IN THE COURT OF APPEAL OF TANZANIA
AT DAR ES SALAAM

(CORAM: MZIRAY, J.A, SEHEL, J.A., And KITUSI, J.A.)

CIVIL APPLICATION NO. 131/01 OF 2019

JUSTUS TIHAIRWA .... APPLICANT

VERSUS

CHIEF EXECUTIVE OFFICER, TTCL .... RESPONDENT

(An Application for review from the decision of the Court of Appeal of Tanzania at Dar-es-salaam)

(Mugasha, Ndika, Kwariko, JJJ.A.)

Dated 8th March, 2019
in

Civil Appeal No. 251 of 2017

RULING

18th & 27th September, 2019

SEHEL, J.A

This is a ruling on the application for review whereby the applicant is inviting this Court to review its decision in Civil Appeal No. 251 of 2017 (Mugasha, J.A, Ndika, J.A, and Kwariko, J.A.) that struck out the applicant's appeal for being time barred. The application is made under rule 66 (1) of the Court of Appeal of Rules of 2009 (the Rules) and it is supported by an affidavit of the applicant.

The brief facts giving rise to the present application are such that: the applicant was dissatisfied with the decision of the High Court Labour Division delivered on 2nd March, 2017 in Revision No. 339 of 2015 hence he filed his appeal to this Court on 4th October, 2017. At the hearing of the appeal, the Court invited the parties to address it on the propriety of the applicant's appeal after it noted that the letter dated 13th March, 2017 requesting to be supplied with the proceedings of the High Court for appeal purposes was not served on the respondent. In his response, the applicant said that he supplied the respondent with all the requisite documents necessary for appeal purposes and further beseeched the Court not to be tied by technicalities but rather should determine the appeal on merit. Whereas, the respondent denied to have been served with that letter. He thus prayed for the appeal to be struck out.

The Court having heard both sides, at pages 8 to 9 of its Ruling said:

> *"It is not contentious that after lodging the notice of appeal the appellant did serve it on the respondent. However, the appellant's letter dated 13/3/ 2017 seeking to be supplied with the record of the High Court for appeal purposes was not served on the respondent. This is*

reflected at page 696 of the record of appeal. In the result, the appellant cannot be allowed to rely on the exclusion of days he waited for the Registrar to supply her with documents for appeal purposes. -See ***FATUMA A. SIMBAMBILI VS DOKASI MHINA****, Civil Appeal No. 84 of 2015 (unreported). The omission to comply with the mandatory dictates of the law cannot be glossed over as mere technicality as viewed by the appellant because it has adverse impact on the time limit of filing the appeal since the appellant cannot rely on the exception under Rule 90 (1) of the Rules. We say so because since the notice of appeal was filed on 14/3/2017 the appellant ought to have filed the appeal not later than 13/5/ 2017. As the present appeal was filed on 4/10/2017, the appeal is hopelessly out of time and we are constrained to strike it out."*

Following the above, the applicant has lodged the present application for review on the ground that there is an error manifest on the face of the record resulting in the miscarriage of justice against the applicant. In the Notice of Motion, the applicant contends that:

1) *the Court finding and holding that the applicant's letter dated 13th March, 2017 was not served to the respondent is not in harmony with the record of appeal*

from pages 684 to 696 inclusive which shows that the respective letter had been served twice to the respondent along with other necessary documents;

2) *when the Court held that the appeal ought to have been filed not later than 13th March, 2017 without due consideration to the fact that filing of the appeal was subject to the hearing and final determination of an application for leave to appeal which was obtained on 20th June, 2017 and thereafter the respective court proceedings were not issued until on 7th August, 2017 as reflected from pages 687 to 699 inclusive of the record of appeal.*

The respondent resisted the application by filing an affidavit in reply. However, when the application was called on for hearing the respondent did not enter appearance although he was duly served with the notice of the hearing on 6th September, 2019 as evidenced in the affidavit of proof of service. On the other hand, the applicant appeared in person and prayed to proceed with the hearing of the application as the respondent defaulted appearance.

Having been satisfied that the respondent was duly served, we allowed the applicant to proceed with the hearing in absence of the respondent by virtue of rule 63 (2) of the Rules.

The applicant began his oral submission by first adopting his notice of motion, affidavit, and written submissions. In trying to show that there was an error apparent on the face of the record in the Ruling of this Court, the applicant argued that, he physically served the respondent, twice, with the letter dated 13th March, 2017 through the respondent's secretary namely June J. Byarugaba. He pointed out that he served that letter to the respondent for the first time on 15th March, 2017 together with the notice of appeal and on 16th March, 2017 he served it again together with the application for leave to appeal as deposed under Paragraph 6 of his affidavit. He submitted that it was the later service appearing at page 696 of the record of appeal that this Court made reference to in its Ruling while at page 686 of the record the same letter was first served to the respondent on 13th March, 2017 together with the notice of appeal. Generally, the applicant acknowledged that both letters appearing at pages 686 and 696 were not stamped by the respondent.

When this Court referred him to page 6 of our Ruling where he urged the Court not to "be bogged down by technicalities", he explained that the secretary who received that letter only stamped, with an official stamp, on the front page of the documents thus leaving the letter under scrutiny together with other documents served to the respondent not stamped.

The applicant further counter attacked the respondent's response in his reply affidavit where the respondent denied to have been served with the letter. He said the respondent's denial was not backed by any evidence because it failed to bring the affidavit of June Byarugaba to counter his allegation. He pointed out that the respondent had never raised any objection regarding non-service of the documents nor the competency of his appeal, be it before or at the hearing of the appeal but rather he had confirmed under Paragraph 7 of his reply submission filed on 5th January, 2018 that the applicant had taken all essential steps within the prescribed period of appeal. With that submission, he urged us to allow his application.

We wish to preface by reproducing Rule 66 (1) of the Rules that vests jurisdiction to this Court to review its own decision. It reads as follows:

"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; 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."

[emphasis supplied]

In **MIC Tanzania Limited and 3 Others vs. The Golden Globe International Services Limited,** Civil Application No. 341/011 of 2017 we reiterated that the jurisdiction of the Court in review is limited in scope to the grounds stated under rule 66 (1) of the Rules.

The applicant herein pegged his application for review under sub-rule (1) (a) of rule 66 of the Rules where he alleged that the Ruling of this Court

dated 8th March, 2019 was based on manifest error on the face of the record that resulted into a miscarriage of justice.

In **Tanganyika Land Agency Limited and 7 Others v. Manohar Lal Aggrwal**, Civil Application No. 17 of 2008 (unreported) we explained on the ingredients of rule 66 (1) (a) thus:

> *"......the ingredients of an operative error are that first, there ought to be an error; second, the error has to be manifest on the face of the record, and third the error must have resulted in miscarriage of justice."*

What amounts to an error manifest on the face of the record was explained in the case of **East Africa Development Bank vs. Bluellne Enterprises**, Civil Application No 47 of 2010 (unreported) which quoted with approval the case of **Chandrakant Joshubhai Patel vs. Republic** [2004] TLR 218 in which the reasoning in MULLA, 14th Edition pp. 2335-36 was adopted and the Court stated:

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

points on which there may conceivably be two options. A mere error of law is not a ground for review under this rule. That a decision is erroneous in law is not 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."

Consequently, a manifest error on the face of the record envisaged under Rule 66 (1) (a) of the Rules must be obvious that strikes in the eyes immediately after looking at the records and it does not require a long drawn process of reasoning on points where there may be possibly two opinions. It is an error which is patently clear and self-evident such that it does not require any extraneous matter to show its existence. The error must have resulted into miscarriage of justice.

We have carefully examined the grounds raised by the applicant in his notice of motion together with the affidavit and submission in support. We are, however, unable to see anything akin to a manifest error on the face of the record resulting in the miscarriage of justice as alleged by the applicant. We say so because the issue as to whether the letter dated 13th March, 2017 was served to the respondent or not was adequately dealt and determined by

this Court. In our Ruling dated 8th March, 2019 we were satisfied that the letter was not served to the respondent. With due respect to the applicant, the affidavit of June Byarugaba was supposed to be filed by him and not the respondent. In the case of **John Chuwa v. Anthony Ciza** [1992] TLR 233 in which an application for leave to appeal was filed two days out of time, the Court emphasized on the need of filing an affidavit of a material person in order to explain the delay (See also **Isaack Sebegele v. Tanzania Portland Cement Co. Ltd**, Civil Reference No. 26 of 2004 (unreported)). It stated:

> *"An affidavit of a person so material, as the cashier in this case, has to be filed."*

In the application at hand, the applicant made assertion in his affidavit that he served the letter to one June Byarugaba but he failed to file the affidavit of the said June Byarugaba to substantiate his assertion that the letter was served to the respondent. The affidavit of June Byarugaba, a person whose evidence is material to the matter in dispute was of a paramount importance. Therefore, the long drawn argument made by the applicant in trying to persuade us to hold otherwise is nothing other than to ask this Court to sit on appeal against its own Ruling which this Court is not

prepared to entertain as it amounts to an appeal in disguise. In **Lakhamshi Brothers Ltd v. R. Raja & Sons** [1966] E.A. 313 it was held and rightly so, in our considered view, that:

> *"The court had 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,* ***but it would not sit on appeal against its own judgment in the same proceedings.****"(emphasis added)*

The second ground by the applicant was that the Court ought to have considered that the applicant was seeking leave to appeal to this Court which was obtained on 20th June, 2017 thus he could not have filed his appeal by 13th May, 2017. We need not be detained much on this because the statement that *"the appellant ought to have filed the appeal not later than 13/5/2017"* was made by passing as an analogy. It was an *obiter dictum* not precedential. In any event it did not cause any injustice to the applicant because the fact still remained that the appeal was time barred.

At the end, we are of the settled position that, the applicant in this application has failed to sufficiently demonstrate before us that there is any

error apparent on the face of the record that calls for us to review our own ruling. Consequently, we are constrained to dismiss the application for want of merit. This being a labour dispute, we make no order for costs.

DATED at **DAR ES SALAAM** this 26th day of September, 2019.

R. E. S. MZIRAY
JUSTICE OF APPEAL

B. M. A. SEHEL
JUSTICE OF APPEAL

I. P. KITUSI
JUSTICE OF APPEAL

The Judgment delivered this 27th day of September, 2019 in the presence of Mr. Justus Tihairwa, present in person and Mr. Emmanuel Mkonyi, Counsel for the Respondent, is hereby certified as a true copy of the Original.

S. J. KAINDA
DEPUTY REGISTRAR
COURT OF APPEAL