

IN THE HIGH COURT OF TANZANIA

(LAND DIVISION)

AT DAR ES SALAAM

REFERENCE NO. 25 OF 2022

THE TREASURY REGISTRAR 1ST APPLICANT

THE PERMANENT SECRETARY

MINISTRY FOR FINANCE 2ND APPLICANT

THE HONOURABLE ATTORNEY

GENERAL 3RD APPLICANT

VERSUS

HADRIAN BENEDICT CHIPETA RESPONDENT

RULING

Date of last Order: 13.12.2022

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A.Z.MGEYEKWA, J

This is a reference that emerged from a ruling of a Taxing Master, Hon. W. Hamza. The application is made under Order XLI Rule 1 of Civil Procedure Code Cap. 33 [R.E 2019]. The application is supported by an affidavit deponed by Deborah Mcharo, the State Attorney.

The application has encountered formidable opposition from the respondent and he demonstrated his resistance by filing a counter-affidavit deponed by Dora S. Mallaba, the counsel for the respondent.

The application stumbled upon preliminary objections from the 1st respondent. He has raised one point of preliminary objection:-

1. *The application is bad in law and improper before this Honourable Court contrary to section 77 read together with Order XLI Rule 1 both of the Civil Procedure Code Cap. 33 [R.E 2019].*

When the matter was called for hearing on 13th December, 2022 the applicant enjoyed the legal service of Ms. Debora Mcharo, learned State Attorney and the respondent had the legal service of Ms. Dora Mallaba, learned counsel.

As the practice of the Court has it, I had to determine the preliminary objection first before going into the merits or demerits of the suit.

The learned counsel for the respondent started his onslaught by submitting that the applicant have brought an Application which is bad in law and improper as per section 77 and Order XLI 55 (1) Rule of the Civil Procedure Code, Cap. 33 [R.E 2019]. Ms. Dora submitted that Order XLI must be read together with section 77 of the Civil Procedure Code Cap.33

and the same provisions were couched for compliance by subordinate Courts not the High Court.

The learned counsel for the respondent went on to submit that the Registrar's decision was on the execution and the execution Court is the High Court. Therefore, in her views, the matter cannot be referred to this Court as reference. Ms. Dora insisted that the High Court cannot seek an opinion from itself. To fortify her submission she cited the case of **Philipo Joseph Lukonde v Faraji Ally Saidi**, Reference No. 1 of 2020.

On the strength of the above submission, Ms. Dora submitted that the application before this Court is incompetent contrary to section 77 read together with Order XLI Rule of Civil Procedure Code. She urged this Court to dismiss the application with costs.

In reply, the learned counsel for the applicant stated that they have noted that the cited provision to move this Court is improper, but in her view, she stated that this Court has the power to hear cases by way of reference originating from the Deputy Registrar. The applicant went on to submit that the impugned decision is related to execution and the same is not appealable before the Court of Appeal, but in her view, the remedy is to file a Reference before this Court.

The learned State Attorney conceded that they have cited a wrong provision of the law, however, she urged this court to replace the wrong citation of the law with a proper citation of the law. She went on to state that there is a *lacuna* in our law, there is no any suitable provision for a party who is dissatisfied with the decision of the Deputy Registrar to move this Court to revise it, therefore, she urged this Court to apply section 95 of the Civil Procedure Code, Cap.33 [R.E 2019] to use its inherited power and Section 2 (3) of the Judicature and Application of Law Act. To support her submission she cited the case of **Director General LAPF Pension Funds v Festo Ngalo**, Civil Application No. 77 of 2008 of 2019 CAT (unreported).

She insisted that in case the provision of the law was wrongly cited then the Court can proceed and change. To support her submission she cited the cases of **Limptission Rice Company v Principal Secretary of Finance**, Civil Appeal No. 259 of 2019, and **Nawab Abdullahim Mulla v International Commercial Bank & another**, Misc. Commercial Application No. 153 of 2021. She stressed that this Court has jurisdiction to determine the instant application.

In conclusion, Ms. Debora beckoned upon this Court to exercise its inherited powers and determine the application at hand.

In his rejoinder, the learned counsel for the applicant reiterated her submission in chief. She went on to state that the State Attorney did not

tender any authority to support her assertion that the Deputy Registrar's decision is not appealable. She insisted that when the DR makes an execution he has concurrent jurisdiction as a Judge hence execution decision is not appealable. Ms. Dora differentiated the cited case of LAPF by stating that the same is not applicable in the matter at hand and the case of **Laemthong** (supra) is related to the alteration of the decision by the DR while the matter at hand is related to execution. The counsel continued to submit that the applicant's State Attorney cannot move this Court under section 95 of the Civil Procedure Code.

I have given careful deliberation to the arguments for and against the application herein advanced by the learned counsel for the applicant and the respondent and it is the right time to resolve the controversy. I will determine the issue ***whether the preliminary objection is meritorious.***

The applicant's counsel preliminary objection is based on the fact that the application at hand is bad in law and improper before this Court for the main reason that the same is brought contrary to section 77 read together with Order XLI Rule 1 of the Civil Procedure Code Cap. 33 [R.E 2019]. The applicants have lodged their application under Order XLI Rule 1 of the Civil Procedure Code Cap. 33 [R.E 2019]. In determining whether the cited provision of the law was a proper provision to move this Court I find it necessary first to reproduce

Order XLI Rule 1 of the Civil Procedure for better understanding, Order XLI Rule 1 of Cap.33 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 above excerpt, it is clear that Order XLI Rule 1 of the Civil Procedure Code Cap. 33 [R.E 2019] deals with references that originate from the lower Courts. The cited provision does not empower this Court to determine reference on the matter decided upon by the Deputy Registrar. I am of the firm view that the decision of the Deputy Registrar of the High Court being a decision made in execution of a decree by a Court which passed the same, is a decision of this Court. See the case of **Nizar Abdallah Hiraji v Rehema Salumu Abdallah**, Misc. Civil Application No. 34 of 2018 HC at Dodoma.

It is my respectful view that the decision of the Deputy Registrar of the High Court is deemed to be the decision of the High Court, therefore, the same is

challenged by way of appeal, reference, and or revision to the Court of Appeal of Tanzania. This Court in the case of **Naulid Mohamed Chingo v Salum Said Mfiwe & Another**, Civil Reference No. 6 of 2022 HC at Dar es Salaam held that

" 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 the Appeal."

The decision or order rendered by the Deputy Registrar of the High Court is the decision of the High Court. See the case of **Sogea Satom Company v Barclays Bank Tanzania & two others**, Misc. Civil Reference No. 15 of 2021 (unreported) HC at Dar es Salaam.

Equally in the case of **Philip Joseph Lukonde v Faraja Ally**, Land Reference No. 01 of 2020, HC at Dodoma, this Court held that:-

" From the above-cited provisions, it is apparent the reference provided for by the law thereunder is from lower Courts to High Court. It is also apparent that the High Court cannot seek an 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."

Based on the above authorities it is clear that this Court has no jurisdiction to entertain the instant application.

For the sake of clarity, I have read the case of the **Director General LAPF Pension** (supra) is distinguishable from the case at hand, the cited case is related to non-citation of the provision of the law while in the matter at hand the application by itself is not properly before this Court as stated above this Court has no jurisdiction to determine the application because it emanates from the order of this Court.

In the final result and for the foregoing reasons, I sustain the objection raised by Ms. Dora, counsel for the respondent and proceed to dismiss the entire application without costs.

Order accordingly.

DATED at Dar es Salaam this 13th December, 2022.




A.Z.MGEYEKWA

JUDGE

13.12.2022

Ruling delivered on 13th December, 2022 in the presence of Ms. Debora Mcharo, State Attorney for the applicants, and Ms. Dora Mallaba, counsel for the respondent.




A.Z.MGEYEKWA

JUDGE

13.12.2022