

IN THE HIGH COURT OF THE UNITED REPUBLIC OF TANZANIA
MWANZA SUB-REGISTRY
AT MWANZA

LABOUR REFERENCE NO. 03 OF 2022

(Originating from Labour Execution No. 25 of 2022)

UKEREWE SACCOS LTD----- APPLICANT

VERSUS

JUMANNE A. JOSIAH----- RESPONDENT

RULING

Last order: 13.02.2023
Ruling date: 17.02.2023

M. MNYUKWA, J.

The applicant filed this application by the way of chamber summons supported by an affidavit deponed by Sabina Philipo Kangola the principal officer of the applicant. When the respondent was served with the application, he filed a notice of preliminary objections with five points which are: -

- 1. Since the Application for execution was heard and determined ex-parte against the Applicant, the present Application is incompetent and ousts the jurisdiction of the Court on a failure by the Applicant to attempt to set*



aside the same before the District Registrar. Alternatively, the Application is an abuse of the Court process.

- 2. That, the present Application is incompetent and bad in law for wrong and improper citation of the provisions of the law thereby requiring the Court to fish for the Application and the relief that has to be granted.*
- 3. That, the present Application for reference is incompetent in law and do not meet the criteria in reference Applications for lack of a pending suit.*
- 4. That, the present Application ousts the jurisdiction of the Court and is misplaced as it seeks to challenge the merit of the Ruling and order of the High Court Judge which is solely the jurisdiction of the Court of Appeal of Tanzania.*
- 5. Since the Application is made on other provisions of the law that requires the Ruling and order to be originating from Trade Unions, Employer Association, Federation, Private Arbitrators or a decision of the Registrar from failure to settle on pre-trial conference, the present Application is therefore incompetent for lack of those Orders.*

In the determination of the preliminary objections which was argue orally, the applicant afforded the service of Mr. Akram Adam and th respondent was represented by Mr. Charles Kiteja, learned advocate.



Submitting first, Mr. Charles Kiteja prays to consolidate and argue grounds No. 2, 3 and 5 together and the 1st and 4th grounds separately.

Arguing on the consolidated grounds he claims that this application is bad in law for not meeting the criterion of reference in law. Supporting his argument he cited Order XLI Rule 1(3) and (5) of the Civil procedure Code Cap. 33 RE: 2019. He went further that the applicant was required to file his reference application before the court which executes a decree or which heard the appeal. He insisted that the reference before the High Court is for the executing officer to seek opinion. To support his argument he cited the case of **Magesa Byaro vs Musoma Town Council** 1997 TLR 3017 which is also referred in the Case **of Paulo Mayeye vs Elijah Alexander & 15 Others** Reference No. 1 Of 2019. He insisted that since the deputy registrar finalized the execution on 22.07.2022 this court has no pending case that requires opinion. He, therefore, insisted that the application before this court is misconceived and the court has no jurisdiction to entertain the same.

Submitting on the 2nd and 5th points, he avers that the application is incompetent in law for improper citation of the provisions of the law. He claims that this application is brought under sections 93(2)(b) and 94(1)(a)-(f) of the Employment and Labour Relation Act, Cap 366 R.E



2019 which are not relevant and does not support the application at hand. He support his argument by citing the case of **Bahadir Shariff Rashid and 2 Others vs Mansour Sharif Rashid & Another**, Civil Application No. 127 of 2006.

Submitting on the 1st point of preliminary objection, he claims that since the application for execution was determined exparte against the applicant and the deputy registrar entertain a reasonable doubt, the applicant was required to set aside the decision of the deputy registrar and not to file this application. Supporting his argument he cited the case of **Benjamin Nkwera vs Hurbet A. Wayotile** Misc. land Appeal no. 10 of 2020 and the case of **Pangaea Minerals LTD vs Petrofuel (T) Limited & Two Others**, Civil Appeal No. 96 of 2015. He avers that the Court insisted that, the exparte decisions are not appealable unless an attempt to set it aside is done for both parties to get the right to be heard. Referring to paragraph 3 of the applicant's affidavit, he insisted that since the applicant is claiming that the decision was given in contrary to the requirement of law, this application is not merited and it deserve to be struck out.

Submitting on the 4th point of preliminary objection, he stated that, the present Application ousts the jurisdiction of the Court and is misplaced



as it seeks to challenge the merit of the Ruling and order of the High Court. He avers that the applicant is challenging the decision of this court, and that this court is not vested with the jurisdiction to entertain it as the same is supposed to be dealt with by the Court of Appeal. He referred to paragraph 6 of the applicant's affidavit claiming that, it challenge the decision of this court while this court lacks jurisdiction to entertain it. He, therefore, prays this application to be struck out with costs.

Replying to the respondent learned counsel submissions, Mr. Akram for the applicant, remarked that this application did not challenge the order of this court but rather the decision of the executing court in Execution Case No. 22 of 2022 and what is stated in paragraph 6 of the applicant's affidavit.

Submitting on the first ground of appeal, he avers that there is no law which limits the filing of the reference application against the ex parte decision and the cited case of **Pangaea Minerals Ltd** (supra) is distinguishable for the applicant is not appealing against the right to be heard but the applicant is challenging the legality of the order itself and therefore the case before this court is proper.

Responding to the 5th point, Mr. Akram avers that the application is made under the proper provision of the law. He remarked that, the



application is brought under order XLI Rule I (3) and (5) of the Civil Procedure Code Cap 33 RE: 2019 and the counsel concede as he did not submit on Rule 24(1) & (2) of the labour Court Rules 2007. He insisted that, the application is brought under the valid provisions of the law, therefore it is proper before this Court. Supporting his arguments he cited the case of **Director General LAPF Pension Fund vs Paschal Ngalo** Civil Application No. 76/08 of 2018 CAT. He insisted that, even though there is a wrong citation of the provision of the law the court has the power to hear and determine the matter as long as it has jurisdiction. Referring to the cited case of **Bahadir Sharif Rashid & 2 Others** (supra) he insisted that it is not a recent case compared to that of **Director General LAPF** (supra) and based on the doctrine of precedent, the latest supersedes the other. He, therefore, prays for the 2nd and 5th points of preliminary objection to be overruled.

Replying on the 3rd point of preliminary objection, he submitted that execution has two stages. First, when the order is given by the executing court and second, administrative procedures which are not yet completed at this stage and therefore, there is pending execution. To bolster his argument he cited the case of **Mint Master Security Tanzania Limited vs Kunduchi Beach Hotel & Resort**, Commercial case No. 79 of 2008.

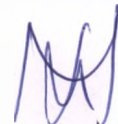


He further submitted that there is no order of proclamation of sale and no court broker report on the closure of the execution. He insisted that the provision of order XLI Rule (1)(3) and (5) applies as there is still a pending execution.

He went on to oppose the submissions made by the counsel of the respondent that this court has the power to issue opinions only. Referring to Order XLI Rule 5, he insisted that this court has the power to set aside, cancel or give any other order. He claims that the cited case of **Magesa Byano** (supra) and **Paul Mageye** (supra) is distinguishable for the circumstances are different from the case at hand.

Rejoining Mr. Kiteja added that this is neither an executing court nor an administrative court. Reacting on the case of **Mint Master Security** (supra) he insisted that the case is distinguishable. He went on that, Rule 24 of the Labour Court is not an enabling provision to make this application proper before this court. He added that Rule 24(11)(h) of the Labour Court Rules requires the presence of the pending application and the applicant did not state if there is pending case. He also insisted that the case of **Director General LAFP** (supra) is distinguishable.

Submitting on the issue of exparte proof, he insisted that the applicant on his affidavit complained that he was not afforded a right to



be heard and the deputy registrar established a reasonable doubt. He prays the application to be struck out.

After the submissions for and against the application, what is tasking me now is the determination of the application at hand. When composing the Ruling, this Court faced with a legal issue as to whether the Court has the jurisdiction to hear Reference Application against the decision of the deputy registrar.

Submitting first, Mr. Akram Adam argued that, this court is vested with the jurisdiction to hear the reference application when executing the award issued by the High Court as it is not part of the composition of the Labour Court. He refers to section 2 and 50 of the Labour Institution Act, Cap 300 R.E 2019 and the case of **Serenity on the Lake Limited v Dorcas Martin Nyanda**, Civil Revision No 1 of 2019. He insisted that this Court is vested with jurisdiction.

Responding, the counsel for respondent opposed the submission made by the applicant's counsel and remarked that, this court is not clothed with jurisdiction to hear and determine the reference application against the decision of the deputy registrar. In arguing, the counsel centred his discussion on the provision of Order XLI Rule 1 of the Civil Procedure Code, Cap 33 R.E 2019. He added that, for the reference to be



referred to this Court, the applicant was required to state the legal issues for it to be determined by the High Court.

He distinguished the case of **Serenity on the Lake Limited** (supra) as the same was dealing with stay of execution and not Reference. He added that, execution is done by the deputy registrar as it is provided for under Rule 49 of GN. No 106 of 2007.

In the beginning I wish to state that, the present application is brought under the provision of Order XLI Rule (1),(3) and (5) of the Civil Procedure Code, Cap 33 R.E 2019, section 93(2)(b), 94(1)(a)(f) of the Employment and Labour Relations Act, Cap 366 R,E 2019 and Rule 24(1)(2) of the Labour Court Rules, GN No, 106 of 2007. Before I embark to determine on whether this Court is vested with the jurisdiction to determine the reference at hand, 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 provision used to bring the present application. The aforesaid provisions reads 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. I find my line of reasoning to be similar with the recent decision of my learned brother Kisanya J, in the case of **Nuridin 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 does not give this power to exercise the jurisdiction which the applicant's counsel contended that this court is vested with.

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

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 **Nurdin 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."

It is also Mr. Akram submission that, the deputy registrar is not part of the composition of the labour court and therefore his decision is subject to reference as the applicant made reference to challenge the execution done by the deputy registrar in the award originating from this Court. His contention based on the notion that, deputy registrar does not constitute part of the Labour Court as it was also held in the case of **Serenity on the Lake Limited** (supra).

In determining this issue, I wish to refer to the decision of this Court in the case of **Iron and Steel Limited v Martin Kualija and 17 others**, Labour Revision No 169 of 2022, my learned sister Hon. Mteule J while define who is the deputy registrar, she stated that:

"A clearer clarification of the status of the deputy registrar in the High Court Labour Division was given after the amendment of Cap 300 vide the Written Laws



(Miscellaneous Amendments) (No.2) Act of 2020, Act No 3 of 2020. Section 67 of Act No 3 added paragraph (b) to section 50(2) of Cap 300, immediately after paragraph (a), which made Deputy Registrars part of the court constitution. Section 50 (1) (b) now reads:-

" 50 – (1) There shall be established a Labour Division of the High Court


(2) The Labour Division of the High Court shall consist of

(b) Such number of Deputy Registrars as the Chief Justice may consider necessary."

She went on that

"From the above provisions, a deputy registrar of the Labour Division constitutes the High Court Labour Division and exercises her powers under Order XLIII of the Civil Procedure Code, Cap 33. Under this circumstances, orders of the deputy registrar of the labour court do not carry a different status from the decision of registrars in other registries of the High Court as they both derive their powers from the same legal foundation in Order XLIII of the CPC..."

Considering the above decision in which I fully subscribed for, it is my firm view that the deputy registrar constitute part of the labour court and the case of **Serenity on the Lake Limited** (supra) is distinguishable following the amendment brought in Cap 300 by the Written Laws



(Miscellaneous Amendments) (No.2) Act of 2020, Act No 3 of 2020. Consequently, it is my considered view that, the decision of the deputy registrar in the Labour Division is incapable to be subjected to the Reference by the High Court. Thus, it is my considered view that, this Court does not have jurisdiction to determine the reference at hand. In the event, the Application for Reference is hereby dismissed for want of jurisdiction.

No order as to costs.

It is so ordered.



M.MNYUKWA

JUDGE

17/02/2023

Court: Ruling delivered on 17th February 2023 in the presence of both parties.

M.MNYUKWA

JUDGE

17/02/2023