IN THE COURT OF APPEAL OF TANZANIA

AT DAR ES SALAAM

(CORAM: JUMA, C.J., MUSSA, J.A. And MUGASHA, J.A.)

CIVIL APPLICATION NO. 20 OF 2014

OTTU ON BEHALF OF P. L. ASENGA & 106 OTHERS ..... 1ST APPLICANTS

SUPER AUCTION MART & COURT BROKERS ..... 2ND APPLICANT

THE ROYALE ORCHARD INN LIMITED ..... 3RD APPLICANT

AMIKAN VENTURES LIMITED ..... 4TH APPLICANT

VERSUS

AMI (TANZANIA) LIMITED ..... RESPONDENT

(Application for Directions, Interpretation and Review from the separate Rulings and Order of the Court of Appeal of Tanzania, at Dar es Salaam)

(Luanda, Mussa, Juma, JJ.A.)

dated the 19th day of December, 2013
in
Civil Application No. 151 of 2013

.....

RULING OF THE COURT

8th February & 18th April, 2019

MUSSA, J.A.:

This is an unusual application in that, by the same token, it seeks for directions, interpretation and a review arising from the decision of the Court [Luanda, J.A., Mussa, J.A. and Juma, J.A. (as he then was)] comprised in Civil Application No. 151 of 2013 and dated the 13th December, 2013. The application is by a Notice of Motion which has

been taken out under the provisions of Rules 4 (1) & (2) (a), (b) & (c) and 66 (1) (a), (b) & (c) and (2) of the Tanzania Court of Appeal Rules, 2009 (the Rules). To facilitate a quick perspective of what this matter is all about, a brief background is necessary:-

Mr. Peter Leina Assenga and 106 others, who are referred amongst the applicants, were employees of AMI Tanzania Ltd, the respondent herein, until May, 1995 when they were terminated by way of redundancy. Through Enquiry No. 18 of 1995, OTTU, then an umbrella organization of Trade Unions, took up the matter and contested the retrenchment exercise in the defunct Industrial Court of Tanzania on behalf of Mr. Assenga and his colleagues. In a verdict handed down by Mr. Tendwa, who was then a Deputy Chairman of the Industrial Court, the Enquiry was dismissed on the 17th June, 1977. Dissatisfied, the first applicant initially mounted Civil Appeal No. 7 of 1977 in the High Court which was, however, struck out for want of a copy of a decree. Undaunted, the first applicant refreshed the beleaguered appeal with another Civil Appeal, numbered 96 of 1998. On the 21st August, 2000 the High Court sitting at Dar es Salaam, (**Katiti, J.**) allowed the appeal and set aside the decision of the

Industrial Court. The late Judge was not minded to grant a reinstatement of the retrenches; rather, the respondent was ordered to pay compensation in lieu of reinstatement in terms of section 25 (a) of the Security of Employment Act.

Aggrieved, the respondent preferred Civil Appeal No. 76 of 2002, which was, however, struck out by this Court for not being in the company of a decree. Subsequently, the ill – fated appeal was refreshed with another one, namely, Civil Appeal No. 54 of 2004 but, once again, the second bite was befallen by the same plight of being struck out on account of incompetence. Accordingly, the respondent's efforts to impugn the decision of **Katiti, J.** by way of an appeal, ended in vain.

In the meantime, the first applicant had initiated the wheels of justice towards the execution of the won decree by seeking, from the High Court, a quantum of payments to the tune of a sum of Shs. 5,071,273,684/=. In response, the respondent resisted the quest upon objection proceedings comprised in Civil Application No. 96 of 1998 through which it was contended, *inter alia*, that the judgment of **Katiti, J.** was, after all, declaratory and, thence, incapable of being

executed. Nonetheless, the High Court, (**Rugazia, J.**) was disinclined and, in the upshot, the objection proceedings were dismissed. More particularly, in its Ruling delivered on the 24th November, 2010 the High Court confirmed the first applicant's compensatory claim and ordered the execution of the decree in appeal by attachment and sale of several of the respondent's properties. The second applicant was appointed to broker the sale and, in the aftermath, three immovable belongings of the respondent, all of them situate within Dar es Salaam City were lined up to be auctioned for sale on the 26th December, 2010. Whereas two of the immovable premises were on plots 6 and 7, Upanga area, the third property was comprised in certificate on title No. 26240 and situate at Baobab village, Masaki area. The way it appears, despite an attempted obstruction from the respondent, the auction and sale were conducted by the second applicant as scheduled, whereupon, the third and fourth applicants emerged as purchasers. Nevertheless, a little later, on the 7th February, 2011 the respondent successfully secured an order of the High Court, (**Twaib, J.**) setting aside the sale on account of irregularities.

Dissatisfied, the applicants mounted Civil Application No. 35 of 2011, seeking an order of this Court in revision, to impugn the February 7th verdict of the High Court. At the conclusion of the deliberations, the Court was of the view that the High Court, (Labour Division) was the one mandated to execute the decree in appeal in terms of Rule 48 (3) of the Labour Court Rules, 2007. Thus, in a Ruling dated the 16th February, 2012 this Court, (**Munuo, Luanda and Massati, JJ.A.**), in the exercise of its revisional jurisdiction under section 4 (3) of the Appellate Jurisdiction Act, 1979, nullified the entire execution proceedings below, as it were, setting aside the proclamation of sale as well as the subsequent order of **Twaib, J.** which set aside the sale. It was further ordered that the decree in appeal be transmitted to the Labour Division of the High Court so as to give allowance to the applicants, just in case they were minded to refresh the execution process.

As it turned out, for whatever cause, the applicants were still discontented, whereupon, on the 12th April, 2012 they preferred Civil Application No. 44 of 2012, seeking to move this court to review its own decision comprised in Civil Application No. 35 of 2011. The thrust

of the claim was that the invocation of Rule 48 (3) of the Labour Court Rules, 2007 was resorted to by the Court *suo motu*. Thus in essence, Civil Application No. 44 was premised on a complaint that the applicants herein, who also featured as applicants in Civil Application No. 35 of 2011, were effectively and improperly deprived an opportunity to be heard with respect to the issue of the applicability of the referred Rule 48 (3).

Having heard either side, the Court [**Luanda, J.A., Mussa, J.A. and Juma, J.A**. (as he then was)] was, in effect, impressed by the argument and shared the applicants' sentiments with respect to the non – compliance with the *audi alteram partem* rule at the hearing of Civil Application No. 35 of 2011. In the upshot, the Court was minded of the following view:-

> *"This Court did not consider the grounds raised and the submissions of the parties. In its stead it revised the entire High Court proceedings suo motu and invoked its revisional powers under section 4 (3) of the Appellate Jurisdiction Act, Cap. 141 R.E. 2002 by nullifying all execution proceedings, proclamation of sale and the*

*Ruling and Order of the High Court (**Twaib, J.**) and in terms of Rule 48 (3) of the Labour Rules and ordered the transmission of the decree in appeal to the Labour Division of the High Court for execution..."*

In the premises, the application for review was granted and, accordingly, the Court vacated its verdict in Civil Application No. 35 of 2011 along with all orders made thereof which were, accordingly, quashed and set aside. Rather remarkably, the Court did not end there but proceeded further with this:-

"But the Court did not at all discuss and made decision in respect of the revisional proceedings filed by the applicants. We find proper and appropriate under the circumstances to discuss and make a decision otherwise the said application namely Civil Application No. 35 of 2011 will be hanging in the air. Fortunately the parties had already made their submissions."

The Court then entered the arena of a detailed consideration of the decision of **Twaib, J.** at the end of which it invoked the Court's revisional jurisdiction and quashed the proceedings of the High Court. In consequence thereof, the Court declared that the auction was

properly carried out and that the buyers of the properties were bona fide purchasers for value. In the end result, the Court directed the High Court to finalise the execution process in conformity with the dictates of Rules 90 (1), 92 and 93 of Order XXI of the Civil Procedure Code.

It was, thence, the respondent's turn to lock horns with the foregoing decision of the Court. In effect, she preferred Civil Application No. 151 of 2013 through which she sought a review of a portion of the Court's decision in Civil Application No. 44 of 2012. To justify her quest, the respondent stated that the impugned application was kind of hybridized in that two verdicts of different dimensions were actually pronounced in the same decision. There was first, a portion of the decision which vacated Civil Application No. 35 along with its accompanying orders. Second, she submitted, there was the other limb of the decision through which the Court invoked its revisional jurisdiction and quashed the proceedings of the High Court presided over by **Twaib, J**. The respondent then argued that she was not seeking a review of that portion of the decision in Civil Application No. 44 of 2012 through which Civil Application No. 35 of 2011 was

vacated along with its accompanying orders. On the contrary, the mainstay of her application was, rather, as against the second limb of the decision through which the Court invoked its revisional jurisdiction, whereupon the proceedings of the High Court and the decision of **Twaib, J.** were quashed and set aside with a further order that the High Court should proceed to finalise the execution process.

The application was, nevertheless, vigorously resisted through affidavits in reply and, in addition, the applicants enjoined a preliminary point of subjection to the effect that the application was barred by Rule 66 (7) of the rules which provides that a decision made by the Court on review shall be final and no further application for review shall be entertained in the same matter.

Incidentally, the application was placed before the same panel, that is, **Luanda, J.A. Mussa, J.A. and Juma, J.A.** (as he then was). Upon deliberations, their lordships compiled separate Rulings and, as it were, Mussa, J.A. and Juma, J.A. (as he then was) separately overruled the preliminary objection and, for different reasons, they both upheld the application for review with an order that Civil Application No. 35 of 2011 should be accorded a fresh hearing in terms

of Rule 66 (6) of the Rules. For his part, Luanda, J.A. compiled a dissenting Ruling in which he upheld the preliminary objection and, accordingly, dismissed the application. Thus, to say the least, in the majority decision, the Court allowed the application for a review of a portion of its own decision with an order to have Civil Application No. 35 of 2011 reheard.

With so much by way of a factual background, as we have hinted upon, the applicants are still discontented and they presently seek a litany of reliefs for directions, interpretation as well as a review. For a better apprehension of what the application is all about, it is, perhaps, pertinent to reproduce their Notice of Motion in full:-

> ***"TAKE NOTICE*** *that o the ..... day of ..... 2014 at ..... O'clock in the morning/afternoon or as soon thereafter as can be heard, Mr. Rosan Mbwambo, Mr. Martin Matunda/Mr. Mpaya Kamara, Mr. Erasmus Buberwa and Mr. Sylvester Shayo Advocates for the above named First, Second, Third and Fourth Applicants, respectively will move the Court for Orders that this Honourable Court may be pleased to:-*

(i) *Direct a departure from the provisions of the Court of Appeal Rules, 2009 in the interest of justice;*

(ii) *Give directions and interpretation as to what is the decision of the Court out of the three separate rulings and orders delivered on 19th December, 2013 (Luanda, Mussa and Juma, JJ.A.) in Civil Application No. 151 of 2013;*

(iii) *Give directions as to whether hearing de novo of Civil Application No. 35 of 2011 is at law amenable given the fact that the sale had already been confirmed and thus absolute; and the Certificates of Sale had been issued to the Third and Fourth Applicants.*

(iv) *In view of the findings and reasoning in the Ruling of Justice Juma, J.A. give directions as to whether it is only Civil Application No. 35 of 2011 which should be heard de novo or even Civil Application No. 44 of 2012;*

(v) *Make any order which it considers necessary and appropriate in the circumstances of this matter; and*

(vi) *Review its own separate Rulings and Orders delivered on 19th December, 2012 in Civil Application No. 151 of 2013 (Luanda, Mussa and Juma, JJ.A.).*

On the grounds that:-

(a) *Circumstances surrounding this matter and in particular separate, conflicting and irreconcilable Rulings/Decisions delivered by this Court on 19th December, 2013 demonstrate that this is a fit case for this Honourable Court to direct a departure from the provisions of Rule 66 (7) the Court of Appeal Rules, 2009 on finality of decision of the Court on review;*

(b) *Through no fault on their part, the Applicants were subjected to unfair procedure in that the two separate Rulings of Mussa and Juma, JJ.A. unlike that of their brethren Luanda, J.A. did not give reasons why they are differing with the considered opinions of their brethren, Luanda, J.A. hence breaching their respective duty to act judicially; thereby giving to the parties impression that the decision in Civil Application No. 151 of 2013 depended more on the personalities of the justices than on the law of the land.*

(c) *The separate rulings of the Court in Civil Application No. 151 of 2013 constitute no decision of the Court as required by Rule 39 of*

the Rules for being conflicting and contradictory on their respective reasoning in as much as:-

(i) It is not clear whether or not there is finality on review because while Luanda and Mussa, JJ.A. find that there is finality on review, Juma, J.A. does not share that position;

(ii) While Mussa, J.A. finds that the Court's decision in Civil Application No. 44 of 2012 had two limbs i.e. review and revision of Civil Application No. 35 of 2011 whose decision is reviewable, Juma, J.A. does not share that position in his ruling as he finds that Civil Application No. 35 of 2011 was reviewed in Civil Application No. 44 of 2012;

(iii) While Juma, J.A.'s reasoning throughout his decision is that the parties were not heard on the applicability or Rule 48 of the Labour Court Rules, 2007 as well as on Rules 90 (1), 92 and 93 of Order XXI of the Civil Procedure Code, Cap 33 R.E. 2002 only, yet he supports Mussa, J.A. in ordering hearing of Civil Application No. 35 of 2011 afresh;

(iv) While Mussa, J.A. holds that parties were not heard at all in Civil Application No. 35 of 2011, Luanda, J.A. holds that parties

were duly heard. Juma, J.A. on his part finds that the parties were heard only that the two of them i.e. Mussa and Juma, JJ.A. were not present and thus the Respondent was denied opportunity; to be heard making it a reason for the hearing afresh;

(v) *It is also not clear from the two separate rulings of Mussa and Juma, JJ.A. whether or not the Respondent and or the parties were denied an opportunity to be heard in respect of (a) applicability of Rule 48 of the Labour Court Rules, 2007, or (b) Rules 90 (1), 92 and 93 of the Civil Procedure Code, Cap 33 R.E. 2002 (CPC); or (c) the whole of Civil Application No. 35 of 2011; and or (d) Civil Application No. 44 of 2012;*

(vi) *Further that from the two separate rulings of Mussa and Juma, JJ.A. it is uncertain whether rehearing should be (a) on the whole of Civil Application No. 35 of 2011; or (b) on applicability of Rule 48 of the Labour Court Rules, 2007; and or (c) applicability of Rules 90 (1), 92 and 93 of the Civil Procedure Code, Cap. 33 R.E. 2002 (CPC); and*

(vii) *Also that from the two separate rulings of Mussa, J.A. and Juma, J.A. it is uncertain whether it is the entire Civil Application No. 35 of 2011 which should be heard de novo or a portion of Civil Application No. 44 of 2012 complained against by the Respondent in Civil Application No. 151 of 2013.*

(d) *That following the decision in Civil Application No. 44 of 2012 the sale was confirmed and made absolute; and Certificates of Sale had been issued well before the filing of Civil Application No. 151 of 2013. Yet the two separate rulings of Mussa, J.A. and Juma, J.A. did not make any finding on that fact and the relevant law applicable.*

(e) *That the decision was procured by perjury in as much as the Respondent through its advocates lied on oath that the Court did not give the Respondent an opportunity to be heard before determining Civil Application No. 35 of 2011 while the records were all clear that both parties were heard both orally and in writing as per the requirements of the Rules;*

(f) *The cardinal rules of natural justice were breached in that:-*

(i) *The Court Mussa and Juma, JJ.A. based its decision on the reasoning that in Civil Application No. 44 of*

2012 the only ground of complaint was that the Applicants were not heard on the applicability of Rule 48 of the Labour Court Rules, 2007 while other grounds were presented and argued by both parties;

(ii) *There was apparent double standard on the part of the Court (Mussa and Juma, JJ.A.) because while considering, analyzing and wholesome agreeing with the affidavits and submissions of the Respondents' Affidavits, submissions and authorities. They did not consider at all (a) the facts constituting proof that the parties were duly heard in Civil Application No. 35 of 2011; and (b) arguments on the issue of jurisdiction of the executing in Civil Application No. 44 of 2012;*

(iii) *The Court (Mussa and Juma, JJ.A.) ignored clear and uncontroverted evidence on record that the sale has been confirmed and Certificates of Sale had long been issued thereby making no finding on the position of the relevant law governing such a situation;*

(g) The Decision of this Court is based on manifest error on the face of the record resulting in miscarriage of justice for:-

(i) Failure to consider the scope and application of Rule 66 (6) of the Court of Appeal Rules, 2009 on the powers of the Court to rehear or modify/amend its earlier decision or to make any order as it deems appropriate after granting review without necessarily hearing the parties afresh in deserving circumstances.

(ii) Failure to consider scope and application of the provisions of Order XXI Rules 90 (1), 92 and 93 of the Civil Procedure Code, Cap. 33 R.E. 2002 (CPC) thereby entertaining Civil Application No. 151 of 2013 and ordering de novo hearing of Civil Application No. 35 of 2011 which had already been overtaken by events because the sale had been confirmed and Certificate of Sale had long been issued.

(iii) Failure to consider relevant law on the procedure of hearing of an application in the Court of Appeal, that is Rule 106 of the Court of Appeal Rules, 2009 thereby holding that Civil Application No. 35 of 2011 should be heard de novo while in fact the parties were duly heard both by way of written submissions and orally;

(iv) *Failure to consider the relevant law on the constitution of the Court on Review*

particularly Rule 66 (5) of the Court of Appeal Rules, 2009 thereby holding that because two of the justices of appeal, Mussa and Juma, JJ.A. did not sit in the bench that heard Civil Application No. 35 of 2011 then the Respondent was denied the right to be heard." [Ephasis Supplied]

The foregoing lengthy and verbose Notice of Motion is supported by three sets of affidavits. The first set was sworn by Mr. Peter Liena Assenga on the 17th February 2014; the second was affirmed by Mr. Mustafa Omar Nyumbamkali on the same date; and the third was jointly affirmed by Messrs. Mustafa Rashid and Abdulsalami Mohamed Abeid, again, on the same date.

The Notice of Motion is being resisted by the respondent through two affidavits in reply sworn by Ms. Angeline Kavishe Mtulia on the 21st May, 2014. In addition, on the 23rd June, 2014 the respondent lodged a notice of preliminary points of objection to the following effect:-

"(i) In view of Rule 48 (1) of the Tanzania Court of Appeal Rules, 2009 the applicants application is incurably defective for non-

citation of the specific rule under which it is brought.

(ii) In view of Rule 66 (7) of the Tanzania court of Appeal Rules, 2009 the decision of this Court in Civil Application No. 151 of 2013 dated the 19th December, 2013 which reviewed the court's decision in Civil Application No. 35 of 2011 is final and not amenable to the further application for review.

(iii) That in view of Rule 66 (1) of the Tanzania Court of Appeal Rules, 2009 the separate ruling of Luanda, J. dated 19th December, 2013 in Civil Application No. 151 of 2013 is not a decision of the Court is not amenable review."

On the 9th September, 2016 the respondent lodged an additional notice of preliminary points of objection in which she complained:-

(i) The Applicants' application is bad in law for being filed by the 1st applicant whose identity is not known.

(ii) In terms of Rules 44-66 of the Tanzania Court of Appeal Rules, 2009 the Applicant's application is

incurably defective for being on omnibus application

Each party from either side has lodged written submissions to support or counter the application as well as the preliminary points of objection and, when the application was placed before us for hearing, the first to fourth applicants were, respectively, represented by Messrs Rosan Mbwambo, Mpaya Kamara, Erasmus Buberwa and Sylvestor Shayo, all learned advoctes. On the adversary side, the respondent had the services of Messrs Julius Kalolo Bundala, Gaudiosius Ishengoma and Abdon Rwegasira, also learned Advocates. It is, perhaps, pertinent to express at once that counsel from both sides fully adopted the entire sets of documents which were, respectively, lodged either in support or to counter the application as well as the preliminary points of objection.

At the outset and, in the wake of a consensus reached by counsel from either side, we intimated and ordered that both the preliminary points of objection and the substantive application will be heard in turns. That is to say, in the event we are minded to uphold the preliminary points of objection, it will suffice to dispose of the

application on account of incompetence. Conversely, if the preliminary points of objection are declined or otherwise found to be inconsequential, the Court shall proceed to determine the substantive application on the merits.

For a start, we propose to first address the first limb of the preliminary objections filed on the 23rd June, 2014 which complains of non-citation of the enabling provision under which the application was predicated. As we have already intimated, the application is actually predicated upon several provisions. The gist of the respondent's complaint is summarized in the following words:-

> *"Citing all eight provisions, including Rule 4(2)(b) and 4(2)(c) of the Rules, which do not even apply to support any of the prayers sought in the Applicant's notice of motion,* ***amounts to wrong citation which renders an application incompetent".***

To buttress her argument, the respondent sought reliance in the unreported Civil Reference No. 22 of 2005- **China Henan Cooperation Group v. Salvand Rwegasira** where, undoubtedly, the Court held that it is now settled that wrong citation of a provision

of the law or rule under which the application is made renders the application incompetent.

In response, the applicants did not wish to directly confront the seemingly simplistic argument of the respondent. They, instead, sought to justify the predication of the application with the up and coming principle of the overriding objective which was introduced into our legislation by the Written laws (Miscellaneous Amendments) (No.3) Act, No.8 of 2018. It is noteworthy that under the referred Act No. 8 of 2018, the Appellate Jurisdiction Act, Chapter 141 of the Laws R.E OF 2002 (the AJA) was amended to introduce the overriding objective of the Act in a new section 3A. The applicants submit that the new principle was recently embodied into case law by the unreported Civil Appeal No. 55 of 2017 – **Yakobo Magoiga Kichere v. Peninah Yusuph**. The principle, it was further submitted, is not a newly invented wheel for, way back, it was reiterated by Bowen L.J. in the English decision of **Cooper v. Smith** (1884) 26 Ch. D. 700:-

> *"Now, I think it is a well – established principle that the object of courts is to decide the rights of parties, and not to punish them for mistakes they*

make in the conduct of their cases by deciding otherwise than in accordance with their rights. Speaking for myself, and in conformity with what I have heard laid down by the other division of the court of Appeal and by myself as a member of it, I know of no kind of error or mistake which if not fraudulent or intended to overreach, the court ought to correct, if it can be done without injustice to the other party. Courts do not exist for the sake of deciding matters in controversy."

For our part, we ask ourselves: Is it necessary, in the first place, to invoke the principle of overriding objectives in the Circumstances of the case at hand? With respect, we think not for, as we have hinted upon, the applicants seek directions, interpretation and review under various provisions of Rules 4 and 66 of the Rules. The cited provisions of Rule 66, in our view, sufficiently address the quest for review, whereas we similarly think that the referred provisions of Rule 4 of the Rules sufficiently cater for the applicants' request for directions and/or interpretation. The application, so to speak, meets the requirements of Rule 48(1) of the Rules and, for that matter, we find the preliminary point of objection which complains of wrong

citation to be without a semblance of merit and the same is, accordingly, overruled.

In the second limb of the preliminary points of objection which were lodged on the 23rd May, 2014 the respondent complains that the separate Rulings of Mussa, J.A and Juma, J.A (as he then was) are not subject to review. In the same token, albeit for a different reason, in the third limb of the same preliminary points of objection, the respondent further complains that the dissenting opinion of Luanda, J.A. is also not subject to review. It is noteworthy that both complaints correspond to the applicants' prayer which is comprised in items (i) and (vi) of the Notice of Motion which impresses upon the Court to depart from the provisions of Rule 66(7) of the Rules and review its own separate Rulings and Orders delivered by Luanda, J.A., Mussa, J.A and Juma, J.A. (as he then was). That being so, we deem it apposite to defer the determination of items (ii) and (iii) of the respondent's objection to a later stage so as to determine them along with the applicant's prayer for review.

That said, we next move to consider the preliminary points of objection which were lodged by the respondent on the 9th September,

2016. In the first limb of the two preliminary points of objection the respondent faults the applicants for not disclosing the **"106 others"** who preferred the application along with Mr. Assenga. In addition, the respondent criticizes the applicants for featuring OTTU who, she alleges, "*ceased to exist in 2001 when it was replaced by TUCTA.*" To buttress her criticism, the respondent sought reliance in the unreported Criminal Appeal No. 345 of 2009- **Hsu Chin and 36 others v. The Republic**. In that case, the Court declined to entertain the appeal on account that the referred **"36 others"** were not mentioned by name in the notice of appeal.

In response to the foregoing criticism, the applicants give three short answers: **First**, that question of the identity of the applicants is improperly raised as a preliminary point of objection the more so as it is not a pure point of law. The identity of OTTU and the 106 others, they submitted, is a question of fact which needs to be ascertained and cannot, therefore, be raised as a preliminary point of objection. To fortify this particular contention, the applicants referred us to the case of **Mukisa Biscuit Manufacturing Company Ltd. v. West End Distributors Ltd** [1969] EA 696. **Second**, the applicants

contend that the question as to the identity of the 1st applicant was dealt with by the Industrial Court way back on the 21st January 1997. Small wonder, they further submit, this question has not been at issue throughout the proceedings of this matter which has been on the court corridors since 1995 when the case was started. In sum, the applicants conclude that the raised concern about the identity of the 1st applicant has been overtaken by events, and in the circumstances, the respondent should be estopped from raising it at this last stage of the proceedings. **Third**, the applicants distinguish the case of **Hsu chin and 36 others** (supra) on the ground that the same was a criminal appeal to which different considerations apply.

Having considered the learned rival arguments on this preliminary point of objection, we entirely subscribe to the contention of the applicants that the issue of the identity of the 1st applicant is not a pure point of law which is fit to be raised as a preliminary point of objection. As was held in the case of **Mukisa Biscuit** (supra):-

> *"A preliminary objection is in the nature of what used to be a demurrer. It raises a pure point of law which is argued on the assumption that*

all the facts pleaded by the other side are correct. It cannot be raised if any fact has to be ascertained."

In the situation at hand, the allegation, for instance, that OTTU is non-existent was not raised at all in the affidavits in reply and, as of necessity, the same needs to be ascertained. Likewise, the names of the 106 others, on whose behalf OTTU stands for, needs to be ascertained.

Besides, as correctly formulated by the applicants, throughout the conduct of this matter, the issue of the identity of the first applicant did not feature at all. We note that, on several occasions, the respondent herself instituted proceedings against the first applicant under the same caption. Such was, for instance, the case in **Civil Appeal No. 96 of 1998** before **Rugazia, J.**, **Civil Appeal No. 96 of 1998** before **Twaib, J.**; and Civil Application No. 151 of 2013 before the Court. In all these instances the respondent instituted action against the first applicant whom he captioned: "**OTTU on behalf of P.L. Assenga & 106 others**". To this end, we agree with the applicants that the respondent cannot be allowed to make a turn about at this last stage of the matter. We also share their views that the

case of **Hsu Chin and 36 Others** is distinguishable. That was a criminal case to which a notice of appeal institutes an appeal and, is, accordingly, governed by different considerations. In fine, the preliminary point raised with respect to the identity of the first applicant is similarly overruled.

Finally, is the preliminary point of objection which complains that the application is incurably defective for being omnibus. The preliminary point of objection is premised on the combined applicants' prayers for directions, interpretations and review. The respondent contends that such an omnibus quest is not permissible and, in that regard, she referred us to the unreported Civil Application No. 98 of 2010 - **Rutagatina V Advocates Committee and Clavery Mtindo Ngalapa.** In that case, the court took the position that there is no room in the rules for a party to file an omnibus application. Nonetheless, in an earlier unreported Civil Appeal No. 103 of 2004 - **MIC Tanzania Ltd V Minister for Labour and Youth Development and another,** the Court had taken a different stance. Incidentally, the judgment of the Court was preceded by a Ruling of the High Court in which Mapigano, J. had stated:-

> *" In my opinion, the combination of the two application is not bad in law. I know of no law that forbids such a course. Courts of law abhor multiplicity of proceedings. Courts of law encourage the opposite."*

On appeal, the Ruling of the High Court was upheld by the Court in the following observation:-

> *"...unless there is a specific law barring the combination of more than one prayer in one chamber summons, the courts should encourage this procedure rather than thwart it for fanciful reasons. We wish to emphasize, all the same, that each case must be decided on the basis of its own peculiar facts."*

As it turns out, the applicants seek to rely on the foregoing decision and would wish us to distinguish **Rutagatina** (supra) particularly on account that the latter case was decided on its own peculiar circumstances in that one of the applications in the combined quest ought to have been placed before a single judge. In the matter presently under our consideration, having considered the three prayers which are being sought by the applicants, we are satisfied that the

circumstances of the case at hand are not a hindrance to the hearing of the omnibus prayers and, accordingly, the preliminary objection on the point is also overruled.

In sum from the foregoing, we have overruled all the preliminary points of objection, save for items (ii) and (iii) of the first set of the preliminary points of objection which we deferred their determination to a later stage. It should also be recalled that we took the position that the deferred preliminary points of objection correspond to items (i) and (vi) of the Notice of Motion whose determination will be consolidated with the deferred preliminary points of objection. That said, we now advance further to a consideration of item (ii) of the Notice of Motion which seeks directions and interpretation as to what is the decision of the Court out of the *"three separate Rulings and orders delivered on the 19th December, 2013".*

From the tone of the Notice of Motion, we note that the applicants are under a misapprehension as to what entails a decision or *ratio decidendi* of a case. Thus, to avert the misconstruction, we are constrained to preface our consideration with a word or two on the

quite elementary subject as to what constitutes a judicial opinion and, ultimately, a decision of the Court.

Judicial opinions (also known as legal opinions or legal decisions) are written decisions authored by judges explaining how they resolved a particular legal dispute and explaining their reasoning. An opinion tells the story of the case: What the case is all about, how the court resolved the same and why.

There are a variety of judicial opinions but the most common and relevant to our discussion are the majority and dissenting opinions. In law, a majority opinion is a judicial opinion agreed to by more than half of the members of a court and, to that extent, the same sets forth the decision of the court and an explanation of the rationale behind the courts' decision. Conversely, a dissenting opinion is an opinion written by one or more judges expressing disagreement with the majority opinion. A dissenting opinion does not create binding precedent nor does it become part of the decision of the court (See **Wikipedia at https//en.wikipendia.org.**).

What is more, Article 122 of the constitution of the United Republic provides that in every appeal, a matter which requires the

decision of the Court shall be decided on the basis of the majority opinion of the justices of appeal hearing the appeal. Rule 39(3) further clarifies that in civil applications and civil appeals separate judgments shall be given by the members of the court unless, the decision being unanimous, the presiding Judge directs otherwise.

From the foregoing brief treatise on judicial opinions, several factors are either directly or implicitly discernible: **First,** a judicial opinion may either be embodied in an unanimous single judgment of the Court or separate opinions of the members of the Court. A common feature of the latter form of opinions is that, often times, the members are bound to differ in their reasoning but, that does not necessarily imply a lack of the majority decision of the court. If we may pose here and interject a remark, in this regard, it is quite unfortunate that throughout their submissions, the applicants are under a misapprehension that on account of the differing reasoning of the members of the court, no decision of the Court is ascertainable from the separate opinions. As we shall shortly demonstrate, the majority decision of the Court easily obtains from the separate

opinions of Mussa, J.A. and Juma, J.A. (as he then was) and the same is upon several issues which we will elaborate.

Secondly, a decision of the Court is comprised in the majority opinion of the members as opposed to the dissention opinion of the minority members which is not part of the decision of the Court. Thus, where a matter is decided upon separate judgments/rulings, the majority decision will be ascertained from the concurrent conclusions of the members of the Court.

Thirdly, it is the author of the dissenting opinion, not those of the majority opinion, who is obliged to assign reasons for his/her dissent. In this regard, we find it apposite to disapprove the apparent misconception raised by the applicants in paragraph (b) of the Notice of Motion to the effect that, in the separate Rulings, Mussa, J.A. and Juma J.A. (as he then was) did not give reasons why they differed with Luanda, J.A. With respect, it was the latter who was enjoined to assign reasons for his dissent as, indeed, he did not.

Much worse, on account of the misconception, the applicants did not end there. They ventured further and, at the foot of the referred paragraph (b) they insinuated that Mussa J.A. and Juma, J.A. (as he

then was) were in breach of *"their respective duty to act judicially, thereby giving to the parties impression that the decision in Civil Application No. 151 of 2013 depended more on the personalities of the justices than on the law of the land"*. With respect, the foregoing personal attack on their lordships is outlandish and, to say the least, it is bad use of language to which we take strong exception.

As we have hinted upon, the decision of the Court is otherwise ascertainable from the separate concurring opinions of Juma, J.A. (as he then was) and Mussa, J.A on three matters: **Firstly**, both their lordships agreed to overrule the preliminary objection raised by the applicants to the effect that Civil Application No. 44 of 2012 was not reviewable. More particulary, Mussa, J.A. wrote at page 20 of his Ruling:-

> *"... upon a true construction, the second limb of our decision is not exactly a sibling of the review exercise. Rather, the decision stands on its own, just as it transcends well beyond the barrier provided under Rule 66 (7) and; is, as such, subject to review. That would suffice to dispose of the preliminary point of objection which is, accordingly, overruled."*

Contemporaneously, Juma, J.A. (as he then was) concurred at page 2 of his Ruling in the following words:-

> *"I agree with Mussa, J.A. this objection ought to be dismissed."*

Secondly, both agreed to vacate the second limb of the Ruling in Civil application No. 44 which directed the High Court to finalize the execution process in conformity with the dictates of Rule 90(1), 92 and 93 of Order XX1 of the Civil Procedure code. In this regard, Mussa, J.A. wrote at page 30 of his Ruling:-

> *"Finding, as I have just done, that the revision was resorted to without according the parties hearing; I need not decide more than is necessary to dispose of the matter before us. That is say, I will not further belabour on the other points of grievance raised by the applicant, the more so as* ***the finding would suffice to vacate the second limb of our decision through which the High Court***

decision of Twaib, J. was revised and set aside." [Emphasis supplied].

In agreement, his brethren, Juma, J.A. (as he then was), wrote at page 11 of his Ruling:-

> *"It seems to me that after raising the possibility that the Labour Court Rules, 2007 may be applicable it was not appropriate for us, in the second limb of our Ruling to* ***"direct the High Court to finalise the process as per the dictates of Rule 90 (1), 92 and 93 of Order XXI of the CPC."***

Thirdly, both concurred on the decision to accord Civil Application No. 35 of 2011 a fresh hearing. In this regard, Mussa, J.A. wrote at page 30 of his Ruling:-

> *"... I am of the well considered and decided view that the only viable option would be for Court to do what it ought to have done in the aftermath of the first limb of our decision and; that is, Civil Application No. 35 of 2011 should*

be accorded a fresh hearing in terms of Rule 66(6)"

Reading the opinion of Juma, J.A. (as he then was), his lordship arrived at a similar conclusion at page 17 of his Ruling:-

> *"In the result, I shall order that civil (Application No. 35 of 2011 be heard afresh in terms of Rule 66 (6)."*

It is noteworthy that in an earlier remark at page 2 of his Ruling, his lordship made a corresponding conclusion with respect to the opinion of his brethren Mussa, J.A.:-

> *"... I share his conclusion that Civil Application No. 35 of 2011 which was reviewed by the court in Civil Application No. 44 of 2012 should be heard afresh in terms of Rule 66 (6)."*

It is our fervent position that the foregoing ascertainment of the *ratio decidendi* from the separate opinions of Mussa J.A. and Juma, J.A. (as he then was) would suffice the directions requested under item (ii) of the Notice of Motion. It also defuses the contention in paragraph (c) of the Notice of Motion to the effect that "*the separate rulings of the Court in Civil Application No. 151 of 2013 constitute no*

decision of the Court as required by Rule 39 of the Rules for being conflicting and contradictory on their respective reasoning..."

In item (iii) of the Notice of Motion, the applicants seek to move the Court to give directions "*as to whether hearing de novo of Civil Application No. 35 of 2011 is at law amenable given the fact that the sale had already been confirmed and thus absolute; and the certificates of sale had been issued to the third and fourth applicants.* "

From where we are standing, we take the view that it is incomprehensible for the applicants to seek directions on a matter which was clearly spelt out by the Court. It should be recalled that in Civil Application No. 35 of 2011, the Court nullified the entire execution proceedings of the High Court, as it were, setting aside the proclamation of sale as well as the subsequent order of **Twaib, J.** which set aside the sale. It should further be recalled that in Civil Application No. 44 of 2012, the Court vacated its verdict in Civil Application No. 35 of 2011 along with all orders made thereof which were, accordingly, quashed and set aside. In a further development, the Court invoked its revisional jurisdiction and, in consequence thereof, resurrected the sale and directed the High Court to finalize the

execution process. The latter decision was finally reviewed and vacated by the Court in Civil Application No. 151 of 2013.

Thus, if the applicants seek directions, they are, accordingly, directed that in the aftermath of Civil Application No. 151 of 2013, the sale was vacated along with the second limb of Civil Application No. 44 of 2012. Just in case the applicants are minded of the view, as seems to be the case, that the certificate of sale will operate as a hindrance, they should brave for an ardent submission to that effect at the re-hearing of Civil Application No. 35 of 2011.

In item (iv) the applicants seek directions as to whether, *"in view of the findings and reasoning in the Ruling of Justice Juma, J.A. it is only Civil Application No. 35 of 2011 which should be heard de novo or even Civil Application No. 44 of 2012."* It is, again, unfortunate that the applicants are bent on twisting words to misguide on a matter which was clearly spelt out by his lordship. We have already expressed the conclusions of his lordship but, perhaps, it is well worth repeating that reading the opinion of Juma, J.A. (as he then was) between the lines, his conclusion left no uncertainties as he said:-

"In the result, I shall order that Civil Application No. 35 of 2011 be heard a fresh in terms of Rule 66(6)"

As we have, again, already intimated, an earlier remark his lordship had stated with respect to the opinion of his brethren, Mussa, J.A.

" Secondly, I share his conclusion that Civil Application N. 35 of 2011 which was reviewed by the court in Civil Application No. 44 of 2012 should be heard afresh in terms of Rule 66(6)"

We should clearly express that nowhere did his lordship order that Civil Application No. 44 of 2012 should also be heard afresh and the applicants are, accordingly, directed.

Having expressed our directions with respect to items (ii), (iii) and (iv) of the Notice of Motion we now revert to a consideration of items (i) and (vi) of the Notice of Motions which we deferred along with items (ii) and (iii) of the respondent's first notice of preliminary objection which was filed on the 23rd June, 2014. As we have intimated earlier, all these items boil down to the issue whether or not

the decision of the Court embodied in Civil Application No. 151 of 2013 is reviewable.

That being the subject, a prefatory remark is, perhaps, well worth that, in its present face the Court's jurisdiction for review was bestowed upon it by the provisions of subsection (4) of section 4 of the AJA. The subsection was introduced in the AJA by the written Laws (Miscellaneous Amendments) Act, No. 3 of 2016. Prior to that, the court's power to review was derived from case law (commencing with the unreported Civil Application No. 26 of 1989 – **Felix Bwogi v. Registrar of Bulldings**) and complimented by Rule 66(1) which goes thus:-

> *"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; or*
> *(b) a party was wrongly deprived of an opportunity to be heard; or*
> *(c) the court's decision is a nullity; or*

(d) the court had no jurisdiction to entertain the case; or

(e) the judgment was procured illegally, or by fraud or perjury."

Thus, on account of its nature and upbringing, the Court's power of review is a jurisdiction which is exercised very sparingly and with great circumspection. Such is the stance which this Court has all along given heed and; no wonder, in its present standing, a review only avails in the rarest of situations which meet the specific benchmarks prescribed under the referred Rule 66 (1). In the premises, it should always be borne in mind that whilst the court has an unfettered discretion to review its own judgment or order but the anchorage of the Court's discretion is not on the basis of sky's the limit. On the contrary, the Court is strictly barred from granting an order of review outside the five grounds enumerated under Rule 66 (1). The restriction was clearly spelt out in the unreported Civil Application No. 62 of 1996 – **Tanzania Transcontinental Co. Ltd. v. Design Partnership** thus:-

"The Court will not readily extend the list of circumstances for review, the idea being that

the court's power of review ought to be exercised sparingly and in most deserving cases, bearing in mind the demand of public policy for finality and for certainty of the law as declared by the highest Court of the land."

What is more, on the terms of Rule 66(7), a review does not contemplate a right to a second bite. That is to say, where an application for review has been made and disposed of the decision or order made by the Court on the review shall be final and no further application for review shall be entertained in the same matter. This requirement is, obviously, premised on the public policy demand for finality and certainty of the law. Perhaps, the requirement is further predicated on the assumption that the resultant decision or order on review will be encompassed within the four corners of the specific benchmarks prescribed under Rule 66(1).

Without prejudice to the foregoing cherished canons of our review practice, it must be quickly rejoined that recourse for review is basically intended to amend or correct an inadvertent error committed by the Court and one which, if left unattended, will result into a miscarriage of justice. (See the unreported Criminal Application No. 4

of 2011 – **Rizali Rajabu vs. Republic**). To this end, review is, so to speak, a power which is necessary for the proper and complete administration of justice and one which is resident in all courts of superior jurisdiction and essential to their existence. (See **Chandrakant Joshubhai Patel v. Republic** [2004] TLR 218). Putting it differently, since this jurisdiction exists, justice demands that it ought to be exercised in fitting situations whenever circumstances of a substantial compelling character demand its invocation in order to correct a manifest wrong and ordain full and effective justice in a given situation. For instance, in the unreported Criminal Application No. 3 of 2011 – **Peter Kidole vs. The Republic**, this Court referred and adopted the following principles which were succinctly set forth in the Australian case of **Autodesk Inc v. Dyson (No. 2)** – 1993 HCA 6; 1993 176 LR 300:-

> *"(i) The public interest in the finality of litigation will not preclude the exceptional step of reviewing or rehearing an issue when a court has good reason to consider that, in its earlier judgment it has proceeded on a misapprehension as to the facts or the law.*

(ii) As this court is a final Court of Appeal there is no reason for it to confine the exercise of jurisdiction in a way that would inhibit its capacity to rectify what it perceives to be an apparent error arising from same miscarriage in its judgment.

(iii)It must be emphasised, however that the jurisdiction is not to be exercised for the purpose of re-agitating arguments already considered by the Court; nor is it to be exercised simply because the party seeking a rehearing has failed to present the argument in all its aspect or as well as it might have been put. The purpose of the jurisdiction is not to provide a back door method by which unsuccessful litigants can seek to re-argue their cases."

Unfortunately, as we have already intimated, the Notice of Motion is verbose and, in some respects, it is unnecessarily repetitive. From the incoherent contentions of the applicants, the vexing issue before us was to specifically articulate the grounds for review. In this regard, it is, perhaps, pertinent to point out that, in an apparent sweeping quest, the applicant request for a " *review of the separate*

Ruling and Orders delivered on the 19th December, 2012 in Civil Application No. 151 of 2013 (Luanda, Mussa and Juma, JJA)."

As we have hinted upon, in item (iii) of the preliminary points of objection filed on the 23rd June, 2014 the respondent faults the applicant for seeking a review of all the three separate opinions including the dissenting opinion of Luanda, J.A. Her argument is that a review only avails to correct a decision of the court and that since the dissenting opinion of Luanda, J.A. is not part of the decision of the court, the same is not reviewable. We entirely agree and uphold the preliminary objection and, for that matter, our deliberations with respect to the quest for review will only be confined to the decision of the court which, as we have intimated, is ascertainable from the concurrent conclusions of Mussa, J.A. and Juma, J.A. (as he then was).

As regards the applicants specific grounds for review, if paragraph (g) of the Notice of Motion is anything to go by, the quest for review is upon a claim that the decision of the court is based on manifest errors on the face of the record resulting in a miscarriage of justice. In paragraph (g) (i) to (iv) the applicants enumerate what they conceived were manifest errors, if at all, in the impugned

decision. In the extracted Notice of Motion, we purposely bolded paragraph g(i) to (iv) so as to be clear of the alleged errors on the face of the record. We intend to sequentially address the alleged errors to determine whether or not they are worth the claim but, ahead of that, we think it is apposite to be clear to what amounts to the expression: *"An error on the face of the record."* It is noteworthy that the expression has been a subject of discussion in a number of cases but, of particular significance, is the case of **Chandrakant Joshubhai Patel v. Republic** (supra) where the Court adopted the following statement of Principle:-

> *"An error apparent 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 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..."

We think that the foregoing proposition sufficiently articulates what constitutes an error manifest on the face of record. We will now proceed to test the alleged errors listed by the applicants in paragraph g(i) to (iv) of the Notice of Motion against the proposition.

The first alleged error, as listed in paragraph g(i) relates to failure to consider the scope and application of Rule 66(6) of the Rules. It is commonplace that in terms of the referred provision, where the application for review is granted, the Court may **rehear the matter, reverse or modify its former decision or make such other order as it thinks fit**. If we understood the applicants well, on a proper consideration of all the available options, it was unnecessary for the court to order as it were, the rehearing of Civil application No. 35 of 2011.

With respect, the contention, even if correct, does not, in our view, constitute an error which will ground an application for review. An error in the choice of options which are enumerated under Rule 66(6) may quality for an appeal but certainly, it is not a ground for review. As was held by the Supreme Court of India in

Thungabhadra Industries Ltd v. State of Andhra Pradesh (1964) SC 1372, a review is by no means an appeal in disguise whereby an erroneous decision is reheard and corrected, but only relates to a patent error. To this end, the patent error alleged in paragraph g(i) of the Notice of Motion is bereft of any merits.

Next is paragraph g(ii) in which the alleged error is *"failure to consider the scope and application of the provisions of Order XXI Rules 90 (1), 92 and 93 of the Civil Procedure Code Cap. 33 R.E. 2002 (CPC) thereby entertaining Civil Application No. 151 of 2013 and ordering de novo hearing of Civil Application No. 35 of 2011 which had already been overtaken by events because the sale had been confirmed and certificate of sale had long been issued"*

Quite obviously, through this ground, the applicants express the inability of the Court in its decision to grasp the scope and applicability of the referred provision of the CPC. It is, in effect, a complaint that, on that score, the decision of the Court is erroneous. As we have gathered from **Chandrakant** (supra) the fact that a decision is erroneous in law is no ground for ordering a review. Neither is the mere fact that the applicant is unamused by the conclusion of the

Court. All said, paragraph g(ii) similarly does not qualify to an error apparent on the face of the record.

Unfortunately, Paragraphs g(iii) falls into the same trap of predicating the alleged errors on erroneous stance of the law. In, that paragraph, the applicants fault the Court for its failure to consider the relevant law on the procedure of hearing of an application in the Court of Appeal, that is, Rule 106 of the Court of Appeal Rules, 2009. In the result, they further claim that the Court thereby held that Civil Application No. 35 of 2011 should be heard *de novo* while in fact the parties were duly heard both by way of written submissions and orally. Thus, through this ground, quite apart from the applicants' allegation that the Court took an erroneous stance on the law, the allegation that the parties were duly heard is not self evident and would obviously require an elaborate argument to be established. To say the least, paragraph g(iii) of the Notice of Motion does not fit in to an error of law apparent on the face of the record.

Coming to paragraph g(iv), the applicants insinuate that the Court held *"that because two justices of the appeal, Mussa and Juma, JJA did not sit in the bench that heard Civil Application No. 35 of 2011*

then the Respondent was denied the right to be heard." To begin with, the Court did not quite decide that the denial of the right to be heard operated from the fact that Mussa, J.A. and Juma, J.A. (as he then was) did not sit on the original panel. All what Juma, J.A. (as he then was) wrote on this particular detail was that:-

> *"The present application presented us with very exceptional circumstances. My brother, Mussa, J.A. and myself did not sit in the Panel that heard the parties arguments and submissions in Civil Application No. 35 of 2011. So, when the two of us sat in Civil Application No. 44 of 2012, we were not privileged to read the submissions which the parties before us presented in Civil Application No. 35 of 2011 before the panel of Munuo, Luanda and Massati, JJA."*

With respect, to say that we were not privileged to read the submissions of the parties is a distant different from holding, as insinuated by the applicants, that respondents was denied the right to be heard merely on account of our absence.

In sum, we are constrained to hold that the applicants have miserably failed to establish that the impugned decision is marred by the enumerated manifest errors to warrant a review.

In the final, event, we find the application to be seriously wanting in merits and we, accordingly, dismiss but since the matter originates from a labour dispute, we give no order as to costs.

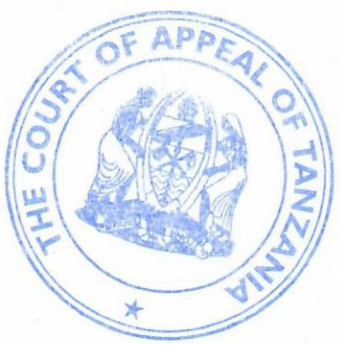
DATED at **DAR ES SALAAM** this 12th day of April, 2019.

I. H. JUMA
CHIEF JUSTICE

K. M. MUSSA
JUSTICE OF APPEAL

S.E.A. MUGASHA
JUSTICE OF APPEAL

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



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