IN THE COURT OF APPEAL OF TANZANIA

AT DAR ES SALAAM

(CORAM: RUTAKANGWA, J.A., LUANDA, J.A., And MMILLA,J.A.)

CIVIL APPLICATION NO. 135 OF 2016

EZEKIEL KAPUGI .....APPLICANT

VERSUS

ABDALLAH MOMBASA.....RESPONDENT

(An application for review of the judgment and order of the Court of Appeal Tanzania at Dar es Salaam)

(Rutakangwa, J.A., Luanda, J.A., And Mmilla, J.A.)

dated 12th day of April, 2016
in
Civil Appeal No. 118 of 2011

RULING OF THE COURT

14th & 28th .September, 2016

RUTAKANGWA, J.A.:-

We deem it not outlandish to preface this ruling in a review application with the instructive holding of the Federal Supreme Court of India on the overriding necessity of accepting the binding finality of decisions of the Court of last resort.

In the case of **Raja Prithwi Chand Lall Chaudhary v. Sukhraj Rai** (AIR 1941 SCI), the Court tellingly held thus:

"This Court will not sit as a court of appeal from its own decisions nor will it entertain applications for review on the ground only that one of the parties in the case conceives himself aggrieved by the decision. It would, in our opinion, be intolerable and most prejudicial to the public interest if the cases once decided by the court could be re-opened and re-heard. There is a salutary maxim which ought to be observed by all courts of last resort: ***Interestei republicae ut sit finis litium****... It concerns the State, that there be an end of law suits... its strict observance may occasionally entail hardship upon individual litigants, but the mischief arising from that source must be small in comparison with the great mischief which would necessarily result from doubt being thrown upon the finality of the decisions of such a tribunal as this."*

Though pronounced over seven (7) decades ago, we find this holding to be impeccable and providing salutary guidance to courts in common law

jurisdictions while handling review applications. It was, indeed, cited and followed by this Court and the East African Court of Justice (Appellate Division) in the cases of **Blueline Enterprises Ltd v. the E.A.D.B.,** Civil Application No. 21 of 2012 and **Angella Amudo v. The Secretary General of E.A.C.,** Civil Application No. 4 of 2015 respectively (both unreported). Both courts in their rulings reiterated with renewed emphasis the time honoured principle to the effect that a judgment of the final court, as ours, is final and its review should be a total exception. Indeed, that is the letter and spirit behind Rule 66 of the Tanzania Court of Appeal Rules, 2009 ("the Rules") under which this review application is brought.

As alluded to immediately above, this is a review application. It is brought under Rule "66(1) (a) (2)" of the Rules. The applicant is seeking a review of the Court's judgment ("the judgment") in Civil Appeal No. 118 of 2011, dated 20th April, 2016, on the ground that it *"is based on errors apparent on the face of the record resulting in a miscarriage of justice."*

We should immediately concede that the impugned judgment was, indeed, delivered on 12th April, 2016. Therefore, this application lodged on 4th May, 2016, was lodged in time in terms of Rule 66(3) of the Rules. However, we cannot vouch for the bold assertion that the "*Court's decision*

is based on errors apparent on the face of the record resulting in a miscarriage of justice." We shall demonstrate why we have found ourselves with the temerity to say so.

As we pointed out in the judgment, the applicant was dissatisfied with the outcome of his appeal to the High Court in Misc. Land Appeal No. 36 of 2007. The learned High Court judge (Mziray, J. as he then was) dismissed that appeal in a judgment delivered in the presence of the applicant on 18th June, 2010. The learned judge had thus held:

> *"I share the views of the ASSESSORS and don't find any ground to allow this appeal. It is arid of merit and accordingly it is dismissed with contempt it deserves. The dismissal is with costs."*

The appellant was made aware of his right of appeal to this Court.

The applicant's right of appeal emanates from section 47 of the Land Disputes Courts Acts Cap 216. The section provides thus:-

> *"47-(1) Any person who is aggrieved by the decision of the High Court (Land Division) in the exercise of its original, revisional or appellate jurisdiction, may*

with the leave from the High Court (Land Division) appeal to the Court of Appeal in accordance with the Appellate Jurisdiction Act.

(2) Where an appeal to the Court of Appeal originates from the Ward Tribunal the appellant shall be required to seek for the certificate from the High Court (Land Division) certifying that there is a point of law involved in the appeal.

(3) The procedure for appeal to the Court of Appeal under this section shall be governed by the Court of Appeal Rules."

Rule 83(1) and (2) of the Rules requires any person desiring to access this Court on appeal to lodge a written notice in duplicate with High Court Registrar within thirty days of the date of the decision to be appealed against. The applicant duly complied with this Rule, as he lodged the notice of appeal on **30th June, 2010.** Thereafter, on **21st August, 2011**, the applicant applied to the Registrar of the High Court to be supplied *"with all essential/necessary documents; including proceedings in application for*

certificate and certificate of delay" to enable him prepare his appeal: see page 71 of the record of appeal.

According to the certificate of delay found on page 72 of the record of appeal, the requested copies were ready for collection on 29th September, 2011. The appeal was instituted on **17th November, 2011**.

When the appeal was called on for hearing on 5th April, 2016, counsel for the respondent, Mr. Gabinus Galikano, challenged its competence claiming that it had been instituted out of time and *"the application for leave"* had been *"improperly obtained"* having been made on **26th November, 2010**, i.e. almost five months after the date of the High Court decision.

Mr. Galikano elaborately submitted thus in support of the first point of objection.

- *"The impugned judgment of the High Court was delivered on 18/06/2010.*
- *Appellant lodged the notice of appeal on 30/06/2010.*

- *The appellant applied to be supplied with copies of proceedings, judgment and decree on 21/08/2011; a copy of this letter was not sent or served on the respondent – see Rule 90(1) and (2) of the Rules.*

- *Since the letter under Rule 90(1) and (2) was not given within 30 days and a copy thereof was not served on the respondent, the appellant was supposed to institute this appeal within 60 days. This was not done, as the appeal was instituted in 2011, that is out of time."*

He accordingly, after addressing us on the second point of objection, pressed us to strike out the incompetent appeal with costs.

After being given the opportunity to respond to Mr. Galikano's submission, the applicant said:-

"I leave the matter entirely in the discretion of the Court. I believed that I had followed the law to the letter."

In our ruling, we thus held:-

"On our part, having gone through the submission of Mr. Galikano and the mandatory requirements of the law, we are increasingly of the view that this purported appeal is incompetent on account of patently being time barred, as correctly urged by Mr. Galikano. Having failed to strictly comply with the provisions of Rule 90(1) of the Rules, the appellant ought to have instituted his appeal "within sixty days of the date when the notice of appeal was lodged." Simple arithmetic leads to one conclusion. This is that the appeal ought to have been lodged by 30th July, 2010. He failed to do so. Instead, he instituted this appeal on 17th November, 2011, after thirteen months had elapsed. It goes without saying, therefore, that this appeal was lodged out of the

prescribed period. This holding alone suffices to dispose of this appeal. We find no pressing need to canvass the second point of preliminary objection."

We struck out the appeal, leaving the appellant with *"liberty to institute a proper appeal, subject to the law on limitation".* Fortunately for the applicant, each party was ordered to bear his own costs. It is this decision which the applicant is seeking to be reviewed on the ground of being based on an error manifest on the face of the record.

The only pertinent alleged errors pointed out in the notice of motion are that:-

"1. *That the Honourable Court entertained preliminary objection which were not formally raised by notice of preliminary objection (hereinafter to be referred to as* ***"ERROR NO. 1").***

2. *That the Honorable Court ignored the Certificate of Delay in Misc. Land Appeal No. 36 of 2007 in the High Court of Tanzania (Land Division) which is on the record of Civil Appeal NO. 118 of 2011 in the Court by holding that the appeal is time-barred (hereinafter to be referred to as* ***"ERROR NO. 2").***

3. *That the Honourable Court disregarded the above mentioned certificate of delay by holding that the appeal in Civil Appeal No. 118 of 2001 in the Court of Appeal ought to have been lodged within sixty days from the day when the notice of appeal was lodged (hereinafter to be referred to as* ***"ERROR NO. 3").***

4. *That the Honourable Court failed to find that the appeal in Civil Appeal No. 118 of 2011 in the Court is maintainable on the ground that a respondent waved his right of lodging notice of preliminary objection..."*

In his written submission in support of these alleged errors the applicant relied heavily on the certificate of delay found, as shown above, on page 72 of the record of appeal. However, he very conveniently, and for us for obvious reasons, avoided making even a fleeting reference to the undisputed letter requesting to be supplied with copies of proceedings, judgment and decree dated 11th August, 2011.

Indeed, a cursory glance at the much relied on certificate of delay, would instantly lead a non- discerning mind to the conclusion that we erred in our ruling for holding the appeal time barred. But we never rushed to our conclusion, on this matter as we were alive to the salutary adage to the

effect *"More haste, less speed".* We were wary of a review proceeding. Alas, we were in error on this as this application amply demonstrates.

Going back to the much trumpeted certificate of delay, we are confident that it speaks for itself, although in our respectful opinion it tells a lie about itself. In full, it reads as follows:

> ***"CERTIFICATE OF DELAY***
>
> *Made under rules 90(1) of the Court of Appeal Rules 2009.*
>
> *This is to certify that the period from 30th day of June, 2010 when copies of proceeding, Judgment and Decree were applied for purposes of appeal to 29th day of September, 2011 when such documents were ready for collection be excluded when calculating the period of appeal for such days were required for purposes of preparing the said judgment and proceeding.*
>
> *Given under may hand and seal of the Court this 30th day of September, 2011.*

D.E. Mrango
REGISTRAR."

We believe that it will be accepted without straining one's mind that although the requisite copies were ready for collection on 29th September, 2011, the same were not applied for on 30th June, 2010. We found nothing in the record of appeal to support this. What there is on record is the undisowned letter dated 21st August, 2011 found on page 71 and in the index appearing as item No. 19 which was written after thirteen (13) months following the High Court decision. Worse still, it was not even copied to, let alone served on, the respondent.

At the hearing of the appeal and this application, we pressed the appellant/applicant to produce for our perusal a copy of the letter dated 30th June, 2010, but he had none. What has become obvious to us is that the Registrar took the notice of appeal lodged on 30th June, 2010 to be tantamount to the application letter envisaged under Rule 90(1) of the Rules. For purposes of appeals to this Court, the two are distinct documents serving two different purposes.

In the light of the above conclusive findings, we are settled in our minds that the applicant is seeking the review not on account of an error apparent on the face record (i.e. in our ruling). He is only looking for a back door to re-argue his unsuccessful appeal in an attempt to get a substitute view. On this he cannot succeed as that is not within the scope of review jurisdiction: see, for instance:-

(i) **Meera Bhanja v. Nirmala Kamari Choudry,** (1955)ISC (India),

(ii) **Independent Medical Unit v. Attorney General of Kenya,** Application No. 2 of 2012 (E.A.C.J.),

(iii) **Peter Ng'homango v. Gerson A.K. Mwanga & Another,** [CAT] Civil Application No. 33 of 2002 (unreported),

(iv) **Devender Pal Singh v State, N.C.T. of New Delhi & Another**, India S.C. Review Petitions No. 497, 620 and 627 of 2002, etc.

We should conclude this short discourse enlightening the applicant on this basic truth. In review jurisdiction, mere disagreement with the view of the judgment cannot be the ground for invoking the same. As long as the point raised in the application has already been dealt with and answered in

the impugned decision, the parties are not entitled to challenge the decision in the guise that an alternative view is possible under the review jurisdiction: see, **Kamlesh Varma v. Mayawati & Others,** Review Application No. 453 of 2012 (India S.C.), **Angella Amudo** (supra), etc.

All said and done we find this application demonstrably wanting in merit. It is accordingly dismissed with costs.

DATED at **DAR ES SALAAM** this 20th day of September, 2016.

E.M.K. RUTAKANGWA
JUSTICE OF APPEAL

B.M. LLUANDA
JUSTICE OF APPEAL

B.M. MMILLA
JUSTICE OF APPEAL

I certify that this is a true copy of the original

B. R. NYAKI
DEPUTY REGISTRAR
COURT OF APPEAL