

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

**AT DAR ES SALAAM**

**REFERENCE APPLICATION NO. 1 OF 2023**

**(Arising from EXECUTION NO. 20 OF 2022)**

**BETWEEN**

**YOHANA MAIKO SENGASU ..... APPLICANT**

**AND**

**MIRAMBO MABULA ..... APPLICANT**

*20/6/2023 & 27/6/2023*

**RULING**

**A. MSAFIRI, J.**

This ruling is in respect of an application for reference, brought by way of chamber summons under Order XLI Rule 1 and 5 of the Civil Procedure Code [Cap 33 R.E 2019], (the CPC), against the decision in Execution No. 20 of 2022, that was delivered before Hon.Kisongo, DR.

The background of this application emanates from the decision of the Court of Appeal in Civil Appeal No. 71 of 2022 that had its origin in this Court. In the said appeal, the Court of Appeal delivered its judgement in favour of the appellant/ the respondent herein against the applicant and one Salim Omary Kabora. It was declared that the sale of the suit land between the respondent and one Salim Kabora was lawful.

*Adls*

The respondent filed an application for execution seeking for an order of eviction of the judgment debtors/ the applicant and one Salum Omary Kabora, from the disputed land described as godown and a factory with two rice husking machines situated at Dumila Township near bus station along Dodoma – Morogoro highway and hand over or restore it to him. He also seeks for payment of TZS.5,000,000/= as general damages against the applicant.

In this application, the applicant is seeking for an order that: -

1. This Honourable Court be pleased to set aside/reverse the order and the proceedings in Execution No. 20/2022 before Hon. Kisongo, DR.
2. Any other reliefs this Honourable Court deem just to grant.
3. Costs.

The chamber summons was taken out at the instance of the applicant and is supported by the affidavit sworn by his advocate, Mr. Emmanuel Augustino and opposed vide counter affidavit of the respondent.

When the application came for hearing, the applicant was represented by Mr. Emmanuel Augustino, learned advocate and the respondent was represented by Mr. Barnaba Lugua, learned advocate.

*Atty.*

The application was heard by way of written submissions.

Arguing in support of the application, the counsel for the applicant prayed to adopt the affidavit in support of the application to form part of his submissions. He submitted that, after the decision of the Court of Appeal, the respondent filed an application for Execution No. 20/2022, praying for the following orders: -

- i. Appointment of a broker to evict Yohana Sengasu (from suit land) and restore it to Milambo Mabula.
- ii. Order Maiko Sengasu to pay 5,000,000/= to Mirambo Mabula.
- iii. The house of Judgment Debtor, Yohana Sengasu, to be attached to satisfy payment of TZS. 5,000,000/= and costs of the broker.

He further submitted that, the applicant was aggrieved by the prayers of respondent and raised the questions for determination by Hon. Deputy Registrar, that: -

- I. There being judgement debtors (Sengasu and Kabora), can payment of the ordered amount TZS.5,000,000/= entirely be directed to the applicant alone?
- II. Can Deputy Registrar order execution of a declaratory order in a manner not specifically decreed?
- III. Can attachment and sale of a house of the applicant herein to

*Alle-*

satisfy payment of the ordered amount be ordered without proof of ownership, location, description and value of the said house?

IV. Does Deputy Registrar have jurisdiction to entertain an execution application made outside the granted prayers?

Counsel for the applicant stated that, the said questions were all overruled with costs on the reason that the decree holder was at liberty to prefer execution against the judgement debtors jointly or severally, before imposing the entire decretal amount of TZS.5,000,000/= on the applicant alone.

He further submitted that, the Honourable Deputy Registrar went beyond the order of the Court of Appeal and assumed the powers of interpreting the said order at length, giving it effect of eviction and vacant possession which were not included in the order of the Court of Appeal.

He raised the key issue for determination in this application as to whether the Hon. DR has jurisdiction to walk beyond court orders/ judgments and order execution in manner not specifically decreed.

He referred to the powers of the Deputy Registrar in execution provided under Order XLIII Rule (g) of the CPC which states that, "*To order that a decree be executed under Order XXI Rule 21*" and

*Adde*

submitted that the said provision limits the powers of the Deputy Registrar to ordering execution of a decree and not vary, amend, interpret or change the decree in any way.

To cement his argument, he cited the case of **Laemthong Rice Co. Ltd vs Principal Secretary Ministry of Finance Zanzibar Civil Appeal No.259/2019** and prayed that this reference be allowed with costs, by quashing the ruling of the Deputy Registrar.

Replying to the submissions by the counsel for the applicant, the counsel for the respondent started by referring to Order XLI Rule 1 and 5 of the CPC, that the said Rules implements Section 77 of the CPC which is a substantive provision dealing with reference to this Court. He pointed out the circumstances on which references can be made as listed below;

- a. The court may initiate reference on its own motion or on the application of any of the parties.
- b. 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.
- c. The court must draw up a statement of the facts on the case and the point on which doubt is entertained.
- d. Refer that statement and its opinion to the High Court for its

*Alle*



decision.

He submitted that, the above mentioned provision does not cover the present scenario where the decision subject of reference was made by the same court, and therefore this Court cannot reverse its own decision. That, the decision by the Honourable Deputy Registrar is the decision of this Court and it cannot be challenged through reference, rather it can be challenged through review before this Court, or through an appeal to the Court of Appeal.

To bolster his arguments, he referred to the string of cases with similar positions. He cited the case of **The Registered Trustee of Taqwa Private Secondary School vs Registered Trustee of Bakwata** Land Reference No.03 of 2022, pg 13, **Halima Saidi Kazuwa vs Said Seleman Ngalunda**, Civil Reference No. 8 of 2021 (Unreported) and **Nathaniel Mwakipiti Kigwila vs Margreth Andulile Bukuku**, Misc. Land Application No. 586 of 2022 (Unreported).

He asserted that the position established by the above cited authorities affirms that this Court lacks jurisdiction to entertain a reference on decision made by the Deputy Registrar of the same court.

For the sake of argument that the decision in question can be

*Alles*

challenged through reference, as per the provisions cited in the chamber summons, the counsel for the respondent submitted that the applicant has failed to present a compelling case that would warrant intervention by this Court.

He argued that, the said provisions clarifies that such a reference can be made by lower courts before or during the hearing of a suit in which the decree is not appealable, or when the question of or usage with the force of law arises during execution of such a decree, and the court trying the suit or appeal or executing the decree has reasonable doubt and seeks the opinion of the High Court.

Regarding the requirement of the presence of a question of law or usage having the force of law, on which the court hearing the suit or executing the decree entertains reasonable doubt, the counsel for the respondent submitted that, execution proceedings subject of this application did not entertain any doubt as the basis for this application.

As to the requirement of preparation of the statement outlining the facts of the case and the specific point on which doubt is entertained along with the court's own opinion on the points that should be referred to this court for determination, the counsel for the respondent stated that, this crucial step was not undertaken as there is no statement or

*Ally-*

opinion prepared and brought before this court for reference.

Regarding the issue on whether the Deputy Registrar has power to walk beyond court orders, the counsel for the respondent submitted that, the same issue was raised in relation to execution of the Court of Appeal decision, and the said objection was unmerited.

Further, regarding to the issue that the Deputy Registrar went beyond the order of the Court of Appeal and assumed the powers of interpreting the said order at length, the counsel for the respondent argued that, the counsel for the applicant has not cited anywhere the interpretation made by Deputy Registrar.

There was no rejoinder from the applicant.

Having gone through the pleadings and submissions advanced by the counsels for both parties, the issue for determination is whether this application for reference is meritorious.

The term "reference" has been defined in the number of cases, among others is the case of **Halima Said Kazuwa vs Said Seleman Ngalunda,(supra)** that defined it from Black's Law Dictionary to mean *"refer to". In other words reference is a legal process in which a party who is disconnected with a decision of a lower court refers the matter to the higher court for corrections".* *Alle.*



In the CPC, reference emanates from Section 77, which states 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 as it thinks fit".*

The applicant attempted to move this Court to entertain his application which is brought under Order XLI Rule 1 and 5 of the CPC.

The said provision read as follows: -

*1. 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 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 application of any of the parties, draw up 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.*

*5. Where a case is referred to the High Court under rule 1, the High Court may return the case for amendment and may alter, cancel or set aside any decree or order which the court making the reference has passed or made in the case out of which the reference arose and make such order as it thinks fit.*

From the above cited provision, I find that, an application for *Adelle*.

reference must meet the following conditions: -

1. The court may initiate reference on its own motion or on the application of any of the parties.
2. There must be a reasonable doubt of any question of law or usage having the force of law arising in the course of proceeding.
3. The court must draw up a statement of the facts of the case and the point on which doubt is entertained.
4. Refer that statement and its opinion to the High Court for its decision.

From the above cited provision, it is clear that, reference must be from the lower court to the High court. Reference must arise from the matter which is before a court subordinate to the High Court and not from the High Court itself, because High Court is not subordinate to itself and therefore it cannot make any order in respect of a matter which arises from its own decision except by way of review.

As stated in the case of **Halima Saidi Kazuwa (supra) at Pg.2,** for reference to qualify for the court's opinion it must fall within the four corners of Section 77 of the CPC. It must be matter arising in case which is before a court subordinate to the High Court.

From the above cited provisions of the law and the case referred to, *Aelle.*

it is my firm view that, the reference before me, having raised from the decision of the Deputy Registrar of this Court in the application for execution of the decision from the Court of Appeal, cannot be subject to reference before this Court, as it has been pointed out earlier, this Court has no mandate to call its own record for reference unless the records are from the subordinate court, as per Order XLI Rule 1 of the CPC.

In the case of **Nathaniel Mwakipiti Kigwila vs Margareth Andulile (Supra)** while citing the case of **Sogea Satom Company vs Barclays Bank Tanzania & 2 Others, Miscellaneous Civil Reference No. 15 of 2021, HC – DSM (Unreported)** the court held that: -

*"Except when 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, reference and/or revision to the Court of Appeal or by way of review to the same High Court".*

It was held further that: -

*"The only way the High Court judge can legally review a decision of the Deputy Registrar is by way of reference under Rule 7(1) of the Advocates Remuneration Order, 2015..."*

It is from the above decisions that, the decision of the Deputy Registrar of the High Court cannot be challenged by way of reference.


*Alls -*

The said decision can be challenged by way of an appeal or revision to the Court of Appeal, or review to this same Court.

Having found that this application cannot be determined in this court, I find no reason to proceed with other arguments by the counsels for the parties. In the premises, I find that this application has no merit, and consequently the same is dismissed with costs.

It is so ordered.

*A. Msafiri*  
**A. MSAFIRI**  
**JUDGE**  
**27/6/2023**

The seal of the High Court of Tanzania, Land Division, is circular. It features a central emblem with a shield and a scale of justice, surrounded by the text "THE HIGH COURT OF TANZANIA" at the top and "LAND DIVISION" at the bottom, separated by two stars.