

IN THE HIGH COURT OF THE UNITED REPUBLIC OF TANZANIA

[IN THE ARUSHA DISTRICT REGISTRY]

AT ARUSHA

APPLICATION FOR REFERENCE NO. 02 OF 2022

*(C/F Execution Application No. 23 of 2021, originating from mediation and Arbitration Labour Dispute No.
CMA.ARS.ARB/187/2015)*

BEATRICE MOHAMED MOSHI.....APPLICANT

VERSUS

THE DIRECTOR ARUSHA CITY COUNCIL.....RESPONDENT

RULING

21st September and 19th October, 2023

TIGANGA, J;

This ruling intends to determine the preliminary objection raised by the respondent challenging the competence of the application at hand. Initially the applicant applied before this court seeking this court to interfere and vary the ruling of the Deputy Registrar, Massam, Deputy Registrar (as she then was) in Execution No. 23 of 2021 and determine the application for execution in accordance with the law.

The application so challenged was made by a Notice of Application, Chamber Summons and affidavit sworn and filed by the applicant through the service of Mr. Sheikh Mfinanga learned Advocate. It was made under Rule 24 (1) (2) (a) (b), (c) (d) (e) and (f) and (3) (a) (b) (c) (d) and Rule 55 (1) and (2) of the **Labour Court Rules** GN 106 of 2007 as well as

Order XLI Rules 1, 23 and 5 of the **Civil Procedure Code** [Cap 33 R.E. 2019].

The application was opposed by the respondent by filing the counter affidavit and a Notice of Preliminary Objection with two point as follows;

- i. The application is incompetent and bad in law for contravening Order XLI of the **Civil Procedure Code** [Cap 33 R.E. 2019] and the application is abusing Court process.
- ii. The application is incompetent and bad in law for contravening with Rule 29(3) (a) (c) and (d) of the **Labour Court Rules** GN 106 of 2007.

Hearing of these two points of preliminary objection was done by way of written submissions.

Before arguing the Preliminary Objection Mr. Mkama Musalama Learned State Attorney started by seeking leave of this Court to rectify the second point of Preliminary Objection to read as Rule 24 instead of Rule 29 because the error was caused by the slip of the pen.

Supporting the 1st point of preliminary objection, he submitted that the application is bad in law for contravening Order XL1 of the Civil

Procedure Code which contravention renders this court to lack jurisdiction to entertain it.

Mr. Musalama submitted that the application at hand was as a matter of procedure not supposed to be filed before this court for, the decision of the Deputy Registrar made in execution proceedings, while executing the decree of the High Court is deemed to be the decision of the High Court therefore the same is challenged before the Court of Appeal, not to the High Court.

In his view, the reference provided under Order XL1 of the Civil Procedure Code (supra) relates to the matter arising from the lower or subordinate Court, not the Deputy Registrar, in execution proceedings. He submitted that the decision for which the reference is sought has already been determined on 18th October, 2022 in Execution No. 02 of 2021, Since the decision of the Deputy Registrar in Execution proceedings is deemed to be the decision of the High Court, therefore the reference of the decision of the High Court cannot be made to the same court.

In support of that contention the learned State Attorney cited and relied on the cases of **Nurdin Mohamed Chingo vs Salum Said Mtiwe and Another, Civil Reference No. 06 of 2022** High Court of Tanzania Dar-es-Salaam (unreported) and **Philipo Joseph Lukinde vs Faraji**

Ally Saidi Land Reference No 01 of 2020, High Court of Tanzania at Dodoma (unreported).

In Mr. Musalama's view, that being the position of the law, and the applicant being aware that the application for execution No. 02 of 2021 has already been determined by this court, he said the court lacks jurisdiction therefore the application be dismissed with costs for being frivolous and vexatious.

In reply to that point, Mr. Mfinanga approached it in two segment, first that the raised preliminary objection is not a pure point of law and secondly, that the same is without merit in the eyes of the laws.

Starting with the first segment he submitted that this preliminary objection is not a pure point of law as it fall short of the criteria enunciated in the case of **Mukisa Bisquit Manufacturing Company Ltd vs West End Distributors Limited** (1969) EA 696 in which it was held *interalia* that;

"A Preliminary Objection is in a nature of what is used to be a demure. It raises a pure point of law which if argued on assumption that all the facts pleaded by the other side are correct. It cannot be raised, if any fact has to be ascertained or what is sought is the exercise of Judicial discretion"

That position according to him was adopted by the Court of Appeal of Tanzania in the case of **COTWU (T) OTRI, UNION and another vs Hon. Idd Simba Minister of Industries and Trade** [2002] TLR 88, in which it was held inter alia that: -

"A preliminary objection should raise a point of law which is based on ascertained facts, not a fact which has to be ascertained and, if sustained a preliminary objection should be capable of disposing off the case".

In further supporting of the argument that the raised preliminary objection is not a point of law worthy a name, he cited the case of the **Soitsambu Village Council vs Tanzania Breweries vs Hector Sequiraa, Civil Application No. 233 of 2016** (unreported), in which it was generally stressed that a preliminary objection should be free from facts calling for proof requiring evidence to be adduced for its verification. In his further view, where a court needs to investigate facts such as an issue cannot be raised as a preliminary objection on a point of law.

In the premises, he prayed for the preliminary objection to be dismissed for being not an objection worth a name.

On the second segment of the 1st preliminary objection, he submitted that it is a settled law that, a party aggrieved by the decision

of the Deputy Registrar in the course of execution has three options which are:

- (i) Reference under Order XL1 of the Civil Procedure Code;
- (ii) Review under Rule 26 of the Labour Court Rules or
- (iii) Application under Section 94 (1) (f) of ELRA.

He submitted that to be the position of this Court in the decision of the case of **Husna Msusa vs Mkurugenzi NMB PLC Misc Application No. 37 of 2011** (unreported) which made reference to the case of **Globelec Tanzania Services Ltd vs Evarista Sessa, Misc Application No. 47/2010** in which the same position was made clear. He also cited the decision in the case of **Mustapha Mbinga vs Tourist Promotion Services (T) Limited Reference No. 03 of 2020** (unreported).

Reading between lines the provisions of Order XL1 Rule 1 of the Civil Procedure Code, which for easy reference is hereby reproduced 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 entertain reasonable doubt, the court may either on its own motion or on the

application of any of the parties, draw up a statement of the fact of the case and the point on which doubts is entertained and refer such a statement with its own opinion on the point for the decision of the High Court”

Reading between lines this provision it is clear that for the provision of order XL1 Rule 1 of the CPC to be invoked, the following condition must exist;

- i) There must be a question of law or usage having the force of law which arises;
- ii) It must arise before or in the hearing of the suit in which a decree is not subject of appeal or in execution of any such decree;
- iii) That, the raised issue leads the court hearing a suit or appeal or executing the decree to entertain reasonable doubt;
- iv) That, the court may either on its own motion or upon application by any of the parties draw a point or statement of facts of the case and the point on which doubts are entertained, to refer the said matter to the High Court for its decision and discretion.

From the said point, then the matter to be referred under Order XLI Rule 1 of the CPC must be made before hearing or during hearing, or

during execution that means, it should not be after the decision over the matter has been given.

The reason for such reference should be and involve an issue on which the referring court has doubt, or in other words it is not certain of the decision the the High Court is required to give either directives or guidance.

In the case at hand the matter at hand for which reference is made has already been decided by the Deputy Registrar, therefore there cannot be directive sought and or guidance to be given, the application requires the court to reverse the decision of the Deputy Registrar which is not the intention of the law under Order XLI Rule 1 of the CPC.

However, the award for which an execution proceeding was filed and entertained by the Deputy Registrar was of the CMA, not of this court. It was filed under Rule 49 (2) of the Labour Court Rules which provide that,

"(2) The decree holder, interested party, beneficiary or otherwise may apply formally to the court for the execution of the decision or award of the commission or such other responsible person or body as a decree of the court".

From the above provision it is instructive to find that the awards of the CMA are executed by the High Court Labour Division in the manner and as a decree of the court are executed. That simply means, the officer executing the award, of the CMA should be an officer who normally execute the decision of the Labour Court (High Court) who is in practice the Deputy Registrar and while doing so, he acts and conduct himself in a similar manner as executing the decree of the High Court.

That being the case, the issue is how the decisions of the Deputy Registrar made in execution proceedings are challenged.

From a number of decisions most of them cited by Mr. Mkama Musalama, State Attorney in the case of **Nurdin Mohamed Chingo vs Salim Said Mtiwe @ another (Supra) Philipo Joseph Lukande vs Faraji Ally Saidi (Supra).**

In my strong view, although these decision was decided by this court, but they are highly persuasive, I entirely agree with my fellow learned brother and sisters that, the decision of the Deputy Registrar made in execution of the decree of the court is deemed to be the decision of the High Court, therefore, it cannot be challenged before the High Court but before the Court of Appeal.

That said, I find merit in the first point of preliminary objection, I sustain it.

Regarding the second point of preliminary where Mr. Msalama submitted that the application for reference offends Rule 24(3) (a)(b)(c) and (d) of the Labour court Rules (supra) as the affidavit filed in support of the application lacks names, description, addresses of the parties and the reliefs sought contrary to the above cited Rule. To buttress his argument, Mr. Musalama, State Attorney cited the case of **Patrick Ihule vs Diamond Trust Bank Ltd, Misc. Labour Application No. 672 of 2019** HC of Tanzania Labour Division DSM.

In reply the learned counsel for the applicant submitted in opposition of the 2nd ground of objection that, the counsel for the respondent did not submit on the second point of objection he thus asked the court to dismiss the same with costs.

In the alternative, he submitted that Labour court is to uphold the law not to dwell on technicalities. He cited the decision of the Court of Appeal which held that the labour court is a court of law and equity, He cited the case of **North Mara Gold Mine Limited vs Michael Magege**, Labour Revision No. 91 of 2020, **NBC Ltd vs Ahmad Mkwepu, Misc. Labour Application No. 195 of 2013 Backlays Bank Tanzania Limited**

Phylisiah Hussein Mchemi, Civil Appeal No. 19 of 2016 **and the case of Felician Rutwaza vs World Division Tanzania**, Civil Appeal No. 213 of 2019, all of which insists that, the High Court Labour Division is a court of both, law and equity, it should not be tied of procedural technicalities but to give effect to substantive justice.

I have traversed the affidavit filed by the applicant in support of the application, I find no deficiencies narrated in the second ground of objection. That being the case, I find the ground to be without merit, it is therefore overruled.

In the fine and having said what I have said herein above, I find the 1st ground of objection to have succeeded, it is upheld, the application is thus struck out for want of jurisdiction of this court.

It is accordingly ordered.

DATED and delivered at **ARUSHA** this 19th October, 2023.



A handwritten signature in black ink, appearing to read "J. C. Tiganga", is written over a horizontal line.

J. C. TIGANGA

JUDGE