

**IN THE HIGH COURT OF THE UNITED REPUBLIC OF TANZANIA
(LAND DIVISION)
AT DAR ES SALAAM**

REFERENCE NO. 14 OF 2020

(From the Decision of the District Land and Housing Tribunal of Ilala District, in Land Application No. 279 of 2009)

SHEKHE SALIM RAJAB SIMA.....APPLICANT

VERSUS

ABDALLAH MOHAMED NJEGA (Mwenyekiti wa Serikali ya Mtaa Kifuru).....RESPONDENT

RULING

Date of Last Order:24.08.2021

Date of Ruling: 16. 11 .2021

OPIYO, J

The matter was referred by Hon. M. Mgulambwa, Chairperson of the District Land and Housing Tribunal of Ilala District. It was brought under section 77 and Order XLI of the Civil Procedure Code, Cap 33 R.E 2019. In brief, the learned Chairperson above named is seeking directives of this court on the position of Law on two cases, namely, Application No. 276 of 2009, the main case which gave rise to a Misc. Application No. 72 of 2016, an application for execution of orders issued in the main case.

The learned chairperson has stated in his reference note that, he is troubled and does not know what to do with the execution case as the decree sought to be executed is not executable. The facts further show that, the main case, vide Land Application No. 276 of 2009 was finalized

on the 2nd June 2010 by a default judgment entered in favour of the applicant to the effect that, the applicant was ordered to reposes the suit premises unconditionally. This being the order to which execution is sought, the learned Chairperson finds it difficult to execute the same owing to the fact that the size of the suit land was not stated precisely in the original case. And, in the application for execution, the applicant prays among others, a demolition of structures found in the said unspecified piece of land.

He was of the view further that, the trial chairperson before entering a default judgement, ought to have ordered an *ex parte* proof from the applicant to satisfy himself as to the size of the suit land and how the same got into the ownership of the applicant.

After receiving the reference, the court issued summons to both parties. However, it was the applicant alone who appeared and addressed this court through written submissions. He was enjoying the legal services of Advocate Aron Allan Lesindamu. In his submissions Mr. Lesindamu joined hands with the learned Chairperson of the tribunal that, under Order VIII Rule 14(1) of the Civil Procedure Code, Cap 33 R.E 2019, the trial chairperson was not supposed to enter a default judgement. Rather after receiving the proof of service, he was required to allow the applicant to make an application orally for the tribunal to proceed *ex parte* and fix the date of hearing for the purpose of receiving the plaintiff's evidence on the claim. He insisted further that, the trial chairman was supposed to pursue *ex parte* proof before entering the default judgement, even though no defense was offered from the defendant.

From the above set of facts, read together with the submissions from the applicant's Advocate, and the records at hand, the question to be settled by the Court is whether this is a fit case for reference. To answer the question, I will reproduce section 77 and Order XLI, particularly Rules 1, 3 and 5 of the Civil Procedures Code, Cap 33 R.E 2019 which are more relevant to this application

Section 77.

" Subject to such conditions and limitations as may be prescribed, any court may state a case and refer the same for the opinion of the High Court and the High Court may make such order thereon as it thinks fit".

Order XLI, particularly Rules 1, 3 and 5

"1. 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.

3. 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.

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 thinks fit."

For a reference case to stand in court as per the above provisions, two conditions should be observed; (1) that there must be a pendency of a suit in respect of a decree which is not subject of an appeal or in the process of executing such decree there arises a question of law or usage which requires an opinion of the Court. (2) the trying or executing court must entertain some doubts on the said question of law and usage as to require the Court's opinion, **see Paul Magege versus Elijah Alexander and 15 Others, Reference No.1 of 2019, High Court of Tanzania, at Mwanza, Unreported.**

In general, the condition precedent for transmittal of the matter by way of reference is that there must be pending proceedings in a court from which opinion of the Court by way of reference is sought, as done by the learned Chairperson in this case, **see Magesa Byaro v. Musoma Town Council [1997] TLR 307 (HC)**. Therefore, it is obvious that the instant case has met all the required conditions for reference, hence the major

question for determination as raised here in above has been answered affirmatively.

Now, on the irregularities pointed out by the learned Chairman in the case at hand. His doubts were on the legality of the default judgment and orders that followed thereafter. His primary concern, which was the same as that of Mr. Lesindamu, representing the applicant was on the procedures followed in reaching the said judgment.

As they both currently, it is obvious, looking at the records from the face of it, the trial Chairman, L.H Hemed did not follow the required procedures before deciding to enter a default judgment in favour of the applicant. Order VIII Rule 14 (1) of the Civil Procedure Code, Cap 33 R.E 2019 provides procedures to be followed before a default judgment is given. For reference, the said provision states that:-

14.-(1) "Where any party required to file a written statement of defense fails to do so within the specified period or where such period has been extended in accordance with sub rule 3 of rule 1, within the period of such extension, the court shall, upon proof of service and on oral application by the plaintiff to proceed ex parte, fix the date for hearing the plaintiff's evidence on the claim".

Picking plainly from Order VIII, Rule 14(1) supra, before a default judgment is entered, **firstly**, the defendant must have been served with a summons requiring him to present a written statement of defense, **see Baba Drilling Co. Ltd versus Sharifu Rajabu, Civil Appeal No. 14**

of 2019, High Court Tanzania, at Dodoma, (unreported).

Secondly, the applicant/plaintiff must provide before the court a proof of service to the said defendant. **Thirdly** the plaintiff should make an oral application to the court seeking leave to proceed ex-parte, **fourthly**, the court will fix a date to hear the plaintiff's evidence on the claim and **lastly**, hearing of the plaintiff's claim will be conducted and a judgment will follow the event.

Unfortunately, the learned trial Chairperson failed to observe these procedures. The records I have do not show if the said Chairperson did comply with the mandatory provision of Oder VIII Rule 14(1) of the Civil Procedure Code, supra. He just jumped to a conclusion as it reads in the proceedings dated 02/06/2010 that...

"The fact that the respondent was duly served and has not filed defense, this court thinks that the Respondent has nothing to defend. We thus enter a default judgment in favour of the Applicant..."

It is from this conclusion, the trial chairman proceeded to issue orders which are the subject of the execution case, vide Misc. Application No. 72 of 2016. That being my observation, it is my finding therefore that, the default judgment dated 02/06/2010 was unlawfully entered, hence the same null and void.

In the final analysis, the said decision is quashed and the orders that followed are set aside accordingly. The case file is remitted back to the

District Land and Housing Tribunal of Ilala District for a retrial before different chairpersons from those who had ever delt with this matter at the trial tribunal and new set of assessors upon description of property being provided sufficient to identify it including ascertainment of size and boundaries if surveyed.

Given the nature of the application, no order as to costs is attracted.



A handwritten signature in black ink, appearing to be "M. P. Opiyo", written over a horizontal line.

M. P. OPIYO,

JUDGE

16/11/2021