IN THE COURT OF APPEAL OF TANZANIA
AT DAR ES SALAAM

(CORAM: MSOFFE, J. A., KIMARO, J. A. And MBAROUK, J. A.)

CIVIL APPLICATION NO. 47 OF 2010

EAST AFRICAN DEVELOPMENT BANK .....APPLICANT

VERSUS

BLUELINE ENTERPRISES TANZANIA LIMITED ..... RESPONDENT

(Application for review from the decision of the Court of Appeal of Tanzania at Dar es Salaam)

(Msoffe, J. A., Kimaro, J. A. And Mbarouk, J. A.)

dated the 5th day of March, 2010
in
Civil Appeal No. 101 of 2009

RULING OF THE COURT

12 July, & 6th September, 2011

MSOFFE, J.A.

We wish to begin this ruling by outlining a brief historical background to the effect that the exercise of review powers by this Court is fairly recent. We say so because when the Court was established on 9th August, 1979 it had no such powers. To this end, indeed the **Appellate Jurisdiction Act** (CAP 141 R.E.2002) does not provide for such powers todate. This Court's powers of review came about through case law starting with the case of **Felix Bwogi**

v Registrar of Buildings, Civil Application No. 26 of 1989 (unreported) to other fairly recent decisions in which the list is long. In the list there is the famous case of **Chandrakant Joshubhai Patel v Republic** (2004) TLR 218 which was decided on 29/4/2003. In our view, this case is famous in the sense that it sets out in fairly sufficient detail a number of principles governing review, some of which are now incorporated under **Rule 66** of the **Tanzania Court of Appeal Rules, 2009** (hereinafter the Rules). We wish to say from the outset that in determining this application we will be guided mainly by the law on review as applied in Tanzania in which **Chandrakant** and the Rules will be our main guidelines. Needless to say, **Chandrakant** has often been cited by this Court in a number of subsequent decisions dealing with review. Notable among the decisions is **Peter Ng'homango v. Gerson A.K. Mwanga and Another,** Civil Application No. 33 of 2002 (unreported) decided on 31/7/2007.

In this application the Court is being asked to review its decision in Civil Appeal No. 101 of 2009 dated 5th March 2010. In the

appeal we did set out a brief chronology of events leading to the appeal which we did need not repeat here. It will suffice to say that after hearing the parties we dismissed the appeal on the above mentioned date.

Consequent to the above decision this application was filed on 4/5/2010. The application made under Rule 66 1(a),(b) of the Rules is by way of a notice of motion in which the Court is being asked to review its judgment on the grounds that:-

(a) *The Applicant was condemned unheard in respect of the issue of res judicata on the basis of two decisions of the Court of Appeal of Tanzania notwithstanding that neither of the said decisions was referred to in argument by either of the parties or by the Court;*

(b) *The Applicant was wrongly condemned to be guilty of abuse of Court process in the absence of complaint by the Respondent either in the Court of first instance or by a Respondent's Notice and on the basis of an allegation particularized by the Court in its judgment, and not by*

the Respondent and without the Court affording the Applicant an opportunity to be heard in respect of the particular allegation;

(c) The Court's decision in relation to the status of the notice of appeal was made in the absence of complaint made by the Respondent, without evidence and without due and proper consideration in consequence whereof its decision is erroneous because it is in conflict with two other decisions of the same court on the same point.

(d) The Court declined to make a decision on the only issue enjoined between the parties in the Notice of Appeal and the Respondent's Notice, notwithstanding the absence of a substantive challenge by the Respondent.

The application is supported by a 26 paragraphs affidavit affirmed by Mr. Dilip Kesaria which essentially is an amplification of the above stated grounds. On the other hand, Professor Mgongo Fimbo filed an affidavit in reply containing 24 paragraphs. At the hearing of the application it was agreed that the parties file written

"oral submissions" or talking notes, so to speak, in support of their respective positions in the matter. It is against this background that this ruling is based on a 88 pages oral submissions by the applicant Bank, 22 pages by the respondent Company, and 37 pages rejoinder by the applicant Bank. In the process numerous authorities were also cited. The applicant Bank was represented by a team of four learned advocates namely Mr. Michael Sullivan QC, Mr. Dilip Kesaria, Mr. Peter Kabatsi and Mr Lugano Mwandambo. The respondent Company had the services of Prof. Gamaliel Fimbo, learned advocate. In our ruling in this matter we will not discuss or deal with each and every point that was raised in the course of hearing. We will confine ourselves to what we think are the salient features of the application. In this sense, counsel will forgive us if we will not deal or touch on everything that was canvassed in their well researched submissions.

Prof. Fimbo has taken a preliminary point to the effect that the notice of motion does not meet the mandatory requirements of the Rules, specifically Rules 66(1),66(2), 66(3) read together with Rules 65(1) and 65(3) requiring that grounds for review and the relief

sought be stated. In Prof. Fimbo's view the "magical words" to the effect that a manifest error on the face of the record resulting in the miscarriage of justice "ought to have been specifically stated in the notice of motion". In response, very briefly, the applicant's view is that the notice of motion complies with the requirements of Rule 48 "or alternatively, as permitted, substantially with Form A". With respect, this point need not detain us. It is correct, as per the above Rules that the ground(s) for review and the relief(s) sought must be stated in the notice of motion. It is also true that the above "magical words" are missing in the notice of motion before us. On this, we agree with Prof. Fimbo that the words ought to have been stated in line with the requirements of Rule 66(1). But in the justice of this case we take solace, or rather comfort, in the fact that there is, at least, the word "erroneous" mentioned under ground (c) of the notice of motion. We also take note of the fact that the complaints under grounds (a) and (b) thereof have a direct bearing on Rule 66(1) (b) where if "a party was deprived of an opportunity to be heard", as alleged in this application, that is a ground for review. In essence therefore, we agree with the applicant that there was substantial compliance with Form A in the First Schedule to the Rules. In future

however, we expect an intended applicant to set out **clearly** the ground for review and the relief sought as per the requirements under Rules 66(1),66(3),66(6),65(1) and 48(1). We mention Rule 66(6) here because although it applies after an application is granted it is expected that an applicant will specify the nature of the relief sought i.e whether the Court should "rehear the matter, reverse or modify its former decision on the grounds stipulated in sub-rule (1) or make such other order as it thinks fit".

Having said so, it occurs to us that reading through the notice of motion and its accompanying affidavit together with the oral submissions; and also after hearing the parties respective advocates; this application is essentially based on grounds (a) and (b) of Rule 66(1) which read:-

(a) the decision was based on a manifest error on the face of the record resulting in the miscarriage of justice.

(b) a party was wrongly deprived of an opportunity to be heard.

In this ruling we will focus on the above two grounds, specifically whether our decision in the appeal subject of this application is "based on a manifest error on the face of the record" and also whether in giving the aforesaid decision we denied the applicant the opportunity or right to be heard.

In **Oxford Advanced Learners Dictionary of Current English** by A.S. Hornby 4th Edition at page 758 the word "manifest" is defined as "clear and obvious". In this sense, an error is manifest if it is "clear and obvious".

In **Chandrakant** this Court stated:-

> *It is, we think apparent that there is a conflict of opinion as to what amounts to an error manifest on the face of the record and it is important to be clear of this lest disguised appeals pass off for applications for review. We say so for the well known reason that no judgment can attain perfection but the most that courts aspire to is*

> *substantial justice. There will be errors of sorts here and there, inadequacies of this or that kind, and generally no judgment can be, beyond criticism. Yet while an appeal may be attempted on the pretext of any error, not every error will justify a review.*

We wish to pause here and observe that the above view was also echoed or expressed by this Court in **Peter Ng'homango** (supra) at page 14 thus:-

> *It is no gainsaying that no judgment, however elaborate it may be can satisfy each of the parties involved to the full extent. There may be errors or inadequacies here and there in the judgment. But these errors would only justify a review of the Court's judgment if it is shown that the errors are obvious and patent.*

Going back to **Chandrakant,** this Court citing the decision of the Supreme Court of India in **Thungabhadra Industries Ltd v. State of Andra Pradesh** (1964) SC 1372 and the decision of the

High Court of Uganda **in Balinda v. Kangumu** (1963) EA 557 went on to say:-

> *...that a point which may be a good ground of appeal may not be a good ground for review...*

Then after citing this Court's decision in **Transport Equipment Ltd v Devram P. Valambhla** , Civil Application No. 18 of 1993 (unreported) this Court in **Chandrakant** said:-

> *We would say in the light of the authorities at hand, that an error which will ground a review, whether it be one of fact or law, will be an error over which there should be no dispute and which results in a judgment which ought to be corrected as a matter of justice.*

This Court in **Chandrakant** also adopted the reasoning in MULLA 14th Edition pp 2335-36 thus:-

> *An error on the face of the record must be such as can be seen by one who runs and reads, that is,* ***an obvious and patent mistake and not something which can be established by a***

> ***long drawn process of reasoning on points on which there may conceivably be two opinions***... *A mere error of law is not a ground for review under this rule. That a decision is erroneous in law is no ground for ordering review... It can be said of an error that is apparent on the face of the record when it is obvious and self evident and does not require an elaborate argument to be established...*
>
> *(Emphasis supplied.)*

In conclusion on what constitutes a manifest error the Court in **Chandrakant** then stated:-

> *...It must be obvious, self evident, etc. but not something that can be established by a long drawn process of learned argument.*

In summary, it is evident from the Rules and **Chandrakant** that for the applicant in this matter to succeed it must be shown that :-

(i) there is a manifest error on the face of the record in that the error is not a mere error of law, it has no dispute, it is clear, obvious, patent etc; the error is not one which can be established by a long drawn process of reasoning on which there may conceivably be two opinions; the error is a good ground for a review and not for an appeal etc.

(ii) the applicant was not given the opportunity to be heard.

It seems to us that the complaints in this application are best captured under paragraph 4 of the applicant's oral submission in which an introduction to this application is made thus:-

4. *Rather, the Honourable Court determined the Appeal on the ground that the matter was res judicata on the basis that on 22nd June 2007 Mandia, J. (as he then was) had dismissed a petition to set aside the Arbitral Award on the ground that the limitation period in the limitation Act 1971 for the issue of such a petition was 60 days rather*

than 6 years (S.B/35) accordingly the petition had been issued beyond the limitation period and so was out of time. Applying the principle said to be discerned from ***Olam Uganda v Tanzania Horbours Authoriry, civil Appeal No. 57 of 2002 (unreported) (A.B/6) and Hashim Madongo v Minister of Trade and Industry, Civil Appeal No. 27 of 2003*** *(unreported) (A.B./5) this Court held that once a dismissal is made under section 3(1) of the limitation Act it is not open to an aggrieved party to go back to the same court and institute an application for extension of time; the remedy is to seek review before the same Court or to lodge an appeal or a revision before a higher Court. This Court construed sections 3 and 14 of the limitation Act accordingly. Further, this Honourable court held that the Appellant had been guilty of abuse of the court process for reasons set out at p.14 to p.17 of its judgment. Finally this Honourable Court held, on what it described as "yet another novel point of law" that the Notice of Intended Appeal was still in existence and that the existence of a*

valid Notice of Appeal meant that the subsequent proceedings before Sheikh J. and Mwarija, J. (who granted leave to appeal the judgment of Sheikh, J.) were unnecessary and uncalled for, that they should have been given the chance to take its normal course, relying on the authorities of ***Arcado Ntagazwa v Buyogera Julius Bunyango*** *(1997) TLR 242 (S.B./2) and* ***Aero Helicopter Limited v F.N. Jensen*** *(1990) TLR 142 (S.B/3).*

Thereafter, in its long submission, the applicant went on to address us on why it thinks we were wrong in our determination of the issues of *res judicata* or limitation, abuse of court process and the notice of appeal. And that, as and where is relevant and indicated, we were wrong in determining the issues without giving the applicant the opportunity to be heard. The following paragraphs from the applicant's oral submission are only a few examples of instances in which the applicant thinks that we erred in the above respects:-

14. *Neither of the two principal authorities referred to and relied upon by this Honourable Court in its analysis,*

namely ***Olam Uganda*** *and* ***Hashim Madongo,*** *was referred to and relied upon by the Respondent at any stage during the hearing of the Appeal, nor did the Court refer the parties to either of the authorities during the course of argument. Nor did this Honourable Court re-list the matter for further argument before delivery of its Judgment, thereby affording the parties an opportunity to be heard on cases which would be treated as determinative of the point of law which the Court itself had described as novel.*

16. *It is submitted that this Honourable Court was wrong not to afford the Applicant an opportunity to be heard on the ratio decidendi and hence relevance of* ***Olam Uganda*** *and* ***Hashim Madongo,*** *particularly as those were critical in the Court' s analysis.*

18. *To proceed to consider and determine an Appeal on the basis of case law which was not the subject matter of legal argument by counsel before the Court amounts to a*

denial of natural justice. Without the benefit of submission on this case law, we respectfully submit, the Court fell into error.

22. *This Honourable Court, however, proceeded in its Judgment to identify, formulate, consider, adjudicate upon and find proven an allegation of abuse of process of the Court without informing the Appellant that that was what it was doing and without giving the Appellant an opportunity to be heard in respect of it.*

31. *Mr. Kesaria was correct; there is such authority and true to his word 23rd February 2010 he wrote to the Registrar and informed him of the authority; he provided the Registrar with a copy of the authority and requested that it should be provided to your Lordships. This Honourable Court had no regard to that authority. Again, with respect, by proceeding in this manner, this Honourable Court fell into error.*

32. *The Court proceeded to consider the status of subsequent proceedings before the High Court consequent on its*

finding that the Notice of Intended Appeal was still valid. The Appellant was not informed that the Court in its deliberations in reaching its decision would consider and rely upon ***Arcado Ntagazwa v Buyogera Julius Bunyango (1997) TLR 242 [S.B./2]*** *and* ***Aero Helicopter Limited v F. N. Jansen (1990) TLR 142[S.B/3].*** *Neither of these authorities had been referred to and relied upon by the Respondent at any stage during the hearing of the Appeal, neither did the Court refer the parties to either of the authorities during the course of argument. Nor did this Honourable Court re- list the matter for further argument before delivery of its judgment, thereby affording the parties an opportunity to be heard on cases which would be treated as determinative of the status of the proceedings before Sheikh J. on a point which the Court itself had characterised as ' a novel point of law' (p. 17 of its Judgment).*

42. *So it is in this case. This Honourable Court decided the issue of res judicata on a basis, namely the application of*

legal principle said to be derived from two legal authorities and the approach of another litigant in another matter, notwithstanding that this was not the basis upon which the argument had been made and the two legal authorities relied upon had not been before the Court at the oral hearing and notwithstanding necessarily therefore it had no argument in respect thereof. It decided the issue of abuse of process on the basis of alleged abusive conduct by the Appellant not relied upon by the Respondent, not identified or considered during the course of the oral hearing and, again, necessarily without hearing any argument in respect thereof. It was the Court itself in its Judgment which identified, formulated, considered and found proven allegations of abuse of process. It decided the issue of withdrawal of the Notice of Appeal having raised the issue suo moto, on the basis of its own research, both legal and factual, carried out after the hearing and without considering the Court of Appeal authority submitted by the Appellant following the hearing which supports the proposition

made by Mr. Kesaria for the Appellant. Consequent upon its finding of the status of the Notice of Intended Appeal, the Court proceeded to determine the status of the proceedings in the High Court on the basis of legal authorities which had not been referred to in argument before the Court and necessarily therefore in respect of which it had heard no argument.

50. *In this case the Appellant was denied that opportunity to change the mind of the Court when it came to rely upon these authorities which underpinned its analysis of the issue of res judicata and in turn the proper construction of sections 3 and 14 of the Limitation Act, and also when it identified alleged grounds of abuse and also when it conducted its own research on the issue of withdrawal of the Notice of Appeal and when it took no heed of the authority submitted by the Applicant after the hearing.*

67. *It is our respectful submission that this Honourable Court erred in its analysis of the ratio decidendi of both of the*

authorities upon which it relied, namely ***Olam Uganda*** *and* ***Hashim Madongo****. Further, it is our submission that if the court had heard from the Appellant and had the benefit of submissions from counsel it would not have been led into error and would not have distilled the legal principle from the cases which it did at p. 11 of its Judgment and it would not then have proceeded to apply it to the facts of this case.*

119. The Honourable Court's wrong application of ***Olam*** *has led it in to further error in its reference to* ***Moss v Anglo- Egyptian Navigation Compay [1865] 1 Chancery Appeals 108 [S.B./21].*** *At p.10 of its Judgment this Honourable Court states that:-*

"The decision in Olam appears to find support in a case cited to us by the appellant, that is the case of ***Moss v Anglo-Egyptian Navigation Company, Chancery Appeals, LC 1865 at page 114*** *that ....a question once adjudicated upon cannot be*

brought in question except by a bill of review in the same court, or by appeal to a higher Court.

*120. Once again, the Appellant was not afforded an opportunity to consider the case of **Moss** in the context of **Olam**, from which this Court wrongly distilled a principle which was treated as determinative of the Appeal.*

183. The error in this Honourable Court's analysis is, with respect, to elide the analysis or reasoning which applies in very specific circumstances (that is, a clear statutory prohibition on legal proceedings beyond a certain time) to a case where those specific circumstances have no application.

319 (iii)Moreover, in proceeding in this way this Honourable Court appears then to have misconstrued and misapplied the ratio of those two authorities. In particular, neither of them turned on the determination of the issue of limitation per se but on the proper construction of

statutory provisions which extinguished any viable cause of action in circumstances where proceedings had not been instituted within the prescribed time;

Likewise, in the applicant's reply to the respondent's oral submissions we have examples of the following paragraphs:-

105. Secondly, the three ingredients referred to in ***Chandrakant Joshubhai Patel v The Republic*** *(see Respondent's submissions, paragraph 22) are satisfied. First there must be an error; it is plain that there is an error for the Court's decision conflicts with an existing Court of Appeal decision. Second, the error is manifest on the face of the record; this Court stated at p. 16 of its Judgment that in the absence of an order from the Court, the notice remained intact. That is incontrovertibly not the legal position. The position at law is that the notice ceased to exist once it was deemed withdrawn. Third, the*

Court's finding plainly caused a miscarriage of justice; the Court considered that proceeding with an application for extension of time when the notice was extant was itself an instance of abuse of process.

110. Secondly, the Respondent's submission at paragraph 24 that the'Court adhered to practice of the Court' simply underscores the Applicant's contention in the Notice of Motion, ground (b) that the findings of abuse of process were made in breach of natural justice. It also underscores the Applicant's contention in ground (c) that the decision was made without due and proper consideration (which would have entailed hearing full submissions on the point as natural justice and Constitution require). The issue of such a Court practice was neither referred to nor relied upon during the course of the Appeal by either the

Respondent or the Court. The Applicant was not afforded an opportunity to make submissions in respect of such Court practice. It is difficult to understand why there should be such a practice when there is binding authority to the effect that following a deemed withdrawal, the Notice ceased to exist. Whether or not such an Order is made cannot affect the issue of whether or not the Notice exists. It is to be noted that the Court cited no authority in respect of such practice. It is be noted further that the Respondent in its submissions cites no authority in support of such a practice. This underscores the importance of calling for submissions from any party adversely affected by such propositions: see the principles of natural justice set out in ***Felix Mselle v Minister for Labour and Youth & Others,*** *Applicant's submissions paragraph 35.*

238. Thirdly, it does not deal with the fact the Court paid no heed to existing binding authority, namely the ***judgment of Nsekela J.A. in ZNZ Civil Application No. 4 of 2006.***

As pointed out under paragraphs 12 and 13 of Mr. Kesaria's affidavit and paragraph 12 of Prof. Fimbo's affidavit in reply, it is true that we decided the appeal on three grounds, namely *res judicata,* abuse of court process and the existence of the applicant's notice of appeal against the dismissal order of the High Court.

We have carefully gone through the applicant's long oral submissions. In the end, we are satisfied that the contents and tenor therein make a strong case for an appeal rather than a review. a close look at the few paragraphs we mentioned above will confirm this fact. Indeed, the paragraphs have the usual words *"the court erred in its analysis, this court has not correctly applied that analysis, the court's wrong application, the court has followed an erroneous analytical path"* etc. As already observed, as per the above Rules and **Chandrakant,** an erroneous decision is not a ground for review.

The ingredients of an operative error for purposes of review are as stated by this Court in **Chandrakant:-**

> *It is necessary for this purpose to revert to the ingredients of an operative error. First, there ought to be an error, next the error has to be manifest on the face of the record, finally the error must have resulted in miscarriage of justice.*

Having made the above general statement, we now wish to move on and, very briefly, identify instances in which it is alleged that we made errors. On *res judicata* the main complaint is that in our interpretation of section 3(1) of the Limitation Act we misapplied the principle in **OLAM UGANDA** and **HASHIM MADONGO**. And that we determined the point on the basis of case law which was not the subject of legal argument by counsel. Yet again, with respect, this is not a ground for review for four reasons. **One,** it is not a manifest error on the face of the record. **Two**, it is a good ground for an appeal rather than a review. **Three**, the point is capable of two opinions i.e the one held by this Court in the appeal on the one

hand, and the applicant's interpretation on the other hand. **Four,** the point cannot be established without indulging in a long drawn process of learned argument.

On the accusation that we relied on authorities which were not the subject of argument by counsel, our brief response will be this:- Ideally, we could have acted along the lines suggested by the applicant. In our jurisdiction however, there is no rule of law or of practice to the effect that this Court should not, in its judgment, rely upon an authority unless it was brought to the attention of counsel during hearing.

On the notice of appeal, the applicant's main complaint here is that we erred in saying that the notice is still intact when in fact it was deemed to have been withdrawn in terms of this Court's decision by a single judge in **Executive Secretary, Trust Wakf Commission, Zanzibar (Administrator of Mtendeni Mosque) v Mussa Saleh Abdalla,** ZNZ Civil Application No. 4 of 2006 (unreported). Yet again, with respect, while on the face of it this point is not ideal for a review we think it is pertinent that we address

it for the benefit of parties. In our judgment we said that going by the **practice** of the Court a deemed withdrawn notice of appeal is followed by an Order from the Court. And that going by that practice unless and until there is an Order from the Court the notice will still remain intact. The practice is based on sound reason: to ensure certainty and finality. We say so because once a notice of appeal is filed in Court it is given a serial number. So, going by Court practice, once an Order is made under Rule 84 (now Rule 91) then it will be clear and certain to everybody that there is nothing pending in Court. And normally the Order is given after a notice to show cause why the notice should not be deemed withdrawn is given by the Court. The following is a typical, or rather the sort of, Order envisaged under Rule 84:-

IN THE COURT OF APPEAL OF TANZANIA
AT ARUSHA

IN THE MATTER OF AN INTENDED APPEAL

COURT OF APPEAL SERIAL NO. 1 OF 1982

EMMANUELI THOMAS .....APPELLANT
and
ALTULELEI VILLAGE COUNCIL .....RESPONDENT

(Appeal from the decision of the High Court of Tanzania at Arusha)

(N. S. Mnzavas, JK.)

dated the 14th day of December 1981
in
Civil Appeal No. 85 of 1978

Between
ALTULELEI VILLAGE COUNCIL ..... APPELLANT
and
EMMANUELI THOMAS .....RESPONDENT

ORDER

NYALALI, C.J.

This matter comes under a Notice to show cause why the Notice of Appeal should not be deemed withdrawn under Rule 84 (a) of the Tanzania court of Appeal Rules, 1979. Notice of appeal to the Court of Appeal appears to have been given early in 1982 but up to now the intended appellant has taken no further action to pursue his appeal. Under Rule 84 (a) of the Tanzania Court of Appeal, the Notice of Appeal is now deemed to have been withdrawn.

(F. L. Nyalali)
CHIEF JUSTICE

At ARUSHA: *25/ 7/ 83*

The practice is also based on another sound reason, that is, in the absence of an Order it is not easy for the Court to know that an

intended appellant has decided to abandon the intention to appeal. In fact, a close look at Rule 84 (a) (which is now Rule 91(a) of the Court Rules, 2009) will show that there has to be an Order from the Court deeming the notice to have been withdrawn. This is evidenced by the use of the words "... and shall, unless the Court orders otherwise..." under the sub-paragraph which presuppose that there has to be an Order. Surely, the Court cannot order "otherwise" without making an Order on the deemed notice of appeal in the first place. By analogy, it is therefore correct to say that, it is for the Court, and not for the intended appellant or respondent, to say by way of an Order that a notice of appeal is deemed to have been withdrawn.

The other major limb of the application before us is that in deciding on *res judicata*, abuse of court process and on the notice of appeal the applicant was not given a hearing. This, according to the applicant, was a breach of natural justice. As we shall demonstrate briefly hereunder this complaint has no basis.

To start with *res judicata*, we wish to refer to the following paragraphs in our judgment:-

> *In the course of hearing Prof. Fimbo raised a novel point of law. That once Mandia, J. dismissed the petition for an order to set aside the award it was no longer open to the appellant to go back before the same Court (Sheikh, J.) with an application for enlargement of time to file the award... The only remedy available to the appellant was to appeal, Prof. Fimbo stressed.*

Thereafter, we recorded the applicant's response thus:-

> *In response, Mr. Michael Sullivan QC* ***submitted at length*** *on the point raised by Prof. Fimbo. In brief, he was of the general view that the order of dismissal by Mandia, J. did not amount to a final or conclusive determination of the matter... the application before Sheikh, J. was not incompetent merely because Mandia,J. had earlier on dismissed a similar application.*

(Emphasis supplied.)

It is evident here that the applicant was heard in full when Mr. Sullivan QC "submitted at length on the point". It is not therefore fair for the applicant to say that it was not heard on *res judicata*.

On abuse of Court process, we wish to begin by stating that the point did not arise before this Court for the first time. Before the High Court the applicant had ample notice of the complaint of abuse of court process. This is reflected by the averment under paragraph 29 of the counter affidavit of Mr. John Dullips Lamba in the High Court thus:-

> *29. That the application is an abuse of the process of the court; the Applicant filed a similar application previously (HC Misc. Civil cause No. 85 of 2006.; application of extension of time to file petition to set aside the arbitrator's award). It was marked withdrawn on 14th September 2006 (Hon Mandia, J.) copy of the drawn order*

which forms part of this counter affidavit is annexed hereto and marked BEL4A,BEL4B.

Further to the above averment on 26/11/2008, in the presence of Mr. Kesaria, Prof. Fimbo submitted on the point thus:- *"I would submit that the application in addition is an abuse of the process of the court..."* Before this Court, as reflected in our judgment, Prof. Fimbo raised the point again. Thereafter, we observed in our judgment that:-*"This contention drew criticism from Mr. Michael Sullivan QC, correctly in our view, that Prof. Fimbo did not elaborate or substantiate the point".* In our view, inspite of Prof. Fimbo's lack of substantiation on the point, it was still open to Mr. Sullivan QC to say something on the point because after all, as stated above, the point was not being raised for the first time. If the applicant did not seize the opportunity to say something on the point the Court should not now be blamed for the alleged failure to accord the applicant a hearing.

As for the allegation that the applicant was not heard on the notice of appeal, again we wish to begin by reflecting on its historical

Before we conclude this Ruling, we wish to observe in passing that there are a number of statements in the parties' oral submissions which are discourteous to the Court or to fellow counsel, as the case may be. For instance, in the applicant's submissions we find statements like :-

> *...There is a real risk here of this Honourable Court creating the perception or giving the impression that it is advocating for one of the parties...*

> *The reference to* ***long drawn process of learned argument*** *in* ***Patel's*** *case, does not permit the sort of obfuscation and with respect, sophistry with which the Applicant has had to deal in addressing the Respondent's submissions.*

> *The respondent's submission is both wrong and a very confused one.*

It is to be hoped that the Court will not be misled by such hopelessly confused analysis.

The Court must not be misled by this submission by the Respondent, and by its cherry picking a few sentences from a detailed analysis.

On the respondent's side we have the following statements:-

...The Notice of motion is as silent as the sphinx...

... rather than being a submission on an application for review (which it is not) the oral submission can better be described as a treatise on legal method...

With respect, going by the practice of this Court it is always expected that counsel will be courteous both to the Court and to fellow counsel.

In the end, for reasons stated, the application has no merit. We hereby dismiss it with costs.

DATED at DAR ES SALAAM this 25th day of August, 2011.

J.H MSOFFE
JUSTICE OF APPEAL

N.P. KIMARO
JUSTICE OF APPEAL

M.S. MBAROUK
JUSTICE OF APPEAL

I certify that this is a true copy of the original.

J. S. Mgetta
DEPUTY REGISTRAR COURT OF APPEAL