

IN THE HIGH COURT OF THE UNITED REPUBLIC OF TANZANIA

(LAND DIVISION)

AT DAR ES SALAAM

REFERENCE NO. 30 OF 2023

(Arising from the Ruling and Drawn Order of Honourable A.S Chugulu DR delivered on the 21st day of August, 2023 in Misc. land Application No. 303 of 2023)

ADRIANO CHANJA APPLICANT

VERSUS

HAMU KOTEKI MWAKASOLA RESPONDENT

RULING

Date of Last Order: 25th October 2023

Date of Ruling: 13th November, 2023

MWAIPOPO, J:

This is an application for a Reference filed by Adriano Chanja, hereinafter to be referred to as the Applicant versus Hamu Koteki Mwakasola, hereinafter to be referred to as the Respondent. The Application emanates from an order given by Hon. Chugulu DR, made on 21st day of August, 2023 in Misc. Land Application No. 303/2023.

The Application is made under Order XLI Rule (1) and (2), 3B (1)(a) (b) and (c) and Section 95 of the Civil Procedure Code CAP 33 RE 2019. CAP 33 RE 2019. The same seeks for the following orders;

- 1. This Court be pleased to call for record and decision of Hon. A.S. Chugulu, Dr. delivered on 21 day August, 2023 in Misc. Land Application no. 303**



of 2023, for purpose of examining and satisfying itself on the correctness, legality or propriety of the said decision and reverse it on the ground that Misc. Application No. 303/2023 was filed out of time.

2. Costs be in the cause

3. Any other reliefs this honourable Court deems fit to grant

This case was fixed for hearing on the 25th of October 2023. At the commencement of the hearing, the counsel for Respondent raised the following preliminary objections to wit;

- 1. This Honourable Court lacks Jurisdiction to entertain this instant application, contrary to order XLI RULE 1 and XL Rule 1 (c) of the CPC code CAP 33 R.E 2022.**
- 2. The Affidavit in support of the Application is incurably defective contrary to Order XIX Rule 3 of CPC CAP 33 RE 2022, thus rendering the Application incompetent.**

Submitting in support of the preliminary objections, the counsel for Respondent began by arguing that this Court lacks jurisdiction to entertain the application because it is contrary to order XLI Rule 1 of the Civil Procedure Code RE 2022. The gist of his objection was that Order XLI Rule 1 provides for the requisite conditions for one to file an application for reference, which for easy of reference he reproduced the provisions 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 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 point on which doubt is entertained and refer such statement with its own opinion on the point for the decision of the High court.

He submitted that the said provisions create 3 conditions for filing a reference as follows;

- i. It has to emanate from the suit or appeal**
- ii. It has to emanate from the Decree which is not subject to appeal**
- iii. It has to raise the question of law or usage of law which the court has to determine its opinion**

The counsel submitted that; this Court lacks jurisdiction to entertain this application because it emanates from an application that its decree is subject to appeal. The Counsel cited Order XL Rule 1 para (c), which states that;

"Appeal shall lie from the following orders under the provisions of section 74, namely;

(c) an order under rule 9 of Order IX rejecting an application (in a case open to appeal) for an order to set aside the dismissal of a suit".

Based on the above cited quotation it was the contention of the counsel for the Respondent that, the instant application originates from Misc. Land Application No. 303/2023 before Hon. A.S. Chugulu DR, which was an application and which

is still pending as an application for setting aside the dismissal order. Therefore, applying the provisions of order XLI which the applicant has sought to bring this application for reference, was wrong, since it was his firm submission that the court lacks jurisdiction to entertain the said application for reference as it emanates from an application whose decree is subject to appeal contrary to the provisions of order XLI Rule 1.

The counsel further referred the court to quotations from Sarkar and Mulla to substantiate his points. He first referred to page 4094 of Mulla's Book, where it is titled "**Decrees not subject to appeal**", under the 1st paragraph, which refers to the CPC of India which is in pari material to Order XLI of CPC of Tanzania which reads as follows;

"Rule 1 does not authorize a reference to the High Court except in a suit or appeal in which the Decree is not subject to appeal. Therefore, no reference can be made to the High Court in a matter which an appeal lies, for in appealable cases a remedy to correct possible error is provided by the appeal".

He also went on to cite Sarkar's book, page 577 which also reads as follows;

"No reference can be made in a suit or appeal unless the Decree that may be passed therein is non appealable".

Based on the citations from our CPC CAP 33 RE 2019 and the quotations from prominent writers Mulla and Sarkar, the Counsel for the Respondent, landed his submissions on the first limb of jurisdiction by stating that the Court lacks jurisdiction to entertain the application for reference which emanates from an application whose decree or order is subject to appeal as underscored in order

XL Rule1 (c). In the upshot he prayed for the Honourable Court to dismiss the application with costs.

Arguing on the second limb of the first preliminary objection, the counsel submitted that; the Court lacks jurisdiction because the Applicant is seeking revisionary powers of the High Court. At this juncture he drew the eyes of the Court on the chamber summons which contains three orders and he make an emphasis is made on the first one which he quoted for clarity, i.e.;

"This Court be pleased to call for record and decision of Hon. A.S. Chugulu, delivered on 21st day August, 2023 in Misc. Land Application no. 303 of 2023, for purpose of examining and satisfying itself on the correctness, legality or propriety of the said decision and reverse it on the ground that Misc. Application No. 303/2023 was filed out of time".

The Counsel went on to submit that this Court has no jurisdiction to revise its own decision but the CAT. This position is provided for under section 4 (3) of the Appellate Jurisdiction Act, as revised in 2019, which states as follows;

Without prejudice to subsection (2), The court of Appeal shall have the power, authority and jurisdiction to call for and examine the record of any proceedings before the High Court for the purpose of satisfying itself as to the correctness, legality or propriety of any finding, order or any other decision made thereon and as to the regularity of any proceedings of the High Court.

Based on the provisions cited above; he submitted that the CAT is the only Court with powers to call for records of the High Court and examine its correctness,

legality or propriety of the impugned decision. He further termed the order by Hon. Chugulu as being interlocutory. In this regard he cited section 5(2) (d) of the AJA. He invited the court to dismiss the Reference for lack of jurisdiction.

Submitting on the second preliminary objection, the Counsel stated that the Affidavit in support of the Application is incurably defective contrary to Order XIX Rule 3 of the CPC CAP 33 RE 2022, thus rendering the Application incompetent. He asserted that the Affidavit is defective for containing legal arguments and submissions instead of facts as provided for under Order XIX Rule 3 of the CPC. He drew the attention of the Court to paragraphs 4,6,7 and 8 of the Applicant's Affidavit for being argumentative and offensive. He implored the Court to expunge the defective affidavits and proceed with the remaining non offensive paragraphs which, if left to stand-alone, they lack merit. He thus concluded his submissions by inviting the Court to find the Affidavit in support of the Application incurably defective thus rendering the whole Application incompetent. He cited the case of **Jackline Ntuyabalilwe Mengi versus Abdiel Mengi and others Civil Application No. 332/2022** where the Court of Appeal had a chance of elaborating on affidavits. (See Page 21-25) 11.

In rebuttal the Counsel for the Applicants, began by objecting to the submissions presented by the counsel for the respondents based on Order XLI Rule 1, which states that the Application is incompetent because the Decree is subject to appeal. He stated that the said position was incorrect because, the application was well titled that it had accrued from the ruling of Hon. Chugulu, Deputy Registrar delivered on 21st of August 2023. The said Application is yet to be determined and there is no Decree or Order arising from Misc. Land Application no. 303/2023 which is subject to appeal. Therefore, there is no appeal to bar this

court from hearing this Reference under Order XLI Rule 1 of the Civil Procedure Code CAP 33 as suggested by the counsel for the Respondent.

With regard to the cited quotations from Sarkar and Mulla, the Counsel stated that the position of CPC in India is different from ours. He referred to Sarkar's book as covering situations where decrees are subject to appeal. A reference can be filed when there is no appeal against the decree. He went on stating that the position is different from ours citing again para 2 of Sarkar page 576. He argued that such provisions are applicable whenever there is an issue of law, which needs to be made clear. That is when a reference would lie and when there is an appeal as well. He submitted that in our case in Tanzania a reference goes further, whether before or during the hearing or whether, the suit or a decree is not subject to appeal or, whenever there is a question of law. In India it is only the Court *suo moto* can deal with the matter. In Tanzania the position is different even a party can originate proceedings by way of referencing the matter for the High Court's determination. With regard to the issue of referencing the decision of the Deputy Registrar, for the decision of the court, there is no decision of the Court of Appeal of Tanzania, however this has been raised recently in the case of **Yohana Sengasu versus Mirambo Mabula Reference no. 1/2023** before Msafiri J. Whereby the Court upheld the decision of the DR and the matter proceeded to be heard. The issue in the instant application is whether one can file a reference against the interlocutory decision of the DR for the determination by the Judge of the High Court. It was his opinion that the Judge can look at the decision of the DR and revise it.

With regard to arguments under Order XL Rule 1 (c) of the CPC, the Counsel submitted that, Respondent's Bill of Costs application was dismissed for want of prosecution. The Respondent filed Miscellaneous Land application no. 303/2023 seeking to set aside the dismissal of an application for Bill of costs. The Application

was made under Order IX Rule 6. However, after an application was made an issue arose as to the applicability of section 19(2) of the Law of Limitation of Act. That was the issue, which was determined by Chugulu, DR. This reference is not in respect of a Decree but in respect of an application for restoration of the Respondent's application and the issue is whether the application is within time or not, the said order by Hon. Chugulu DR, is not appealable at this stage. He submitted that the Counsel for the Respondent has called it an interlocutory order, while he finds it a preliminary order. The contended that an interlocutory order is supposed to serve the interest of the parties during or while awaiting the application or determination of the substantive matters between the parties and that common matters are injunctions and status quo. He submitted that there are issues which although preliminary, their determination disposes off the subject matter. The counsel also amplified that there are issues which touch on the jurisdiction of the court. The question of limitation of time is one of those. There are issues of interpretation, then a reference can lie, seeking for the determination of the court. If the Court says that the matter is within time they would proceed. (See Sarkar). He submitted that there is an ambiguity regarding applicability of section 19(2) of the Law of Limitation Act in respect of the decision of the DR. The question is whether the section covers the orders of the Registrar.

With regard to the second preliminary objection, the counsel for the Applicant conceded that paragraph 7 and 8 of the Affidavit were argumentative. He submitted further that paragraph 4 was in order and 6 was also expressing views on counting of the days. He argued that the court could still proceed to hear those paragraphs that were not offensive. He concluded by stating that the application was proper before the Court and that it should be maintained.

In rejoinder, the Counsel for the Applicant reiterated his submissions in chief, and recited the provisions of Order XL Rule 1, where it is said that the Decree is not subject to appeal. The interpretation that comes out is that, the Application for reference emanates from Application No. 303/2023 whereby the Respondent is seeking to set aside the dismissal order, and in the said Application, the Applicant herein filed a preliminary objection that the said Application is time barred. That is when the Hon. DR Chugulu gave her order to over-rule the preliminary objection and proceeded with an application. Thus, the said order or whole of the decision of the DR is still pending in court as submitted by the Counsel for Applicant. Meaning that if at all they were prejudiced and aggrieved by the said decision on preliminary objections, they still have a chance of appealing against that decision to the effect that the whole application was erroneously entertained by this court because it was out of time, he stressed the point that it would have been possible for the applicant to seek this reference, if at all in the Application No. 303/2023, he lacked an avenue of appealing. He submitted that, was the reason as to why they cited order XL Rule 1 (c) which states that the decision in case no. 303/2022 can be appealed against. The interpretation is that the decision in 303/2023 is subject to appeal. He reiterated his submission that this court has no jurisdiction to entertain this reference.

In the same vein, he further contended that it was a misconception on the part of the counsel for the Applicant to state that the position in India is in different. The Counsel read Order 46 Rule 1 of the CPC in India from Mulla's book which is in pari materia with our order XLI Rule 1. He implored the Court to use the comments analyzed by the Authors in interpreting order XLI Rule I. The counsel also disputed the case of **Yohana Michael Sengensu Vs. Mirambo Mabula**, for being distinguishable since it only dealt with an objection as to whether the preliminary objection raised by Advocate Lugua in the said case could suffice to

meet the standard on point of law and whether the Reference had to be brought by way of a statement or chamber summons with an affidavit (See page 4).

With regard to whether the said order was interlocutory. The Counsel for the Respondent submitted that the contention by the counsel for Applicant that the order by Chugulu DR could only be interlocutory if it was meant to support the interest of parties pending determination of the main case, is erroneous since the said order was an interlocutory as per section 5(2) of AJA and an appeal or revision cannot be preferred from it. With regard to section 19(2) of the Law of Limitation Act, R.E 2019, he submitted that there was no any ambiguity as suggested by advocate Lugua on the counting of days, which needed the attention of the High Court by way of Reference.

Lastly, with regard to the contents of the affidavits, he submitted that the counsel for the applicant has conceded that para 7 and 8 are offensive. He added up paragraph 6, which also contains the word "**misdirected**". Once these are expunged the affidavit will remain with paragraphs 1-5, which do not suffice to amplify the questions of usage of law, which is a prerequisite requirement under Order XLI Rule 1 of the CPC.

Having heard the submissions from both parties, I now proceed to analyze as to whether the preliminary objections raised by the counsel for the respondent should be sustained or overruled.

I will begin with a preliminary objection on jurisdiction, which the counsel for the respondent argued on two limbs;

Firstly, the counsel for the respondent submitted that this Honourable Court lacks Jurisdiction to entertain this instant application, contrary to order XLI RULE 1 and XL Rule 1 (c) of the CPC code CAP 33 R.E 2022. Secondly, the counsel submitted

that; the Court lacks jurisdiction because the Applicant is seeking revisionary powers of the High Court contrary to law.

In response to the first limb of the preliminary objection, I have noted that the application has been filed by way of reference under Order XLI Rule (1) together with other supporting provisions of the law i.e. Section 3A (1) and (2), 3B (1)(a) (b) and (c) and Section 95 of the Civil Procedure Code CAP 33 RE 2019.CAP 33 RE 2019.

The said application, among other things, seeks for an order of the court to call for record and decision of Hon. A.S. Chugulu, Deputy Registrar (DR) delivered on 21 day August, 2023 in Misc. Land Application No. 303 of 2023, for the purpose of examining and satisfying itself on the correctness, legality or propriety of the said decision and reverse it on the ground that Misc. Application No. 303/2023 was filed out of time.

Order XL Rule 1 sets out requirements for a reference to be filed. It states and I quote;

"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 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 a statement with its own opinion on the point for the decision of the High Court".

Based on the above quotation, the counsel for the respondent has submitted that this Courts lacks jurisdiction because the cited order is not applicable, as the order which culminated into this reference is appealable under order XL Rule 1 (c) as opposed to the conditions set out under Order XLI Rule 1.

I agree with the above position of the Counsel for the Respondent since the provisions of order XLI rule I, provides for a scenario in which the Decree would be not be subject to appeal. Without going into the merits of the Application, I have perused the records related to the impugned decision and satisfied myself that the said order only dismissed the preliminary objection raised by the Counsel for the Applicant herein, to the effect that the Application by the Respondent was out of time. That Hon. DR Chugulu, in the said application overruled the said preliminary objection by ruling that the application by the respondent therein was filed within time. Therefore, the said was interlocutory one. The Applicant still had a chance to wait and contest the final decision by Hon. DR.

According to Mulla, in his book titled The Code of Civil procedure, in analyzing the said order which is in pari material with our Order XLI Rule 1, states in his book that;

Rule 1 does not authorize a reference to the High Court except in a suit or appeal in which the decree is not subject to appeal. Therefore, no reference can be made to the High Court in a matter in which an appeal lies, for in appealable cases a remedy to correct possible error is provided by the appeal.

See also Sarkar, the code of Civil procedure where it is stated that;

No reference under Order 46 Rule 1 can be made in a suit or appeal unless the decree that may be passed therein is non appealable. Reference under the said order is not competent unless the court

trying the suit or appeal entertains a reasonable doubt about it or unless the determination of the point is essential for the disposal of a pending case.

Indeed, I agree with the counsel for the Respondent that, the applicant still has a right under Order XL Rule 1 (C) to file an appeal if aggrieved by the whole decision of the DR when the matter is completed. Therefore, the resultant outcome of the case will still be appealable. The procedure for reference cannot be used as an alternative to other means of challenging the decision such as an appeal, when an opportune time arises.

Similarly, I also agree with the Counsel for the Respondent that, the first order made by the applicant in the Chamber Summons is suggestive of a revision. As per section 5 (2) (d) of AJA, the impugned decision by Hon. DR, it being an interlocutory order is not subject of revision at this stage as prayed for by the Applicants in his Chamber's Summons, since it is an interlocutory order. For easy of reference the said section reads;

No appeal or application for revision shall lie against or be made in respect of any preliminary or interlocutory decision or order of the High Court unless such decision or order has the effect of finally determining the suit.

As I have noted, the order by the Deputy Registrar **Chugulu** did not finally determine the suit as the said suit as still pending before the High Court and its final decision will finally be appealable.

See also the case of **Paul A. Kweka and Another versus Ngorika Bus Services and Transport Company Ltd, Misc. Civil Application No. 2001, Arusha**, where the Court of Appeal stated that, an order granting an application to set aside the exparte Judgement is not appealable.

it is my firm position that, the exercise of the right to file a Reference is dependent upon the conditions set out under Order XL Rule 1 of the CPC and also in consideration of an issue as to whether the impugned decision in the instant case finally determines the matter or not. In the instant case, the ruling by the Hon. DR did not finally determine the matter, as analyzed herein above. In the case of **Vodacom Tanzania Public Limited Company vs Planetule Communications Ltd, Misc. Commercial Cause No. 295/2017, CAT, DSM,** it was stated that;

"It seems to me that the real test for determining this question ought to be this; does the judgement or order, as made, finally dispose of the rights of the parties? if it does, then I think it ought to be treated as final order; but if it does not, it is then, in my opinion, an interlocutory order".

Further, the Court while citing the case of **Britania Limited vs National bank of Commerce and Doshi hardware (T) Ltd,** stated that;

"We are of the opinion that the ruling and order of the High Court sought to be revised is an interlocutory order.... because in that order nowhere it has been indicated that the suit has been finally determined".

Finally, the court held that;

"We uphold the 2nd preliminary objection raised for the respondent as we find this application incompetent having arisen from an interlocutory order which is prohibited by section 5(2)(d) of the Appellate Jurisdiction Act, 1979, as amended

In light of the settled position of the law, it is clear that an interlocutory ruling or order is not appealable, save where it has the effect of finally determining the charge, suit, or petition. As adumbrated above, the Order by Hon. DR is an interlocutory one, after dismissing the preliminary objection by the Applicant, the Hon. DR made an order for hearing the whole Application on merit, whereby if the Applicant herein will still be aggrieved, can challenge the decision. While giving reasons for not allowing the practice of challenging interlocutory orders, the Court of Appeal of Tanzania in **the Vodacom case (supra)** stated that the rationale is to stop the irresponsible practice by which a party could stall the progress of a case by engaging in endless appeals or litigations against interlocutory decisions or orders. The court took the stance of furthering the effect of the provisions of Article 107A(2)(b) of the Constitution of the URT, 1977, which prohibits delay in dispensation of justice when delivering decisions in matters of criminal and civil nature.

In view of the foregoing this court lacks jurisdiction to entertain the reference filed under Order XLI Rule 1 (c) by the Respondent.

The second preliminary objection is to the effect that the Application is incurably defective contrary to Order XIX Rule 3 of the Civil Procedure Code, CAP 33 2022.

The counsel for the applicant has submitted that the Affidavit in support of the Reference is defective under paragraphs 4,6,7 and 8 for containing arguments. He cited the case **Jackline Ntuyabalilwe mengi (Supra)** to support his contention. The Counsel for the Applicant has conceded that the contents of paragraph 7 and 8 are defective, and further stated that if court finds paragraph 6 also defective, it can proceed to expunge those offensive paragraphs and deal with non-offensive ones; i.e. paragraph 1-5. The counsel has contended that those remaining paragraphs if left alone without para 6,7 and 8 are meaningless

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and cannot support the requirements of the application made under Order XLI Rule 1. They render the affidavit incompetent hence a recipe for dismissal by the Court.

I have perused the said paragraphs and I agree with counsel for the Respondent that such paragraphs are offensive for being argumentative and conclusive hence contrary to order XIX Rule 3 of the CPC which requires Affidavits to contain facts which the deponent is able of his own knowledge to prove. In this regard I have also considered the submissions by the Counsel for the Applicant, which have **conceded** to the submission made by the Applicant in this regard. For easy of reference the said paragraphs read as follows;

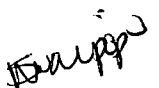
6. That Honorable A.S.CHUGULU, DR **misdirected** herself on the point of law in taking the counting out of the time between the presentations of the letter seeking for a copy of impugned of order and the date of collecting the same to be automatically omitted instead of making the same as a ground of delay.

7. That the decision is **prejudicial** as it tends to compel the parties to be engaged into hearing an application which is filed out of time.

8. That the decision is **illegal** and if not reversed and set aside it is likely to cause substantial injustice and abuse of the Court process.

Therefore, based on the submissions by the Counsel for the Respondent, I sustain all the preliminary objections raised and proceed to dismiss the Application for reference with costs. The Application No. 303/2023 shall proceed to be heard on merit.

DATED at DAR ES SALAAM this 13th day of November, 2023.



S.D. Mwaipo
S.D. MWAIPOPO

JUDGE

13/11/2023



Ruling delivered this 13th day of November, 2023 in the presence of the Adriano Chanja, the Applicant and Felix Mutaki, Learned Counsel for the Respondent, is hereby certified as a true copy of the original.

S.D. Mwaipo
S.D. MWAIPOPO

JUDGE

13/11/2023

