IN THE COURT OF APPEAL OF TANZANIA
AT ARUSHA

CIVIL APPLICATION NO. 16 OF 2013

(CORAM: MJASIRI, J.A., MUSSA, J.A., And JUMA, J.A.)

1. **HALMASHAURI YA KIJIJI CHA VILIMA VITATU**
2. **JUMUIYA YA HIFADHI YA WANYAMA PORI-BURUNGE** ..... **APPLICANTS**

VERSUS

1. **UDAGHWENGA BAYAY**
2. **LULII KISAKA**
3. **WAKIMU GIYAMU**
4. **MARCO SIKISI**
5. **GEMBULA HOTAY**
6. **GIDAJIDI GIRGIS**
7. **GWAYDESI MARCO**
8. **GIDABARDED NANAGI**
9. **GITIJI KWAYE**
10. **BUJAJI GISIMA**
11. **GIDAJURU MONGELA**
12. **GIAMU MARISHI**
13. **MABE GIYAMU**
14. **GIDAMAKERI GIDAMARIR**
15. **GIYAMU MOMOYEDA**
16. **JONAS**
17. **GIDAMUDEH QAMARIR**

..... **RESPONDENTS**

(Application from the decision of the Court of Appeal of Tanzania at Arusha)
(Msoffe, J.A, Mjasiri, J.A. And Juma, J.A.)

dated the 15th day of March, 2013
in
Civil Appeal No. 77 of 2012

.....

RULING

13th & 18th October, 2016
JUMA, J.A.:

The applicants, HALMASHAURI YA KIJIJI CHA VILIMA VITATU and JUMUIYA YA HIFADHI YA WANYAMA PORI-BURUNGE lodged this application on 22nd April 2013 by way of a Notice of Motion made under Rule 66 (1) of the

Tanzania Court of Appeal Rules, 2009 (the Rules). The applicants are seeking orders of the Court to review the Court's final decision on appeal in Civil Appeal No. 77 of 2012 which was delivered on 15th March, 2013. The application is predicated on one ground:—*"a) - The decision was based on a manifest error on the face of the record resulting in the miscarriage of justice."* The application is supported by an affidavit sworn on 17th April 2013 by DUNCAN JOEL OOLA wherein the learned advocate engaged by the applicants expounded the errors apparent on the face of the decision of the Full Court which calls for review:

> *"8. ...I verily believe that the decision of this court was based on a manifest error on the following grounds namely;-*
>
> > *a)- That this Honourable Court erred in law when it failed to consider the fact that the respondents herein did not prove lawful occupation of the disputed land.*
> >
> > *b)- That this Honourable Court erred in law and in fact when it failed to consider the fact that the said land belong to the 1st Applicant (even after it had rightly adjudged that the allocation to the 2nd Applicant was unlawfully done) and that the 1st Applicant had never allocated the said land to respondents thus the Respondents remained*

trespassers as they were declared so by the High Court.

c)- This court erred in law and in fact when it failed to consider and deliberate upon the issue of trespass contained under the 2nd ground of appeal resulting into misdirection and non-direction in its Judgment."

The application is opposed on the grounds contained in the affidavit in reply of John Faustin Materu, learned Advocate who has been representing the respondents from the time the dispute was before the trial Tribunal.

Mr. Materu disputed the two applicants' stand that the decision of the Court subject of this application "*was based on manifest material errors that needed to be reviewed by this Court*". Instead, the learned advocate supported the decision of the Court by insisting that it was a decision based on evidence that was before the two courts below. He added that this evidence proved that the purported allocation of land by the first to the second applicant, violated the procedures set out by the law.

Further, Mr. Materu averred that there was no evidence on the record from which the Court could sustain a finding that the respondents had trespassed onto

the land which the first applicant had purportedly allocated to the second applicant.

The undisputed background to the instant application traces back to a competing claim over part of the village land situated in VILIMA VITATU village at MARAMBOI in Babati District. The dispute was first presented before the District Land and Housing Tribunal (hereinafter referred to as the Tribunal) for Manyara at Babati where the village government (Village Council) known as in its Swahili name of *HALMASHAURI YA KIJIJI CHA VILIMA VITATU* (the first applicant herein) and the Wildlife Management Area for Burunge (WMA) known in its Kiswahili name of *JUMUIYA YA HIFADHI YA WANYAMA PORI-BURUNGE* (the second applicant herein) filed a suit before the Tribunal (Application No. 70 of 2008) to seek an Order to evict the seventeen (17) respondents who were considered as trespassers to the land allocated to the second applicant. The applicants had alleged in the Tribunal that the respondents herein had trespassed into the disputed area around 2006 and 2007.

The respondents filed a joint statement of defence in the Tribunal and denied that they were trespassers on the suit premises. They claimed that they

had been in lawful occupation since time immemorial and the applicants had no legal right to take their land without following the applicable laws.

On 24/7/2009 the Tribunal made its decision and declared the respondents as trespassers and ordered their immediate eviction.

The respondents were dissatisfied. They preferred their first appeal to the High Court at Arusha in Land Appeal No. 31 of 2009. The respondents were unlucky for a second time when on 24/7/2009, Ngwala, J. dismissed the respondents' first appeal. Still determined to resist their eviction on ground of trespassing, the respondents filed their second appeal (Civil Appeal No. 77 of 2012) to this Court armed with one main ground of appeal and four grounds of appeal in the alternative. In its decision on the second appeal, the Court restricted itself to the fourth alternative ground of appeal which in essence sought to determine whether there was any village meeting on 14/12/1999 as found by the first appellate Judge and whether the minutes of this meeting were properly received by the trial Tribunal.

The Court made several findings which formed the basis of its decision to allow the respondents' appeal. **Firstly,** the Court found that sections 11, 12 and 13 of the Village Land Act, 1999 which provide the manner in which the Village

Council and Village Assembly may deal with land falling under their jurisdictions came into effect on 1/5/2001. **Secondly,** the Court also found that Regulation 12 (1) of the Wildlife Conservation (Wildlife Management Areas) Regulations, 2005 [GN No. 283/2005] which were deemed to have come into operation on 24/1/2003, provides that in establishing a Wildlife Management Area in a village land, both the Village Council and the Village Assembly must be involved.

Thirdly, the Court found that in 2006 or 2007 when the respondents allegedly trespassed, the Village Land Act, 1999 and the Wildlife Conservation (Wildlife Management Areas) Regulations, 2005 were already in force. **Fourthly**, the Court found that although the Minutes of the Resolution of the Village Government dated 11/12/1999 were admitted before the trial Tribunal as an IDENTIFICATION exhibit "pending tendering of the original document." However, the original copy of the Resolution was not tendered in evidence as suggested.

The Court as a result concluded that in the absence of the record of meetings of 11//12/1999 and 14/12/1999, the allocation of the disputed land to the second applicant cannot be said to have been done by the Village Council and the Village Assembly in accordance with Village Land Act and the Wildlife Conservation (Wildlife Management Areas) Regulations, 2005.

At the hearing of this application on 13th October, 2016, Mr. Duncan Oola and Mr. Peter Kibatala, learned counsel, appeared for the applicants. Mr. John Materu, learned counsel, appeared for the respondents. It transpired that Mr. Materu acting on behalf of the respondents, had earlier on 18th July 2016 filed a Notice of Preliminary Objection contending that the application is supported by a defective affidavit. He prayed to abandon the preliminary point of objection to allow the hearing of the application for a review to proceed.

On behalf of the applicants, Mr. Oola submitted that the Court sitting on second appeal failed to recognize the statutory role of the first applicant as the overseer of the village land with power to allocate and shut out trespassers over the village land. The learned advocate submitted further that the Court had also failed to recognize that the first applicant had validly allocated the village land to the second applicant. Mr. Oola also faulted the Court for failing to make a finding that the respondents had trespassed onto the land that had been lawfully allocated to the second applicants.

Mr. Kibatala also made additional oral submissions to augment what Mr. Oola had submitted on. He urged us to regard the failure of the Court to take into account a Government Notice evidencing the allocation of disputed land to the

second applicant as an error apparent on the face of the decision of the Court calling for our review.

In response, Mr. Materu reiterated his opposition to the application, arguing that the applicants have brought their application without good cause and it should be dismissed with costs. He faulted the applicants' advocates for raising new facts which was not touched in the judgment of the Court subject of this application for review. He insisted that the decision of the Court revolved around a single issue whether there was evidence to prove that the first applicant had lawfully allocated land to the second applicant. This issue was answered in the negative because there was no evidence to prove lawful allocation.

To cement his position that the application has not shown the manifest error in compliance with the provisions of Rule 66 (1) (a) of the Rules, Mr. Materu referred us to the decisions of the Court in **Efficient International Freight Ltd and Dr. Gideon Hosea Kaunda vs. Office DU The Burundi,** Civil Application No. 23 of 2005 and **Wambura Evarist and 6 Others vs. Sadock Dotto Magai and Fishpark (T) Limited,** Civil Application No. 127 of 2011 (both unreported). Mr. Materu also referred us to a statement the Single Justice of the Court made in **Karim Ramadhani vs. R.,** Criminal Application No. 25 of 2012 (unreported) to the effect that:

"...it is not sufficient for purposes of paragraph (a) of Rule 66 (1) of the Rules, for the applicant to merely allege that the final appellate decision of the Court was 'based on a manifest error on the face of the record' if his elaboration of those errors disclose grounds of appeal rather than manifest error on the face of the decision. It is appropriate to point out that in his supporting affidavit, the applicant has neither successfully expounded the 'error on the face of the record' nor has he established any linkage between those purported grounds of review with the resulting miscarriage of justice required under paragraph (a) of Rule 66 (1) of the Rules."

Submitting in rejoinder, Mr. Kibatala reiterated the position that there is an error apparent on the record when the Court failed to consider the lawful allocation of land to the second applicant and the entry of the respondents as trespassers over land. He also reiterated the failure on the part of the Court to recognize the Government Notice as an error apparent on the record making the appellate decision of the Court fit for review.

On our part, we have considered the final appellate Judgment of the Court and the opposing parties' submissions.

The main ground for review which the applicants disclosed in their notice of motion is that *"the decision [of the Court] was based on a manifest error on the face of the record resulting in the miscarriage of justice"* This ground predicates

the motion on the ground for review provided for under Rule 66 (1) (a) of the Rules, which states:

> *66.-(1) The Court may review its judgment or order,* ***but no application for review shall be entertained except on the following grounds*** –
>
> *(a)- the decision was based on a manifest error on the face of the record resulting in the miscarriage of justice;* [Emphasis added].

It is evident from the plain reading of Rule 66 (1) of the Rules that the parameters for this Court to review its decision are very restricted. In **Charles Barnabas vs. Republic,** Criminal Application No. 13 of 2009 (unreported) the Court observed that:

> *".... review is not to challenge the merits of a decision. A review is intended to address irregularities of a decision or proceedings which have caused injustice to a party. Further to Justice Mandia's observation, I will add two other matters by way of emphasis.* ***One,*** *a review is not an appeal. It is not "a second bite", so to speak. As it is, it appears the applicant intends to "appeal" against the aforesaid decision through the back door. Our legal system has no provision for that.* ***Two,*** *with the coming into force on 1/2/2010 of the* ***Tanzania Court of Appeal Rules, 2009,*** *rule 66 (1) thereof sets out the grounds for review."*

Taking a leaf from case law, a manifest error for purposes of grounding an application for review must be an error that is obvious, self-evident, etc., but not something that can be established by a long drawn process of learned argument: **Chandrakant Joshughai Patel v. Republic,** [2004] TLR 218. The decision of the Court of Appeal of Kenya in **National Bank Of Kenya Limited v Ndungu Njau** [1997] *eKLR* can as well provide us with a persuasive guide when it stated:

> *"...A review may be granted whenever the court considers that it is necessary to correct an apparent error or omission on the part of the court.* ***The error or omission must be self-evident and should not require an elaborate argument to be established****.* ***It will not be a sufficient ground for review that another Judge could have taken a different view of the matter****.* ***Nor can it be a ground for review that the court proceeded on an incorrect exposition of the law and reached an erroneous conclusion of law.*** ***Misconstruing a statute or other provision of law cannot be a ground for review****.*
>
> *In the instant case* ***the matters in dispute had been fully canvassed before the learned Judge****. He* ***made a conscious decision on the matters in controversy*** *and exercised his discretion in favour of the respondent.* ***If he had reached a wrong conclusion of law, it could be a good ground for appeal but not for review.*** *Otherwise we agree that the learned Judge would be sitting in appeal on his own judgment which is not permissible in law.* ***An issue which has been hotly contested as in this case cannot be reviewed by the same court which had adjudicated upon it****."* [Emphasis added].

The **first** discernible guidance from above decision is that, an error on face of the record must be self-evident without the need for elaboration by arguments. **Second**, a decision of the Court is not open for review simply because a different panel of the same Court may reach a different conclusion on the same facts. **Third**, a decision of the Court is not open for review because the Court misinterpreted the provision of the law.

Back to the instant application, the expounded grounds for review which the two applicants have preferred are in their essence an appeal in disguise, and well designed to surreptitiously challenge the merit of the final appellate decision of the Court. It seems to us that proof of "*lawful occupation of the disputed land*" by the second applicant is first and foremost a ground of appeal. This ground was clearly raised in the second appeal to the Court and was dealt with by the Court when it considered the laws like the Land Act, 1999 and the Village Land Act, 1999 governing the manner in which the Village Council (VC) and Village Assembly (VA) may deal with land falling under their jurisdiction. Similarly, the Court considered the involvement of the VC and VA in designation of Wildlife Management Areas (WMAs).

The Court on pages 4 and 7 of the Judgment came out very clearly that the purported allocation of land to the second applicant was not proved, more so

because the purported meetings on 11/12/1999 and 14/12/1999 to allocate land to the second applicant was not proved in evidence:

> *"...It follows therefore that the allocation [to the second applicant] ought to have been done according to the law as propounded above. The question is whether on the basis of the record before us it can safely be said that the allocation was made in accordance with the law.*
>
> *....*
>
> *.....In conclusion therefore, in the absence of any record of the meetings of 11/12/1999 and 14/12/1999 it will be fair to say that there is no material upon which we could safely say that the allocation of the land in question was made in compliance with the dictates of the law as stipulated above. In other words, there is nothing to show that the Village Council and the Village Assembly were involved in allocation the land in issue. It was imperative that it be established first in evidence that the 1st respondent allocated land to the 2nd respondent [second applicant herein] in line with the procedures set out by the law before a suit against the appellants [respondents herein] could be sustained successfully. Apparently no such evidence was forthcoming in the case...."*

With regard to the ground of review on trespass contending that the Court, had in its final decision failed to consider the fact that the land belonged to the

VC and the VC had allocated to WMA making the respondents as trespassers, it is clear that the Court considered the question whether the respondents were trespassers when they moved onto the disputed land around 2006 and 2007.

Similarly, the ground for review claiming that the Court failed to realize that the disputed land belonged to Village Council (first applicant) is not borne out by the judgment of the Court. On page 3 of that decision, the Court highlighted the legislative basis of the control of the first applicant (Village Council) and the Village Assembly over village land especially on allocations of village land:

> *"...We propose to begin with the law governing the subject under discussion here. Our starting point will be Sections 11, 12 and 13 of the Village Land Act, 1999 which was assented by the President on 15/5/1999 and came into effect on 1st May, 2001 vide GN No. 486 of 2000. The* ***above sections provide for the manner in which the Village Council and the Village Assembly may deal with land which is within their jurisdiction****. Section 13 (5) in particular provides for the role of the Village Assembly upon receiving recommendations of the Village Council.*
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> *Under Regulation 12 (1) of the Wildlife Conservation (Wildlife Management Areas) Regulations, 2005 (GN 283/2005) which were*

deemed to have come into operation on 24th January, 2003..." [Emphasis added].

Our inevitable conclusion is that the grounds which the two applicants have preferred as grounds for review— are plainly grounds of appeal which the Court dealt with in its final decision. In the circumstance we agree with Mr. Materu that the applicants cannot, under the cover of review, be allowed to come back to the Court with the same questions which were raised and disposed of in their merit in the second appeal.

In the result, this application must fail in its entirety. It is dismissed accordingly with costs.

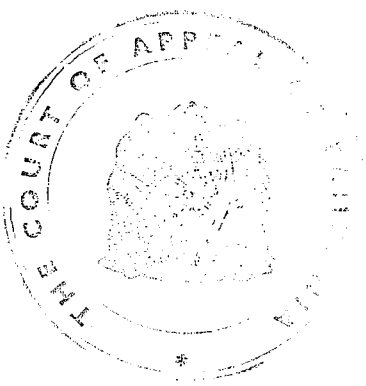
DATED at **ARUSHA** this 17th day of October, 2016

S. MJASIRI
JUSTICE OF APPEAL

K. M. MUSSA
JUSTICE OF APPEAL

I. H. JUMA
JUSTICE OF APPEAL

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



B. R. NYAKI
DEPUTY REGISTRAR
COURT OF APPEAL