IN THE COURT OF APPEAL OF TANZANIA
AT DODOMA

(CORAM: MUSSA, J.A., KWARIKO, J.A., And LEVIRA, J.A.)

CIVIL APPLICATION NO. 480/03 OF 2018

JOHN KASHEKYA ..... APPLICANT

VERSUS

ATTORNEY GENERAL ..... RESPONDENT

(Application for review from the decision of the Court of Appeal of Tanzania at Dodoma)

(Kileo, Oriyo And Juma, JJ.A)

dated the 8th day of June, 2018
in
Civil Appeal No. 116 of 2015

RULING OF THE COURT

25th September & 2nd October, 2019

KWARIKO, J.A.:

By a notice of motion taken under Rule 66 (1) (a) of the Tanzania Court of Appeal Rules, 2009 (the Rules), the applicant is applying for review of the decision of this Court in Civil Appeal No. 116 of 2015 dated 8/4/2016 on the ground that:

> *The decision made by the Honourable Court was based on a manifest error on the face of the record resulting in the miscarriage of justice in that the*

Court based its decision on a finding that the appellant carried out the business of mineral prospecting without the necessary consent from the owner of the land while the consent was there and the same was exhibited at the trial of the suit.

The notice of motion is supported by an affidavit of the applicant who essentially explained the chronological events pertaining to this application. Pursuant to Rule 106 (1) (2) of the Rules, the applicant also filed written submissions in support of the application.

On its part, the respondent filed an affidavit in reply sworn by Mariam Matovolwa, State Attorney wherein she opposed the application on the ground that it is unmaintainable for lack of valid reason for review of the impugned decision.

In view of what our decision will be, we find it apposite to revisit albeit briefly, the facts of the case which led to this application as culled to from the impugned judgment. As it can briefly be stated, the applicant had applied for a prospecting right from the Commissioner for Mines to prospect for gold in Nzuguni area within Dodoma City and was granted the same on 5/6/1992. Thereafter, the applicant went to Nzuguni and was

shown an area at Madengi Hill where he was to prospect for the gold. He prepared by clearing it and putting signs to show that it was his area. He also extracted samples of gold from that area for analysis. According to the applicant, he had incurred a lot of expenses in respect of the said activities; and that, he had obtained temporary claim of right to the area he had demarcated.

Following the said developments, the Commissioner declined to register the applicant's claim over the area. That is when the applicant filed a suit against the respondent before the High Court at Dodoma (Civil Case No. 18 of 1996), for damages arising out of the expenses he had incurred in that development. The respondent denied the claim for the reason that, the applicant failed to meet legal requirements for the registration of the claim by the Commissioner.

In the end, the High Court found that the applicant had failed to meet legal requirements towards his claim to be registered because he had not obtained consent from the Capital Development Authority (CDA), the surface rights holder. It thus found the suit devoid of merit and dismissed it. Being aggrieved by that decision, the applicant appealed against it in

this Court which in the end it upheld the trial court's decision and dismissed the appeal. It is against that decision that this application has been filed.

At the hearing of the application, Mr. Cheapson Luponelo Kidumage, learned advocate represented the applicant whilst, Ms. Janeth Rajabu Makondoo, Senior State Attorney and Mr. Xavier Masalu Ndalahwa, State Attorney appeared for the respondent.

Mr. Kidumage prefaced his submission by adopting the notice of motion, the affidavit in support thereof and the written submissions to form part of his oral submission. He argued that the applicant applied for the review for the reason that, exhibit P15 which was the requisite consent towards the registration of his mineral right was not considered by the Court, which he said, is a manifest error on the face of the record which occasioned injustice to the applicant. He contended that, had that exhibit been considered, the decision could have been different. To lend credence to the foregoing contention, Mr. Kidumage referred us to the decision of the Court in **Tanzania Transcontinental Trading Company v. Design Partnership Ltd** [1999] T.L.R 258.

Upon being probed by the Court, Mr. Kidumage submitted that exhibit P15 was endorsed by the District Commissioner who was the owner of gold prospecting land as opposed to the CDA.

In reply, Mr. Ndalahwa contended that, since the applicant did not attach the said exhibit P15 to his affidavit, he did not wish to respond to it. He we nt on to argue that, neither the notice of motion nor the affidavit has mentioned the error which the Court committed fit to be reviewed. In addition, Mr. Ndalahwa argued that, non-consideration of exhibit P15 is not a ground for review. To bring his point home, the learned State Attorney cited the case of **Roshan Meghee & Company Ltd v Commissioner General of Tanzania Revenue Authority** [2017] TLS LR 482.

As regards the applicant's submission, Mr. Ndalahwa contended that the same fits in an appeal and this Court is not sitting as an appellate Court, but it is exercising its review jurisdiction. The learned counsel referred us to the case of **Tanzania Transcontinental Trading Company** (supra) cited by the applicant as being relevant to his contention. Finally, Mr. Ndalahwa argued that, the application is non-meritorious and urged us to dismiss it with costs.

In rejoinder, Mr. Kidumage argued that, even if exhibit P15 was not attached to the affidavit, it did not occasion any injustice to the respondent because she knew what this application is all about.

We have considered the parties' pleadings and the corresponding submissions. We are alive that, the Court has powers to review its own decisions. Rule 66 (1) of the Rules provides 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;*
>
> *(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.*

The cited Rule is more or less a replication of what was held in the Court's decision of **Chandrakant Joshubhai Patel v. R** [2004] T.L.R 218 where it was said *inter alia* thus:

> *"The Court of Appeal has inherent jurisdiction to review its decisions and it will do so in any of the following circumstances (which are not necessarily exhaustive):*
>
> *(a) where the decision was obtained by fraud;*
>
> *(b) where a party was wrongly deprived of the opportunity to be heard; and*
>
> *(c) where there is a manifest error on the record, which must be obvious and self-evident, and which resulted in a miscarriage of justice."*

Before that decision, similar holding is found in the cases of **Transport Equipment Limited v. Devram P. Valambhia** [1998] T.L.R 89 and **Tanzania Transcontinental Trading Company** (supra) to mention but a few. After the coming into force of the Rules, there have been many decisions of the Court in exercise of its powers of review. Some of them are **Mashaka Henry v. R,** Criminal Application No. 2 of 2012, **Fadhili Yahya v. R,** Criminal Application No. 6 of 2011 (both unreported) and **Roshan Meghee & Company Ltd** (supra).

In the present application, the applicant has invoked sub-rule 1 (a) of Rule 66 of the Rules, such that the impugned decision was based on a manifest error on the face of the record which occasioned injustice to him. In his written submissions, the applicant mentioned the alleged error to be the Court's non-consideration of exhibit P15 which he said, is the requisite consent, a condition precedent for the registration of his mineral right. As rightly argued by Mr. Ndalahwa, the applicant did not mention the alleged error neither in the notice of motion nor explained it in his affidavit so that the opposite party and the Court could prepare for it. The revelation of the alleged manifest error on the face of the record in the written submissions amounts to a statement from the bar which cannot prove the applicant's complaint. We are therefore settled that the applicant took the respondent by surprise and Mr. Ndalahwa was correct when he refrained from discussing exhibit P15.

However, even if, for the sake of argument we take liberty to consider the said exhibit P15, we will only end up with the decision that, the applicant wants the Court to re-open the appeal which had already been decided in the impugned decision. This is so because, in the memorandum of appeal before the Court, the applicant complained under

grounds number 3 and 5 about exhibit P15 and who was the surface rights holder respectively. The decision of the Court has been shown earlier that, the applicant did not get consent from the CDA as the surface rights holder. Now, if the Court dismissed the appellant's grounds of appeal for the reasons it had advanced, the law does not allow him to appeal against that decision by way of a review. Our view finds support in the case of **Karim Kiara v. R,** Criminal Application No. 4 of 2007 (unreported), where the Court referred to the case of **Lakhamshi Brothers Ltd v. R. Raja and Sons** [1966] 1 EA 313, where it was said thus: -

> *"In a review the court should not sit on appeal against its own judgment in the same proceedings. In a review, the court has inherent jurisdiction to recall its judgment in order to give effect to its manifest intention on to what clearly would have been the intention of the court had some matter not been inadvertently omitted."*

Essentially, the applicant's application is an appeal in disguise whereby an erroneous decision is reheard and corrected. In the case of **Thungabhadra Industries v. Andhra Pradesh** [1964] SC 1372 as cited by Mulla, 14th Edition it was said thus: -

"A review is by no means an appeal or a revision in disguise whereby an alleged erroneous decision is reheard and corrected."

We are also of the considered view that, non-consideration of exhibit P15 does not form a manifest error apparent on the face of the record. In the Court's decision of **African Marble Company Ltd v. Tanzania Saruji Corporation Limited,** Civil Application No. 132 of 2005 (unreported), quoting Mulla, Indian Civil Procedure Code, 14th Edition, it was stated thus:

"An error apparent on the face of the record must be such as can be seen by one who writes and reads, that is, an obvious and patent mistake and not something which can be established by a long-drawn process of reasoning on points on which there may conceivably be two opinions."

The above quotation is true to the instant case as the alleged manifest error on the face of the record is something that needs a long-drawn process of reasoning from the opposing parties.

Conclusively, we agree with the learned State Attorney that, the applicant has failed to prove that the impugned judgment was based on a manifest error on the face of the record resulting into the miscarriage of

justice to him. The application is thus devoid of merit and we hereby dismiss it. We order no costs as the applicant was said to have pursued the appeal whose decision is subject of this application through legal aid provided by the Tanganyika Law Society.

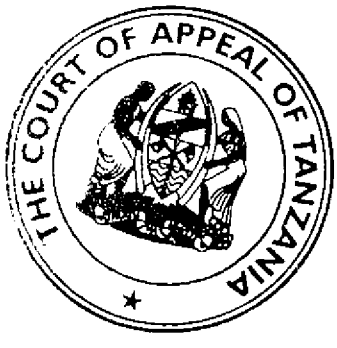
DATED at **DODOMA** this 1st day of October, 2019.

K.M. MUSSA
JUSTICE OF APPEAL

M.A. KWARIKO
JUSTICE OF APPEAL

M.C. LEVIRA
JUSTICE OF APPEAL

The Ruling delivered on this 2nd day of October, 2019 in the presence of Mr. Matimbwi Joseph for Cheapson Kidumange, counsel for the Applicant and Ms. Neema Mwaipyana State Attorney for respondent is hereby certified as a true copy of the original.



E. F. FUSSI
DEPUTY REGISTRAR
COURT OF APPEAL