

**IN THE HIGH COURT OF THE UNITED REPUBLIC OF TANZANIA
(LAND DIVISION)**

AT DAR ES SALAAM

REFERENCE NO. 04 OF 2023

(Originating from Execution No. 35 of 2019 of the High Court Land Division)

NATIONAL HOUSING CORPORATION.....APPLICANT

VERSUS

DEEPEN PREMJI DUSARA.....1st RESPONDENT

KISHORE PREMJI DUSARA.....2nd RESPONDENT

MRS. PRABHEN MOHANLAL BHIKA.....3rd RESPONDENT

**JOSHUA E. MWAITUKA t/a
FOSTER & COMPANIES.....4th RESPONDENT**

RULING

10/03/2023 & 13/03/2023

Masoud, J.

The applicant in this reference lost in favour of the first, second and third respondents in Land Case No. 86 of 2016. As the applicant was aggrieved, she appealed to the Court of Appeal which appeal, namely, Civil Appeal No. 222 of 2022, was still pending when this reference was heard on 10/03/2023, and she successfully sought in Civil Application No. **258/18 of 2019**, and obtained a stay of execution on 15/11/2021. The

stay was, however, conditional upon the applicant depositing a bank guarantee for a total sum of Tshs 75,000,000/- as security for the due performance of the decree covering general damages awarded to the respondents within thirty days.

It is on the record, which record was not disputed, that this court as per Hon. Hamza, Deputy Registrar, proceeded with the execution of the decree in Land Case No. 86 of 2016 in Execution No.35 of 2019 upon application by the respondents on the ground that the applicant failed to comply with the order of stay granted in her favour by the Court of Appeal. It is also on the record that the executing court ordered attachment and eviction in respect of premises in Plot No. 508, Block 40, Samora Area, and Plot No. 813 Mataka Road.

It was against the above backdrop that the applicant, aggrieved by the execution of the decree in Land Case No. 86 of 2016 filed the instant reference under section 95 of the Civil Procedure Code, cap. 33 R.E 2019 seeking to be heard on the following orders:

Ex-parte Order

1. That the attachment and eviction order against the applicant be suspended/lifted pending ruling of Misc. Application No. 847/2022 and Civil Appeal No. 222 of 2022 which awaits Court of Appeal session.

2. Respondents or their agents, assignees, transferees, predecessors, successors, be desisted from taking any action in the premises subject to the order.

3. Any further or other relief(s) this court may deem fit to grant.

Inter-parties

1. That the attachment and eviction order against the applicant be suspended/lifted pending ruling of Misc. Application No. 847/2022 and Civil Appeal No. 222 of 2022 which awaits Court of Appeal session.

2. Respondents or their agents, assignees, transferees, predecessors, successors, be desisted from taking any action in the premises subject to the order.

3. Any further or other relief(s) this court may deem fit to grant.

The reference was supported by an affidavit of one Aloyce Sekulu, learned Principal State Attorney, for the applicant. The affidavit, among other things, had a total of eight annexures forming part of the said affidavit. They included ruling of the Deputy Registrar of 24/02/2023 on a concern raised by the applicant through Mr Lukelo, learned Principal State Attorney, the eviction order dated 27/7/2023, a warrant of attachment dated 2/8/2022, a copy of the ruling of the Court of Appeal which granted the order of stay of execution on condition that the applicant deposit a bank guarantee of Tshs 75,000,000.00 as security for the due performance of the decree in respect of general damages, and a copy of bank guarantee dated 20/11/2021, but appearing to be signed by principal officers of Azania Bank on 18/02/2021.

The affidavit supporting the reference was in a nutshell to the effect that, the applicant complied with the condition in respect of which the order of stay of execution was given by the Court of Appeal, that she notified the Deputy Registrar by a letter dated 23/07/2022, that the

Deputy Registrar proceeded granting an order for attachment and eviction of tenants in respect of the premises which are a subject matter of the instant reference about a month after receiving the said letter, and that the Deputy Registrar proceeded with the execution without considering the order of stay granted by the Court of Appeal and the application (Misc. Land Application No. 847 of 2022) which was then pending before Hon. Makani J.

The reference was, however, objected by the respondents pursuant to a notice of preliminary points of objection consisting of three points raised by the first, second and third respondents, and also opposed by a counter affidavit of the said respondents deposed by Winner Julius, learned Advocate, for the said respondents. The three preliminary points of objection were, namely, that the court has no jurisdiction over the matter; that, the instant application is a misuse of court processes; and that the court was not properly moved.

As to the counter affidavit, the thrust of the respondents' opposition of the reference was that, the execution was proper and in accordance with the law; that the applicant did not comply with the condition in respect of which the stay of execution was granted by the ruling of the Court of Appeal in Civil Application No. 258/18 of 2019; that the condition required the applicant to deposit bank guarantee within thirty days of the ruling which was on 16/11/2021; that the failure to comply with the condition as per the said ruling was evidenced by a letter from the Deputy Registrar of the Court of Appeal dated 24/02/2022 confirming that the order was not complied with as there was no deposit proof received by the Court of Appeal; that the said confirmation letter by the court of appeal was made in response to the respondents' inquiry letter dated 10/02/2022; and that the applicant was all along aware of the execution proceedings.

In addition, there was a number of annexures accompanying the counter affidavit. They included, a copy of the letter by the Deputy

Registrar of the Court of Appeal to the effect that there was no proof of deposit of bank guarantee; a copy of the inquiry letter by the respondents; execution proceedings of 20/06/2023 in Execution No. 35 of 2019 in which attachment of the premises was ordered; a copy of notice of change of address in respect of Civil Application No. 258/17 of 2019 concerning the Office of Solicitor General; and a copy of the ruling dated 06/03/2023 by Makani J. in Misc. Land Application No. 847 of 2022 dismissing the applicant's application for restoration of Misc. Land Application No. 546 of 2022.

When the reference came up for hearing, it was by consent agreed and accordingly ordered that the hearing of preliminary objection and the hearing of the merit of the reference should simultaneously be held, on understanding that the former would first be determined before the latter, and followed by determination on the merit of the reference if the former would not dispose of the reference. It was in this respect that the simultaneous hearing was held. The applicant was represented by Mr

Aloyce Sekule, assisted by Mr Samuel Lukole, both learned Principal State Attorneys, while the respondents were duly advocated by Ms. Winner Julius, learned Advocates, for the respondents.

The rival arguments on the submissions for and against the objection by the learned counsel for both sides which are on the record revolved on the issues, namely, whether the court has jurisdiction over the reference; whether the reference was a misuse of court process; and whether the court was properly moved for the orders sought. Looking at the issues, they all boil down to one question on whether the reference is competent before the court.

Some authorities emanating from decisions of this court were cited and expounded upon by Ms. Julius, learned Advocate for the respondents in a bid to convince and persuade the court that the reference was not competent before the court. On the other hand, the counsel for the applicant, Mr Sekule, learned Principal State Attorney, forcefully insisted

that the case laws referred to are distinguishable and therefore not relevant in the instant reference representing unique features.

Amongst others there were decisions of this court in, **Nuridin Mohamed Chingo v Salum and Another**, Civil Reference No. 6 of 2022; **Duncan Shilly Nkya and another v Oysterbay Hospital Co. Ltd**, Reference No. 26 of 2022; and **Registered Trustees of Taqwa Private Secondary School v Registered Trustees of BAKWATA**, Land Reference No. 03 of 2022, which restated the principle that this court has no jurisdiction to entertain a reference arising from a decision of Deputy Registrar in execution proceedings. The said principle has it that the court is only empowered to entertain reference brought under rule 7(1) of the Advocates Remuneration Order, 2015 seeking to challenge a decision of the Deputy Registrar as a taxing officer.

It is worthwhile at this juncture to point out that the above authorities were all inspired by two earlier decisions of this court, to wit, **Philipo Joseph Lukonde v Faraji Ally Saidi**, Land Reference No. 01 of

2020 (Dodoma) (unreported), and **Songea Satom Company v Barclays Bank Tanzania and Two Others**, Misc. Civil Reference No. 15 of 2021. Both authorities insisted that this court has no jurisdiction to entertain reference on a decision rendered by the Deputy Registrar in execution proceedings. It is clear in both cases that a decision or order rendered by the Deputy Registrar of the High Court is a decision of the High Court, and may only be challenged by way of appeal, reference, and/or revision to the Court of Appeal or by way of review to the same court.

It was, on the contrary, only argued that this court has jurisdiction to entertain and determine the reference pursuant to the provisions of Order XLI, r.3 and r.5 of the Civil Procedure Code, cap.33 R.E 2019 which requires the executing court to make reference to the High Court. Aside from the arguments by the counsel for the respondents that the said Order does not apply when this court is the executing court through the Deputy Registrar, which I buy and subscribe to, and which is supported by the

above cited case law, it is clear to me that the instant reference is not in any way within the purview of the said provisions of the Order. I so find because it was not made by the executing court on its own motion, or on application in respect of a question of law arising before or during the execution of the decree.

In addition, it is clear also that the reference was not brought under the provisions of XLI, r.3 and 5 of the Civil Procedure Code, but under section 95 of the Civil Procedure Code. As such, the reliance on the said provisions of Order XLI of the Civil Procedure Code was a mere afterthought, let alone that the provision does not provide for reference to this court which is the very court that entertained the execution.

As to the provision of section 95 of the Civil Procedure Code, it was argued that it applies where there is no specific provision which was not the case at hand as the applicant was entitled to seek for other appropriate remedies before the Court of Appeal as already indicated herein above based on the cited authorities. Against the arguments by the respondents'

counsel on inapplicability of section 95, Mr Sekule, learned Principal State Attorney, said that the provision applies in the instant matter in view of the uniqueness of the subject matter at stake involving a government property which is not subject to attachment.

Besides the above argument by Mr. Sekule, it was in addition argued that, after all, non-citation of enabling provision of law is no longer fatal as the court has jurisdiction to entertain the reference and grant the sought orders. Reliance was made on the case of **Dangote Cement Ltd v NSK Oil and Gas Ltd**, Misc. Commercial Application No. 08 of 2020, where the court drew inspiration from rule 48(1) of the Court of Appeal Rules, 2009 as amended.

According to the said rule 48 of the Court of Appeal Rules which is however not applicable in this court, non-citation or wrong citation can be ignored if the Court has jurisdiction on the matter before it. Even if I were to draw inspiration from the above rules as was in **Dangote Cement**

(supra), this argument could not assist the applicant as the provisions of Order XLI of the Civil Procedure Code are inapplicable in the instant case.

Equally, the strange argument that the court is empowered to entertain the reference because of the uniqueness of the matter involving a government property is unfounded. I say so and find because uniqueness of the matter cannot in the circumstances vest the court jurisdiction which was not vested to it under the law as is the case with rule 7(1) of the Advocates Remuneration Order, 2015.

As to the point on the misuse of the court process, it was argued that the reference was preferred whilst there were other similar matters pending before this court and before the Court of Appeal. It was added that while the other two matters were pending, there was a written concern by the applicant entertained under execution No. 35 of 2019. The manner in which the applicant filed these matters and the instant reference of which this court has no jurisdiction to entertain and the

unwarranted use of section 95, it was submitted, evidence an abuse of court process rendering the instant reference incompetent.

The other aspect underlined by Ms. Julius in relation to the point was the intervention by the Attorney General as a party in the application in respect of the objection proceedings and the subsequent application seeking to set aside the dismissal. And a further insistence that the instant applicant was strangely impleaded in the said proceedings as a respondent.

The case of **Rajabu Myinge v Haruna Mlongela**, Misc. Land Application No. 40 of 2022 was invoked to support the argument about abuse of court process. In that case, the court referred to a number of other decisions and held that:

I find abuse of legal processes arise when a person, while knowing that he has no claim of right over the subject matter, or when a party being assured that the court has no jurisdiction, yet tries to insist and forcefully, confer jurisdiction to the court.

In the case of **JV Tangerm Construction Cp. Ltd and Another vs TPA and AG**, Commercial Case No. 117 of 2015, the court among other things had it that "*... an abuse is done when one makes an excessive or improper use of a thing or to employ such thing in a manner contrary to the natural legal rules for uses.*"

Going by what the court said, I think it is only the instant application that may come close to the purview of the principles restated by the above authorities in so far as the reference is contrary to the law, and as the arguments made in support of the applicant's stance are flawed. As to the other application allegedly made by a letter, the claim by Ms. Julius is in my view supported by what the Deputy Registrar said in the ruling she delivered on 24/02/2023 to the effect that there was a concern raised by Mr Lukelo, learned Principal State Attorney on 20/02/2023 that the court misdirected itself when it ordered execution to proceed, although there were objection proceedings pending before Hon. Makani J., and subsequently, the restoration proceedings, pending before the said

Honourable Judge, following the dismissal of the said objection proceedings.

Although the applicant's learned Principal State Attorney disputed the arguments and submissions as to abuse of the court processes and the claim about moving this court by a letter, he did not dispute the fact that there was a pending appeal, and the other applications involving the Attorney General as applicant and the instant applicant as one of the respondents and subsequently, the instant reference.

Looking at the record which has not been impeached by the applicant, I am satisfied that there is reasonable basis for the respondents advancing the claim. Although what the applicant did is, in my considered opinion, annoying in certain respects, I find it not established on the preponderance of probability that it amounted to abuse of court processes as alleged, or misuses of the court processes as pointed out in the notice of preliminary objection.

When all is said and done, regard having been had to the respective findings on the first point of objection, I am settled that I have no any other option left but not to entertain the application on its merit for want of jurisdiction. Accordingly, the conclusion suffices to dispose of the reference.

In the result, the reference is dismissed with costs. It is so ordered.

Delivered at Dar es Salaam this 13th day of March, 2023.




B. S. Masoud
Judge