

IN THE HIGH COURT OF TANZANIA

(LAND DIVISION)

AT DAR ES SALAAM

REFERENCE NO. 1 OF 2023

(Arising from Execution No. 20/2022)

YOHANA MAIKO SENGASU DECREE HOLDER

VERSUS

MIRAMBO MABULA JUDGMENT DEBTOR

RULING


Date of Last Order: 04.05.2023

Date of Ruling: 24.05.2023

A. MSAFIRI, J.

This is a reference application arising from Execution No. 20/2022 before Hon. DR. Kisongo, brought under Order XLI Rule (1) and (5) of the Civil Procedure Code, [33 R.E. 2019] (the CPC) whereas the applicant is praying for this Court to set aside/ reverse the order and the proceedings in Execution No. 20/2022 before Hon. Kisongo, DR.

The respondent have filed a Notice of preliminary objection on point of law that, this application for reference is incompetent as it has been preferred against the law.

The preliminary objection was set to be heard by way of written submission whereby the applicant was represented by Mr Emmanuel M. 

Augustino, learned advocate, whereas the respondent was represented by Mr Barnaba Luguwa, learned advocate.

Arguing on the preliminary objection, Mr Luguwa was of the view that the application at hand is improper before this Court as it had to be brought by way of statement containing facts of the case and opinion of the judicial officer, and not by way of chamber summons supported by the affidavit like any other applications under Order XLI Rule 1 and 5 of the CPC. He further stated that the instant application was not brought by the trial judicial officer for determination under Order XLI Rule 1 of the CPC but was brought by the Advocate of the applicant.

Hence he prayed that this application be struck out with costs.

Mr Augustino for the applicant responded and pointed that the preliminary objection should be based on pure point of law, but what the counsel for the respondent has submitted does not point to a point of law.

He submitted further that this application was properly brought before this Court. That it was preferred under Order XLI Rule 1 and 5 of the CPC. That Rule 1 provides that; *".....the court may, either of its own motion or on the application of any of the parties..."* He insisted that it was correct to bring the matter as an application. To support his point,

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he cited the case of **NCL International Ltd vs. Alliance Finance Corporation Ltd**, Civil Reference No. 6 of 202. He prayed for the dismissal of preliminary objection with costs.

Having gone through the submission before this Court, the issue for determination is whether the raised preliminary objection has merit.

In determination, I will be guided by the principle established in the case of **Shahida Abdul Hassanali Kasam vs. Mahed Mohamed Gulamali Kanji**-Civil Application No. 42 of 1999 (unreported), reiterated its posture on the point by saying:-

"The aim of a preliminary objection is to save the time of the court and of the parties by not going into the merits of an application because there is a point of law that will dispose of the matter summarily"

In the case of **Mukisa Biscuits Manufacturing Co. L.T.D versus West End Distributors L.T.D** (1969) EA 696, the preliminary objections were set to have the following tests;-

"A preliminary objection consists of a point of law which has been pleaded, or which arises by clear implication out of pleadings, and which if argued as a preliminary point may dispose of the suit".

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Furthermore, the case of **Lyamuya Construction Company Ltd vs. Board of Registered Trustees of Young Women Christians Association of Tanzania**, Civil Appeal No. 2 of 2010 (Unreported) gives a detailed account of what a point of law is. It was observed in the said case that;-

*"a point of law must be that of sufficient importance and, I would add that **it must also be apparent on the face of record, such as the question of jurisdiction; not one that would be discovered by a long drawn argument or process.**"(Emphasis supplied).*

It is my view that in the matter at hand, the raised preliminary objection does not fit the required criteria established in the cases cited hereinabove.

The raised preliminary objection that the application has to be brought by way of statement containing facts of the case and opinion of the trial judicial officer, and not by way of chamber summons supported by the affidavit like any other applications cannot be termed as a pure point of law. In my view such argument does not show how Order XLI Rule 1 and 5 of the CPC was violated. The reason that the application was not made by the trial judicial officer, but the applicant's Advocate is unmaintainable because Order XLI Rule 1 provides for the alternative;

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the Court may move on its own motion or by application of any of the parties.

In that regard, I find that this preliminary objection has no merit and it is overruled with costs. The application shall proceed on merit.

It is so ordered.

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A. MSAFIRI
JUDGE
24/05/2023

