. 169 of 2022 where it was held that the decision of the Deputy Registrar in Execution Proceedings is the decision of the High Court in which this Court cannot exercise its power of Revision.

He went on that, based on the above decision, the High Court cannot make Reference on its own decision as it has power to do Reference on the decision originates from other court. He went on that,



the Deputy Registrar of the High Court is mandated to do Reference by Order XLIII of the Civil Procedure Code, Cap 33 R.E 2019 and therefore this Court has no power to intervene the decision by the Deputy Registrar either by way of Revision or Reference.

He further distinguished the decision of **St. John University of Tanzania** (supra) cited by the applicant's counsel with the present case as the former was seeking temporary injunction to restrain the issuance of Garnishee Order Absolute pending the hearing of the main suit while the present case is the application for Reference to challenge the decision of the Deputy Registrar. He added that, the case of **National Insurance Corporation of Tanzania Limited** (supra) is also distinguishable with the case at hand as its facts are different with the facts which are before this Court as the validity of the Garnishee Nisi did not arise in the above cited case.

He finalizes his submission by insisted that, the case of **Iron and Steel Limited** (supra) which is the latest decision of this Court provides that, the High Court does not have power to question execution proceedings of the Deputy Registrar of the High Court by way of Reference or Appeal. He added that, as the decision of **National Insurance Corporation of Tanzania Limited** (supra) and the



decision of **Iron and Steel Limited** (supra) are the conflicting decision of this Court, the doctrine of precedent requires the latest position to be considered. He ends up insisting that, the decision of the Deputy Registrar cannot be challenged by this Court by way of Reference.

Re-joining, the counsel for applicant submitted that, the decision of **Iron and Steel Limited** (supra) cited by the counsel for respondent is distinguished with our case at hand because, the decision referred to is the decision of the Labour Court where by its Rules specifically stated so, and, since this is not a labour dispute, it is very distinguished with our case at hand. He added that, the case of **National Insurance Corporation of Tanzania Limited** (supra) is very relevant to the circumstances of our case at hand while the case of **St. Joseph University of Tanzania** extracted the principles of Garnishee Order Nisi and Garnishee Order Absolute. He ends by stating that, by Order XLI of the Civil Procedure Code, Cap 33 R.E 2019, this Court has power to do Reference.

After the submissions from the counsel of both parties on the legal issue raised by the Court as to whether this Court is properly moved, what tasking me is now to decide on the legal issues raised and addressed by the parties before me.



Before I embark to determine on whether this Court is properly moved or not, I find it pertinent to reproduce Order XLI Rule 1, 3 and 5 proviso of the Civil Procedure Code, Cap 33 R,E 2019 which are the enabling provisions used to bring the present application. The aforesaid provisions provides that:

*"Order XLI Rule 1*

*Where before or on the hearing of 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."*

*Order XLI Rule 3*

*The High Court after hearing the parties if they appear and desire to be heard, shall decide the point so referred ad shall transmit a copy of the judgement 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*

*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 in the case out of which the reference arose and make such order as it think fit."*

Reading between the lines from the above cited provisions of law, there is clear indication that Reference which is envisaged in the above provisions of law, is the Reference from the decision of the lower court to the High Court and not the Reference which can be made by the Deputy Registrar of this Court to the same Court which is the High Court. I find my line of reasoning to be similar with the recent decision of my learned brother Kisanya J, in the case of **Nurdin Mohamed Chingo v Salum Said Mtiwe and Another**, Civil Reference No. 6 of 2022 when interpreting Order XLI Rule 1 of the Civil Procedure Code, Cap 33 R.E 2019 he stated that:

*"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 of 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 points on which doubt arises together with their opinion on each point for decision of the High Court.”*

The other provision of Order XLI Rule 3 and 5 of the Civil Procedure Code, Cap 33 R.E 2019 mainly supplement what has been stated from Order XLI Rule I above. Thus, it is my firm opinion that, the above cited provisions of law does not expressly states that, the decision rendered by the Deputy Registrar of this Court when executing the decision delivered by this Court is the decision of the lower court for it to be subjected to Reference before this court. For that reason, the provisions cited by the applicant’s counsel cannot move this Court to exercise its power of reference as prayed since the cited provisions does not give mandate to this court to call its own record for reference as it only mandate to do so on the decision of the lower court.

This Court has been faced with the akin situation in the case of **Sogea Satom Company v Barclays Bank Tanzania & 2 others**, Miscellenous Civil Reference No. 15 of 2021, my learned brother, Mruma J hed that:



*"Except when 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."*

He went on in the above decision by saying that:

*"The only way the High Court Judge can legally review a decision of the Deputy Registrar is by way of reference under Rule 7(1) of the Advocates Remuneration Order, 2015..."*

The aforesaid stand was also taken in this Court in the case of **Philipo Joseph Lukonde v Faraji Ally Saidi**, Land Reference No. 01 of 2020 as quoted with approval in the case of **Nuridin Mohamed Chingo** (supra), where the High Court of Tanzania at Dodoma held that:

*"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 Executing Court, his decision cannot be subjected to this kind of application. For the reasons 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 Advocate Remuneration Order, 2015 clearly provide for reference on 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 persuaded and guided by the above decision of this Court as held above, it is my considered view that, this court was not properly moved by the enabling provisions used to bring the present application, as it has no power to hear and determine the application for reference on a decision made by the Deputy Registrar of this Court, on its own decision originating in this Court, as the said power can only be exercised by the Court of Appeal.

Before I wind up, I would like to point out that, the case **of St. John University of Tanzania** (supra) is distinguishable in the circumstance of our case at hand as the former was filed under section 68, 95 and Order XXXVII Rule 1 of the CPC, Cap 33 R.E 2019 as well as Rule 2(2) of the High Court (Commercial Division) Rule, GN NO. 250 of 2019, asking the Court to grant exparte interim injunction order to the applicant, pending the hearing of the Application. While, in our case at






hand, the application is for Reference brought under Order XLI (1)(3) and (5) of the CPC, Cap 33 R.E 2019, asking this court to make reference to the decision made by the Deputy Registrar of this Court.

Additionally, as submitted by the counsel of the respondent that considering the rule of precedent, the case of **National Insurance Corporation of Tanzania Limited** (Supra) and the case of **Nuridin Mohamed Chingo** (Supra) reassures me to follow the latest decision.


All said and considered, the Reference Application No 3 of 2022 is hereby struck out, with no order as to costs as the matter was raised by the court suo moto.

It is so ordered.



  
**M.MNYUKWA**  
**JUDGE**  
**08/12/2022**

**Court:** Ruling delivered on 08<sup>th</sup> December 2022 in the presence of the counsel for the applicant and in presence of the respondent.

  
**M.MNYUKWA**  
**JUDGE**  
**08/12/2022**