

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

**(LAND DIVISION)**

**AT DAR ES SALAAM**

**REFERENCE NO. 26 OF 2022**

(Arising from Execution No. 26 of 2022)

**DUNCAN SHILLY NKYA.....1<sup>ST</sup> APPLICANT**

**KIWANGO SECURITY CO. LTD.....2<sup>ND</sup> APPLICANT**

**VERSUS**

**OYSTERBAY HOSPITAL CO. LTD.....RESPONDENT**

**RULING**

*18<sup>th</sup> & 30<sup>th</sup> November, 2022*

**L. HEMED, J**

DUNCAN SHILLY NKYA and KIWANGO SECURITY CO. LTD the applicants herein filed the present application under order XLI Rule (1) (20, Sections 38 (1) and 95 of the Civil Procedure Code, Cap 33 seeking for the following order among others that:

*" ... the Honourable Court be pleased to review the doubts pointed out in proceedings and orders issued in execution No. 16 of 2019 dated 31<sup>st</sup> October, 2022 and thereafter this Honourable Court be pleased to quash the decision issued by Hon. W. A. Hamza – Deputy Registrar for being unprocedural..."*

The respondents OYSTERBAY HOSPITAL CO. LTD countered the application and raised a preliminary objection on point of law that: -



*"... this Court lacks jurisdiction to entertain this application for reference of the decision of a Deputy Registrar whose decision, in law is deemed to be the decision of the High Court in terms of order XLI Rule 1 and 5 the Civil Procedure Code, Act Cap 33 RE 2019J".*

The preliminary objection was argued orally. During hearing of the preliminary objection Mr. Ludovick Nickson and Ms. Ester Simon, learned advocates stood to represent the applicants while the respondents enjoyed the service of Mr. Ashiru Lugwisa, learned advocate.

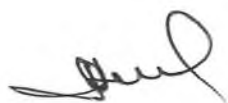
Arguing in support of the preliminary objection Mr. Lugwisa stated that as a general rule, a decision of the High Court can only be challenged in the Court of Appeal which has the power to rectify decisions or orders of the High Court. He asserted that the order which is subjected to the present application for reference is appealable to the Court of Appeal of Tanzania in terms of Section 5 (2) of the Appellate Jurisdiction Act, Cap. 141 and thus it cannot be challenged by way of reference under Order XL1 R. 1 of the Civil Procedure Code. The learned counsel for the respondents was of the further view that the decision of the Registrar is the decision of the High Court, thus it cannot be challenged by way of reference in this



same Court. He supported his argument by the decisions of this Court in **Nurdin Mohamed Chingo vs Salum Said Mfiwe**, Reference No. 6 of 2022 (unreported) and **Sogea Salum Company vs Barclays Bank Tanzania**, Reference 15 of 2021. He finally submitted that this Court should dismiss the application because the decision of the Deputy Registrar cannot be subjected for reference in the same Court.

Replying to the submissions, Mr. Nickson stated that the decision of the Registrar or Deputy Registrar of the High Court can be challenged by way of reference to a Judge of the High Court. He stated that only decisions of Judges which are appealable to the Court of Appeal. The only appealable decisions of Deputy Registrar are those made in exercise of extended jurisdiction. To cement his point that decisions of Deputy Registrar can be challenged by way of reference, he cited the decision of the Court of Appeal in **Laemthong Rice Co. Ltd vs Principal Secretary Ministry of Finance Zanzibar**, Reference No. 259b of 2019 and **Tito Shuno & 49 Others vs Kiteto District Council**, Civil Application No. 170 of 2012.

Mr. Nickson also pointed out that this Court has jurisdiction to entertain the matter even if Order XL1 Rule 1 of the Civil Procedure Code



does not allow or clearly state if the Court has jurisdiction. He cited the case of **Amani Girls Home vs Isaack Charles Kanela**, Civil Application No. 325/08 of 2019 and the case of the of the **Director General LAPF pension Fund vs Pascal Ngalo**, Civil Application No. 76/08 of 2018 to cement his argument that even where there is no enabling provision, the application does not become incompetent. He finally prayed for dismissal of the preliminary objection.

In his rejoinder submission Mr. Lugwisa did not have much to rejoin, he reiterated his submissions in Chief.

Having heard from both parties, let me now turn to determine whether this Court has jurisdiction to entertain the application at hand. The applicant attempted to move this Court to entertain his application *vide* Order XL1 Rule 1 and 2 of the Civil Procedure Code Cap. 33 RE 2019. The said provision states as follows.

*" 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."*

From the wording of the provision quoted above, the said Order XLI Rule 1 and 2 of the Civil Procedure Code [Cap 33 RE 2019] deals with references which emanates from the lower Courts. The provision does not empower this Court to determine reference on the matter decided upon by the Deputy Registrar. I do subscribe to the position taken by my brother Hon. Kisanya, J in **Nuldin Mohamed Chingo vs Salum Said Mfiwe and Another**, Civil Reference No. 6 of 2022 (High Court Dar es SALAAM) who stated thus:

*"The established position is to the effect that the decision made by the Deputy Registrar of the High Court is deemed to be the decision of the High Court. it is therefore challenged by way of an appeal, reference and / or revision to the Court of Appeal."*

This stance was also taken in the case of **Sogea Satom Company Vs. Barclays Bank Tanzania and two Others**, Misc. Civil Reference No. 15 of 2021 (unreported) (HC- DSM) where it was held that:



*"Except where 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 ... or revision to the Court of Appeal or by way of review to the same High Court ".*

Order XLI Rule 1 & 2 of the Civil Procedure Code Cap. 33 does not empower the High Court to call its own records made by the Deputy Registrar and examine by way of reference.

In **Philip Joseph Lukonde vs Faraja Ally**, Land Reference No. 01 of 2020, (High Court Dodoma). The Court was confronted with similar application, it 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 ... in this Court as execution Court, this decision cannot be subjected to this kind of applications"*

I have also noted from the affidavit supporting the application, deponed by one Duncan Shilly Nkya in paragraph 6 it has been stated that



there is a pending application No. 396/17 of 2021 in the Court of Appeal for stay of Execution. It is my firm opinion that since there is an application in the Court of Appeal seeking to challenge the same execution process, this Court ceases to have jurisdiction. It follows therefore, that only the Court of Appeal which has jurisdiction to make orders regarding the execution process conducted by the High Court.

In the upshot I find merits on the preliminary objection. The objection is sustained. The entire application is thus dismissed with costs. It is so ordered.

**DATED at DAR ES SALAAM this 30<sup>th</sup> day of November, 2022.**



  
**L. HEMED**

**JUDGE**

**COURT:** Ruling delivered this 30<sup>th</sup> November, 2022 in the presence of Ms. Ester Simon, learned advocate for the Applicant and Mr. Ashiru Lugwisa, learned Advocate for the Respondent.

  
**L. HEMED**  
**JUDGE**  
**30/11/2022**