

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

MISC. LAND APPLICATION NO. 586 OF 2022
(Arising from Execution No. 29 of 2022, Hon. Kisongo, Deputy Registrar)

NATHANIEL MWAKIPITI KIGWILA.....APPELLANT

VERSUS

MARGARETH ANDULILE BUKUKU.....RESPONDENT

RULING

Date of last Order:03/02/2023

Date of Judgment:06/03/2023

K. D. MHINA, J.

This application is brought under a certificate of urgency by way of Chamber Summons made under Section 38 (1) of the Civil Procedure Code [Cap. 33 R. E. 20019] ("the CPC").

The Applicant, *inter-alia*, is seeking the following orders: -

- i. This Court be pleased to call for and satisfy itself as to the correctness of the order made in Execution Application No 29 of 2022, whose effect was to dismiss a preliminary objection with regard to time limitation, thus alluding to itself the power to deal with the application contrary to the law;*
- ii. That after so finding, it be pleased to quash, vary and set aside the said order.*

- iii. That costs incidental and subsequent to this Application be provided for.*
- iv. Any other relief the Court may deem fit to grant.*

The grounds for the application were expounded in the affidavit, which Dr. Mutabaazi Julius Lugaziya, the counsel for the applicant, swore in support of the application.

After being served with the chamber summons, the respondent confronted it with a notice of a preliminary objection (p.o) canvassed on only one ground, namely;

- i. That this Honourable Court is not seized with jurisdiction to hear and determine this application.*

Before going to the merits and demerits of the preliminary objection, a brief background leading to this application, as gleaned from the record, is very important.

The record reveals that following the conclusion of the Land Case No. 40 of 2017, whereby the respondent was awarded TZS 10,000,000/= as general damages as she filed an application for Execution No. 70 of 2022 for the payment of that decretal amount and the mode of execution sought was the eviction of the applicant from Plots No. 256/1, 257/1 and

258 Block "A" Kunduchi Salasala within Kinondoni Municipality and detention of the applicant as a Civil Prisoner. On 30 April 2021, before Hon. A Chugulu, the Deputy Registrar, the counsel for the respondent prayed to withdraw the application with leave to refile. The Deputy Registrar granted the prayer in the following words;

Order: *The application is herein withdrawn by wants of the applicant with a leave to refile within 7 days.*

Later the respondent re-filed the application, which was registered as Execution No. 29 of 2022 with the same modes of execution but with a change in the description of properties. Instead of Block "A" as in the withdrawn application, the block number changed to Block "E" in the refiled application.

This time the execution proceedings were before the Hon. C. M Kisongo, also a Deputy Registrar. Having been served with the application for Execution, the applicant countered it with the notice of preliminary objection containing two limbs as follows;

- i. This application is hopelessly time-barred, having been re-filed way beyond the seven days period as ordered by this court on 30 April 2021*

by Hon. Chugulu, DR, while Application for Execution No. 70 of 2020 between the same parties and in respect of the same subject matter.

ii. This application is bad in law for seeking and executing non-existing orders.

In dismissing the preliminary objection, the Deputy Registrar held that since the decree subject to execution was made on 26 May 2020 and because the time limit for execution as per column 20 of part 3 of the schedule of the Law of Limitation Act, the order granting seven (7) days to re-file could not take away the respondent's rights to execute provides that the application for execution was made within the time prescribed by the law. Also, it held there was an existing order to be executed because the respondent was awarded TZS 10,000,000/= as general damages.

Undaunted, the applicant approached this Court with this application at hand.

The preliminary objection was argued by way of written submission. The applicant was represented by Dr. Lugaziya, learned counsel, while the respondent by Mr. Dennis Kahana Advocate.

In essence, Mr. Kahana challenged the jurisdiction of this court in two aspects as follows.

In arguing the first aspect of the objection, he submitted that the Applicant's act to question the decision of the Deputy Registrar through section 38 (1) of the Civil Procedure Code is bad in law as it is geared towards re-opening the same matter already determined by this court.

He submitted that a party aggrieved by the decision of the Deputy Registrar has room to challenge the same by way of an appeal or revision to the Court of Appeal or by way of review to this same Court. To bolster his argument, he cited one, **Sogea Satom Company vs. Barclays Bank Tanzania and Others**, Civil Reference No.15 of 2021(HC-DSM unreported), two; **Philipo Joseph Lukonde and Faraji Ally Saidi**, Land Reference No. 1 of 2020 (HC- Dodoma Unreported) and three; **Nurdin Mohamed Chigo vs. Salum Said Mtiwe and another**, Civil Reference No. 6 of 2022, (HC- DSM unreported), where in all those cases this court held that a decision of the Deputy Registrar of the High Court is deemed to be the decision of the High Court. Therefore, it is challenged by an appeal, reference, or revision to the Court of Appeal. Another recourse

against such a decision is to file an application for review to the High Court, which made the impugned decree.

On the first aspect, he concluded by submitting that this court is *functus officio* and cannot entertain this application for want of jurisdiction.

On the second aspect, Mr. Kahana submitted that this application had been preferred under section 38 (1) of the Civil Procedure Code, Cap. 33, R. E 2019, which provides that;

"All question arising between the parties to the suit in which the decree was passed, or their representative, and relating to the execution, discharge or satisfaction of the decree, shall be determined by the court executing the decree and not by a separate suit."

He elaborated that the cited statutory provision dictates the three mandatory conditions for consideration. He mentioned those three conditions were;

- i. The question (s) must arise between the parties to the suit in which the decree was passed or their representatives.
- ii. The question (s) must relate to the execution, discharge, or satisfaction of the decree.
- iii. Such question (s) shall be determined by the executing court.

In relation to the application at hand, Mr. Kahana submitted that, from the Applicant's chamber summons and the affidavit, none of the above conditions, which are couched mandatorily, are met because the Applicant is challenging the decision the Deputy Registrar, who was neither a party in Application for Execution No. 29 of 2022. Therefore, the application does not conform within the ambit of section 38 (1) of the CPC, which requires the question to arise between the same parties. But in this application, the applicant's grievances are towards the decision of the Deputy Registrar.

He further submitted that the purpose of section 38 (1) of the as per **Sarkar** at page 402 is to avoid multiplicity of suits, and its practicability is found in **Maureen George Mbowe Jiliwa and Another vs. Twiga Bancorp Limited** and others, Land Case No. 27 of 2018 (HC-Land Division unreported) that;

"The wording of the above-quoted provision of the law and specifically the bolded part is very clear that the quoted provision of the law is governing the determination of questions arising between the parties to the suit in which the decree was passed or their representative and not even person who are parties to suit."

Therefore, he argued that this application had been taken out of context since the Deputy Registrar was neither a party to the suit nor a party to the decree subject to execution. Therefore, this court lack jurisdiction to further this application.

Expounding further on Section 38 (1) of the CPC, Mr. Kahana submitted that the section had set another condition that all questions arising between the parties in a decree should be determined by the court executing the decree and that phrase was given a proper interpretation by this Court in **K-Group (T) Limited vs. Diamond Motors Limited**, Civil Reference No. 13 of 2020 (HC-DSM Unreported) in which at page 7, this court held that;

"Discerning from the provision, it is the duty of the court executing the decree, in this case the Deputy Registrar to interpret the terms of the judgment as passed by the Court."

He concluded by submitting that the prayer by the Applicant before this Court to challenge the decision of the Deputy Registrar does not fall under section 38 (1) of the CPC hence unmaintainable as this Court cannot be moved to question and overturn its own decision. A decision of the Deputy Registrar of this Court is the decision of the High Court.

In response, Dr. Lugaziya started by submitting that, in this application, the applicant is seeking a reference lodged under section 38 (1) of the CPC against the ruling of the District Registrar, in which she declined to dismiss an application for execution which was hopelessly time-barred.

Responding to the first aspect of the preliminary objection, Dr. Lugaziya submitted that a distinction must be made when one is a judge and when one is "Deemed" to be a judge. He argued that this question arose in the Court of Appeal in **Shiminimana Hisaya & Sabimana Fokas vs. Republic**, Criminal Appeal No. 6 of 2004, reproduced in the book of Dr. Fauz Twaib & Daudi Kinywafu, Criminal Procedure and practice in Tanzania: A case Digest; in which a Resident Magistrate with Extended Jurisdiction, sat in the High Court building and proceeded to hear and conclude a case therein, convicting and sentencing the Appellants. The proceedings were rendered null and void on the sole ground that the resident Magistrate, on being mandated to execute the functions reserved for a judge, does not convert that person into a judge. He is only "deemed" to be one, but he is not one.

Therefore, he argued that even *arguendo*, if the Deputy Registrar was said to be a judge. However, she did not become one; that fact alone does not render the application a misnomer.

In a further submission, he cited **CRDB Bank Ltd vs. George Mpeli Kilindu & another**, Civil Application No. 74 of 2010, whereby the Applicant Bank was aggrieved by the decision of Bubeshi J in execution proceedings, sought to have them impugned by way of revision at the Court of Appeal. The Court of Appeal held that such a decision was not amenable to appeal, but the remedy was available under S. 38 (1) of the C.P.C.

Regarding the second aspect of the preliminary objection, Dr. Lugaziya submitted that the circumstances surrounding this application squarely fall under the ambit of S. 38 (1) of the CPC. His reasons were; first, the matters herein relate to the parties (the District Registrar being the arbiter); second, the issues relating to the execution in execution no. 29 of 2022. Therefore, the application under S. 38 (1) of the C.P.C is properly before this court, because the Court of Appeal is not an executing court.

In rejoinder, Mr. Kahana submitted that this application had been preferred under section 38(1) of the CPC. This provision has nothing to do

with reference applications that are provided for under section 77 and order XLI rule (1) of the CPC. He further argued that if the law intended section 38(1) of CPC to enable this Court to refer to its own decision, it would have been so explicitly stated. On the contrary, the section only meant to deal with issues arising between the parties to the suit in which a decree was passed and relating to the execution, discharge, or satisfaction of the decree. Therefore, the application does not fall under the ambit of that section because, in this application, a grievance is on the order of the Deputy Registrar, who is neither a party to the decree nor an execution proceeding.

He further stated that there is nowhere in submission in chief; the respondent indicated that a decision of the Deputy Registrar is deemed a decision of a Judge as alleged by the applicant.

Further, he submitted that the cited cases were distinguishable from the application at hand. The case of **Shiminimana** (Supra) was distinguishable because it dealt with the Resident Magistrate with Extended Jurisdiction, while in **CRDB Bank Limited** (Supra), the decision was delivered by a Judge; however, it was not preferred and determined under section 38(1) of the CPC while in this application, the decision was

delivered by the Deputy Registrar under the powers vested on her under section 38(1) of the CPC.

He concluded that the law provides clearly that the orders of the Deputy Registrar of the High Court are appealable to the Court of Appeal as per Section 5(1)(b)(ix) of the Appellate Jurisdiction Act, Cap. 141 R.E 2019.

Further, Order XLIII Rule 1 of the CPC provides for the powers of the Registrar of the High Court. The Provision of the section to the Appellate Jurisdiction Act recognizes orders of the Registrar as orders of the High Court hence appealable to the Court of Appeal.

On the basis of pleadings and the submissions advanced by the learned counsel for the parties herein, the main issue for determination is whether this Court has jurisdiction or not.

As stated hereinbefore, this application for reference is pegged under Section 38 (1) of the Civil Procedure Code [Cap 33 R.E. 2019]. Therefore, in determining this matter, the entry point is the definition of the term "reference."

Though not clearly defined by the Civil Procedure Code, the term found its basis under section 77 of the same Act. The section reads that;

"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."

The term has been defined in several cases, for instance, in **Halima Saidi Kazuwa vs. Said Seleman Ngalunda**, Civil Reference No. 8 of 2021 (HC-DSM -Tanzlii), this Court explained that;

"The term reference is defined in Black's Law Dictionary to mean "refer to. "In other words, reference is a legal process in which a party who is discontented with a decision of a lower court to refer the matter to the higher court for corrections".

Further, the practicability of section 77 of the CPC on referring the matter to the higher court explicitly expounded under Order 41 Rule 1 of the Act. The provision read;

*"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". [Emphasis provided]*

From the above-cited provision of law, the following can be gleaned.

One, the Court may initiate reference on its own motion or on the application of any of the parties.

Two, there must be a reasonable doubt of any question of law or usage having the force of law arising on the cause of the proceeding.

Three, the court must draw up a statement of the facts of the case and the point on which doubt is entertained.

Four, refer that statement and its opinion to the High Court for its decision.

Further, this Court, in the cited case of **Halima Saidi Kazuwa (Supra)**, it held that;

"For reference to qualify for the court's opinion it must fall within the four corners of Section 77 of the Civil Procedure Code. It must be matter arising in case which is before a court subordinate to the High court".

Flowing from above, it is quite clear that reference referred under the Civil Procedure Code must be from the subordinate court to the High Court, and there must be a statement from the court referring to the problem/ a reasonable doubt for the directives and determination of the

High Court. Therefore, it is clear that the parties cannot lodge it through an application.

Therefore, from the discussion above, the next issue is whether the decision of the Deputy Registrar in execution proceedings can be challenged by way of reference in this court.

This should not detain me long because there is already a plethora of this Court's jurisprudence. As rightly cited by Mr. Kahana in his submission, in **Sogea Satom (Supra)**, 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 an appeal, reference or revision to the Court of appeal or by way of review to the same High court."

Also, in **Philipo Joseph Lukonde (Supra)**, when this Court determined the issue as to whether or not the High Court has jurisdiction to entertain reference application against the order of the Deputy Registrar, it held that;

"It is apparent the reference provided for by the law thereunder is from the 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".

The same also was held in **Nurdin Mohamed (Supra)** 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 or revision to the Court of Appeal. Another recourse against such decision is to file an application for review to the High Court which made the impugned decree".

Apart from the above discussion on the first aspect of the preliminary objection, it should be noted that the powers of execution given to the Registrars are derived from Order 43 Rule 1 (f), (g), (h), (i) and (j) of the CPC. The Order reads that;

1. Subject to any general or special direction of the Chief Justice, the following powers may be exercised by the Registrar or any Deputy or District Registrar of the High Court in any proceeding before the High Court-

(f) to issue notice under Order XXI, rule 20;

(g) to order that a decree be executed under Order XXI, rule 21;

(h) to issue process for execution of a decree under Order XXI, rule 22;

(i) to stay execution, restore the property, discharge judgment-debtors and require and take security under Order XXI, rule 24;

(j) if there is no judge at the place of registry, to issue a notice to show cause and to issue a warrant of arrest under Order XXI, rule 35; The Civil Procedure Code [CAP. 33 R.E. 2019] 273

Further, for the person aggrieved with any decision when the Registrar is exercising its powers under the above-cited provision of law, the remedy is in the Appellate Jurisdiction Act, Cap 141 (R: E 2019). As rightly cited by Mr. Kahana, the relevant provision is Section 5 (1) (b) (ix), which reads;

"5(1) In civil proceedings, except where any other written law for the time being in force provides otherwise, an appeal shall lie to the Court of Appeal-

(b) against the following orders of the High Court made under its original jurisdiction, that is to say-

(ix) Any order specifies in rule 1 of Order XLIII in the Civil Procedure Code....."

Therefore, it is quite clear that an aggrieved party may file an appeal to the Court of Appeal against the decision of the Deputy Registrar exercising its powers under Order 43 Rule 1 of the CPC.

Flowing from above, it is apparent that the application for reference before this Court triggered by the decision and order made by the Deputy Registrar is not proper. Unlike in Bill Costs (Taxation matters), where the Advocates Remuneration Order, 2015 explicitly and clearly provides for a reference to the High Court from the decision of the Deputy Registrar as a Taxing officer, the Civil Procedure Code does not apply in a way the applicant has applied for a reference against the decision of the Deputy Registrar in execution proceedings.

In **Philipo Joseph Lukonde (Supra)**, it was held that;

"It is my view that, unlike in taxation matters, the decision of the Deputy Registrar being a decision made in execution of a decree by a court which passed the same, is a decision of this court.

It is my further view that unlike in Taxation matters where a reference on a decision of a Taxing masters could lie to a judge of the same court, the Deputy Registrar who presides over execution

matter in executing court is deemed to have been concurrent jurisdiction with a judge of the same executing court”.

It is from the above elaborations that a reference from the decision of the Deputy Registrar of the High Court cannot lie to this Court. That decision may be challenged only by way of an appeal to the court of appeal as per section 5 (1) (b) (ix) of the Appellate Jurisdiction Act, Revision to the Court of Appeal. Revision is not a new phenomenon, as the Court of Appeal already revised the decision of the Deputy Registrar of the High Court in **Millicom (T) N.V. vs. James Allan Russel Bell**, Civil Revision No. 3 of 2017 (Tanzlii). Also, that decision can be challenged by way of review in the same executing court. There is no provision to challenge that decision by reference to the Court of Appeal; therefore, an aggrieved party cannot challenge that decision to the Court of Appeal by reference.

Therefore, as rightly argued by the counsel for the respondent, this Court finds that it has no jurisdiction to entertain this application. Thus, the argument by Dr. Lugaziya, after citing the case of **Shiminimana** (Supra), is unmeritorious.

Flowing from above, since the first aspect of the objection alone disposes of the appeal, I see no reason to deliberate and determine the

second aspect of the objection on whether or not it was proper for the application to be brought under section 38(1) of the CPC.

In the event I sustain the preliminary objection that this Court has no jurisdiction to entertain this application, and consequently, I dismiss this application for reference with costs.

I order accordingly.

DATED at DAR ES SALAAM this 6/03/2023.




K. D. MHINA
JUDGE