

TANZANIA / JUDGMENT

NYARUGUSU Ruling

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14 March 2025

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IN THE HIGH COURT OF THE UNITED REPUBLIC OF TANZANIA IN THE SUB-REGISTRY OF
MWANZA AT MWANZA CIVIL REFERENCE NO. 28425 OF 2024 (Arising from Execution No. 18514
of 2024 of the Resident Magistrates' Court of Mwanza at Mwanza) NYARUGUSU MINE COMPANY
LTD APPLICANT VERSUS BEJOMAKI FINANCIAL SERVICE LIMITED
.....1ST RESPONDENT MADUHU MULOLA NKINDA2ND
RESPONDENT NTOBI KISHEGENA MALUGU.....3RD RESPONDENT
STANSLAUS MASUNGA NKOLA.....4TH RESPONDENT

RULING

10th & 14th March 2025 CHUMA, J. By way of reference under order XLI Rule 1 of the Civil Procedure Code, Cap 33 R.E 2019 (the CPC), the court is being moved to give its opinion on the pending application for Execution No. 18514 of 2024 before the Resident Magistrates' Court of Mwanza (the trial Court) for the reason that the orders sought to be executed are not capable of being executed. The application is being supported by an affidavit of Akram Adam the applicant's counsel. The 1st respondent's counsel raised four points of preliminary objections that; 1|Page

1. The Application is incompetent for being brought by Applicant Counsel, who had no locus standi, mandate and/or instructions to initiate the Application in absence of the board resolution, contrary to Section 182 of the Companies Act, CAP 212 and Order XLI Rule 1 of the Civil Procedure Code, CAP 33, R.E 2019.
2. The affidavit is bad in law for being deposed by a third party on facts not of his own knowledge capable to prove, goes Contrary to Order XIX Rule 3(1) of the Civil Procedures Code, CAP 33, R.E 2019.
3. The Application is bad in law as far as was taken at the instance of ONE LINE ATTORNEYS, who had no locus standi, mandate and/or instructions to take instance on absence of the board resolution, contrary to Section 182 of the Companies Act, CAP 212 and Order XLI Rule 1 of the Civil Procedure Code, CAP 33, R.E 2019.
4. The, supporting affidavit is defective in the eyes of the law for containing false information. During the hearing of these points of preliminary objections, Messrs. Akram Adam and Arsein Molland represented the applicant and the 1st responded respectively. In the course of the hearing, this court noted a legal issue that touches competency of the application. I,

therefore, invited the parties to address the court as to whether this application meets the threshold of Order XLI Rule 1 of CPC. 2|Page Mr. Adam submitted that order XLI Rule 1 of the CPC requires that, in case of any concern the court on its own motion or any of the parties may seek the opinion of the High Court. That, at first instance, the parties may address the executing court their concern for it to refer to the High Court for opinion, or the applicants may prefer an application for reference direct to the High Court. To him, this application is proper because it has been brought by the party. On his part, Mr Molland was of the view that, Order XLI Rule 1 of the CPC applies where there is a question of law in the course of execution of decree, the executing court may on its motion draw a statement of doubt or parties may apply before the executing court for it to draw statement for High Court opinion. Therefore, according to him, it is the executing court that draws a statement of doubt for reference to the High Court after being moved by the parties. In rejoinder Mr. Adam submitted that the provision applies where the matter is not appealable hence parties may apply to the High Court for directives. Having heard the rival submissions of parties I will now address the essence of Order XLI Rule 1 of the CPC and whether this application is proper before this court. For ease of reference, I will quote rules 1 and 2 of Order XLI the CPC hereunder; 3|Page

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 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.
2. The court may either stay the proceedings or proceed in the case notwithstanding such reference, and may pass a decree or make an order contingent upon the decision of the High Court on the point referred; but no decree or order shall be executed in any case in which such reference is made until the receipt of a copy of the judgment of the High Court upon the reference. (emphasis added) Guided by this provision it is quite clear that the application for reference may be filed before this court when; one, any question of law or usage having the force of law arises before the subordinate court hearing a suit or executing a decree; two, the subordinate court must have entertained a reasonable doubt, in my view doubt as to whether the 4|Page matter may proceed without the opinion of the High Court; three, the court may on its motion or upon application refer the matter before the high court; four, reference is made by statement of the facts of the case drawn by the subordinate court and the point on which doubt is entertained and refer such statement with its own opinion on the point for the decision to this court; five, the subordinate court after referring the matter for High Court's opinion may stay the matter before it or proceed with the matter and pass a decree or made order(s) which shall be contingent upon the opinion of the High Court. In the instant matter, the applicant is moving this court to opine and give its direction on the pending application for execution for the reason that no decree or order is capable of

being executed. It should be noted that under section 38 of the CPC, all questions that arose before the executing court shall be entertained by the same court executing the decree. It reads; 38.-(1) All questions 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. 5| Page

In the present application, the applicant who is the 1st judgment debtor raised one point of preliminary objection before the trial court that the order dated 11/02/2021 sought to be executed is not a decree capable of being executed. I quote; “Kwamba maombi ya utekelezaji wa amri ya tarehe 11/02/2021 kama tuzo ya mahakama hii ina makosa kisheria na hivyo mahakama hii haiwezi kufanya utekelezaji kwani hakuna tuzo halali inayoweza kutekelezwa.” The Trial court heard this point of preliminary objection by way of written submission and dismissed the same on 26/9/2024 for being devoid of merit and scheduled the matter for hearing on its merit on 21/10/2024. The trial court found the settlement deed executed by the parties is capable of being executed as it was duly signed by the parties and it was received by the court and formed part of the court’s record. The trial court said; “Kwa kuzingatia hoja za pande zote mbili ni kwamba ni kweli tarehe 25/01/2021, pande zote kwa pamoja zilisaini makubaliano ya kisheria (deed of settlement) ambaye yatisainiwa na pande zote kwenye kesi hii na kugongwa mihuri ya ofisi husika na wahusika wanaotakiwa kusaini makubaliano hayo ikiwa ni makubaliano ambayo tarehe 6|Page 11/2/2021, mbele ya Mh. J.I.Ryoba – RM aliyopea na kwingiza kwenye mwenendo wa kesi hiyo kwamba yamepokelewa na kuwa sehemu ya kumbukumbu... inapotokea pande kwenye kesi husika wamekubaliana na kuingia makubaliano ambayo ni halali na ambayo haivunji misingi ya sheria basi makubaliano hayo yatabaki kuwa sehemu ya maamuzi ya mahakama baada tu ya kupokelewa na mahakama na kuwa sehemu ya kumbukumbu ya mahakama katika mwenendo wa kesi hiyo husika ili mradi yawe halali kwenye makubaliano ya kesi hii inaonekana yaliandaliwa na wakili msomi ambaye alipaswa kuiongoza mahakama kwenye njia sahihi...hata kama kulikuwa na tatizo dogo la kiufundi iwe kwenye maandishi vinginevyo bado lengo la pande zote lilikua ni makubaliano ya kumaliza kesi yao.. mahakama hii inaona hakuna sababu za msingi zilizotolewa kwenye pingamizi hili na inalitupilia mbali kwa gharama.” Therefore, in my view, the trial court unequivocally decided and resolved the legal issue which appears to be part and parcel of the matter raised in this application. That being the case, there is no legal issue before the trial court which remains to be a doubt wanting this court intervention by way of reference. It should also be noted that, order XLI Rule 1 of the CPC cannot be used as a substitute for a proper way to 7| Page

challenge the subordinate court’s decision(s) on legal matters raised in execution proceedings. Since the ruling of the trial court on Preliminary Objection is an interlocutory order, the applicant was supposed to await the outcome of execution proceedings and in case of disagreement with the result therefrom challenge its final verdict in a proper forum. In the case of Kalebu Kuboja Mjinja V Shadrack Dniel Tembe, Civil Appeal No. 24 of 2020 (unreported) this court said; “The orders subject to appeal are listed in section 74 and Order XL of the Civil Procedure Code, Cap. 33, R.E. [Cap. 33, R.E. 2019]. An order arising from the execution proceedings is not listed in the said provisions. It is therefore not appealable. But,

that does not mean the execution order cannot be challenged. The remedies available to a person aggrieved by the execution order or proceedings include, applying for revision of the execution proceedings, litigate the questions relating to execution under section 38 of the CPC...” In the event, this application was filed contrary to order XLI Rule 1 of the CPC. The applicant has abused the court process and stayed the trial court’s proceedings unnecessarily. 8|Page Be that as it may for the sake of argument assuming the application is proper before this court, from the raised objection I feel compelled to start with the second point of objection. In this point, the respondent faults the affidavit for being bad in law for being deposed by a third party on facts, not of his own knowledge capable of proving, Contrary to Order XIX Rule 3(1) of the Civil Procedures Code, CAP 33, R.E 2019. Arguing on the above point the respondents’ counsel has singled out paragraphs number 1, 2, 5 and 6 (c) which contain facts not within the advocates’ knowledge as alleged by the applicant in the verification clause. Going by the submission of the respondents’ advocate paragraph five in particular the deponent avers that the applicant never engaged in amicable settlement and that who endorsed had no capacity which is not within his knowledge. This fact however contested by Mr Akram Adam's advocate who argued that this application was not intended to finally prohibit execution proceedings before the subordinate court but rather to direct a better way of carrying out such execution. The facts deposed are not limited to that within the knowledge of the deponent but even on the statement and not hearsay as alleged by Mr Molland. 9|Page As to facts in para 2 and 5 submitted by Mr Molland Mr. Akram stated that the same needs evidence that ceases his point from being pure point of law. From my scrutiny, I am at once with the submission of Mr. Molland that by its nature the facts in paragraph five for instance could not have been deposed on the advocate's personal knowledge because is not privy to Nyarugusu Mining Company Limited and no affidavit in support thereof. They must have been derived from information or beliefs. The law on affidavits is quite settled on verification concerns as provided for in Order XIX Rule 3 (1) of the Civil Procedure Code, Cap. 33, R.E. 2019 which reads thus; “Affidavits shall be confined to such facts as the deponent is able of his own knowledge to prove, except on interlocutory applications on which statements of his belief may be admitted”. The import of this provision was cemented by the decision in the case of Tanga Kadala and 6 others Vs. Abdul Hillal Ally Civil Application No. 447/14 of 2023. Where it was held that; “While an advocate is not prohibited from swearing an affidavit on behalf of his client, such affidavit must conform to the requirements of a valid affidavit; it must be confined to facts the deponent is able to prove on 10 | P a g e his own knowledge except on interlocutory matters on which statements of his belief may be admitted provided that the grounds thereof are stated”. Guided by the above authorities since the pointed paragraphs do not suggest being on the advocate's knowledge no doubt its source of information had to be explained otherwise cannot be acted upon by the court. See the case of Silima Vuai Foun V Registrar of Societies & 3 Others, [1995] TLR 75, where the Court of Appeal’s view in that case was inspired by two decisions of Standard Goods Incorporation V Harakhchand Nathu & Co. Ltd (1950) 17 B.A.C.A. 99; and Bombay Flour V Hunibhai M. (1962) 803. In the latter, it was held that “....as the affidavit did not state deponent’s means of knowledge or his source of information and

belief, the affidavit was defective and incompetent, the application based on the affidavit was dismissed”. From the above analysis I am in agreement with the respondents’ advocate that the applicants’ affidavit contravened Order XIX Rule 3 (1) of CPC rendering the same fatally defective and I do hereby expunge the highlighted paragraphs. My position is guided by the cases of Phantom Modern Transport (1985) Ltd V DT Dorbie (Tanzania) Ltd Civil Reference No.15 of 2001 and Jackline Ntuyabaliwe Mengi & 2 Others 11 | P a g e V Abdiel Reginald Mengi & 5 Others, Civil Application No. 332/01 of 2021 (CAT-DSM), (Unreported) Having expunged the referred paragraphs, the pertinent question here is whether the remaining paragraphs suffice to sustain the instant application. My scrutiny of the remaining paragraphs reveals that the gist of the application is centered on the expunged paragraphs rendering the remaining ones nugatory. I then find the second point of objection meritable which suffices to strike out the application without venturing to the rest points of objection. In the final analysis, I proceed to struck out this application. Owing to the nature and circumstance of this matter including the issue raised by the court suo motto, I desist from making an order for costs. It is so ordered. DATED at MWANZA this 14th day of March 2025. W. M. CHUMA JUDGE 12 | P a g e Ruling delivered in court in attendance of Akram Adam for applicant, Mr. Molland advocate for the first respondents and the rest of the respondents this 14th day of March 2025. W.M. CHUMA JUDGE 13 | P a g e

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Prepared on 14 October 2026 · Esheria