IN THE COURT OF APPEAL OF TANZANIA
AT ZANZIBAR

(CORAM: MWARIJA, J.A., NDIKA, J.A., And KEREFU, J.A.)

CIVIL APPLICATION NO. 04 OF 2016

EXECUTIVE DIRECTOR
GOLDEN SANDS HOTEL LIMITED ZANZIBAR ..... APPLICANT

VERSUS

1. **ATTORNEY GENERAL ZANZIBAR**
2. **UNION TRUST RESORT LIMITED**

.....RESPONDENTS

(Application for Review from the decision of the Court of Appeal of Tanzania at Zanzibar)

(Othman, Kimaro and Mussa, JJA)

dated the 10th day of December, 2015
in
Civil Appeal No. 119 of 2015

RULING OF THE COURT

04th & 12th December, 2019

KEREFU, J.A.:

By a notice of motion taken under Rules 66 (1) (a), (2), (3) and 48 (1) and (2) 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. 119 of 2015 dated 10th December, 2015 on the ground that the decision was based on a manifest error on the face of the record resulting in a miscarriage of justice. The

notice of motion is supported by an affidavit of Amit Babubhai Ladwa, the applicant's administrator.

Before embarking on the merits or demerits of the application, we find it apposite to narrate the brief facts leading to this application as obtained from the record of application. It is indicated that, on 16th May, 1997 the Government of Zanzibar granted the applicant a 33 years lease over a parcel of land situated at Matamwe Northern Region in Zanzibar described by site plan No. 275/97 (the disputed plot). The purpose of the said lease was for the applicant to construct a hotel complex as per the hotel project plan approved by the Executive Secretary, Zanzibar Tourist Commission on 14th April, 1997. The said project plan contained ten conditions to be complied by the applicant. That, failure to comply with any of the said conditions entitled the Executive Secretary, Zanzibar Tourist Commission to revoke the said project. The applicant failed to comply with the said conditions hence the project approval was revoked on 28th November, 2003. Subsequently, on 24th December, 2003 the lease agreement was also revoked by the Ministry of Water, Construction and Lands.

In the wake of the said revocation, the applicant instituted a suit, Civil Case No. 33 of 2010 in the High Court against the Attorney General Zanzibar

(first defendant and first respondent herein), the Director General, Zanzibar Investment Promotion Authority (second defendant), Executive Secretary, Zanzibar Tourism Commission (third Defendant) and Union Trust Resort Limited (fourth defendant and the second respondent herein). In that suit, the applicant prayed for re-instatement of the project with site plan No. 275/97 and payment of compensation at the tune of TZS. 2,500,000,000.00. Alternatively, the applicant prayed to be offered an alternative land with payment of compensation at the tune of TZS. 4,000,000,000.00. In addition, the applicant prayed for the payment of cash compensation of not less than TZS. 6,000,000,000.00.

Having heard the evidence of witnesses from all parties, the trial court (Mwampashi, J.) made the following orders, that:-

(a) The revocation of the plaintiff's lease and the project approval license in regard to the suit plot is declared not valid for the failure by the 1st defendant i.e the Government to follow the laid down procedure and the rules of natural justice;

(b) Notwithstanding the above declaration, under the circumstances of the suit and the reasons abundantly given in the judgment the plaintiff's lease and the project license

are nullified and the lease granted to the 4th defendant in regard to the suit plot is declared valid;

(c) The government is ordered to honour its promise by granting another plot of land to the plaintiff;

(d) The plaintiff is entitled to TZS. 28,000,000.00 deposited by the 4th defendant into the 2nd defendant's account as compensation for its unexhausted improvements taken over by the 4th defendant; and

(e) Each party to bear its own costs.

Aggrieved by that decision, the applicant appealed to this Court via Civil Appeal No. 119 of 2015. The Court (Othman, Kimaro and Mussa, JJA) partly allowed the appeal with costs to the applicant and ordered the first respondent to allocate to the applicant an alternative plot of similar size. Undaunted, the applicant has approached the Court, but this time, as stated earlier, by a way of an application for review. In the notice of motion the applicant has raised five grounds that:-

(1) The decision has a manifest error on the face of record in that the Court found that the applicant is entitled to an alternative plot of the same size and amenities without ordering refund or compensation of the expenses spent on

the plot by the applicant for the exhausted improvements for the applicant to be properly and fairly reinstituted (Restituo Ad Integrum);

(2) The decision has a manifest error on the face of record in that the Court found that the lease of the second respondent was valid despite the purported revocation being contrary to law and procedure which renders invalid whatever is made out of an invalid act;

(3) The decision has a manifest error on the face of record in that the Court found that there was no compliance with the condition of the lease without evidence of such evidence being legally provided to the Minister Responsible for Lands;

(4) The decision has a manifest error on the face of record in that the Court found that the trial court had held that 'the question whether the revocation of the plaintiff's company lease was valid or not' does not depend on the existence of good grounds for the revocation. It was therefore wrong to validate an act based on an illegal decision on the purported existence of valid reasons for revocation; and

(5) *The decision has a manifest error on the face of record in that the Court correctly found the order for payment of compensation of TZS. 28,000,000.00 was unfounded for having no basis in the issues and the pleadings, it should have answered issues No. 2 and No. 3 in the affirmative and assess the proper amount of compensation from the amount claimed by the appellant therein.*

When the application was placed before us for hearing, the applicant was represented by Mr. Salim Hassan Bakari Mnkonje, learned counsel, while the first respondent had the services of Ms. Hamisa Mmanga Makame, learned Principal State Attorney and the second respondent was represented by Mr. Nassor Khamis Mohamed, assisted by Mr. Suleiman S. Abdalla, both learned counsel. It is noteworthy that the said learned counsel for the parties had earlier on lodged their respective written submissions in support of or in opposition to the application, which they sought to adopt at the hearing to form part of their oral submissions.

When invited to elaborate on the above grounds for review, Mr. Mnkonje commenced his submission by asking for leave, which we granted, for him to

abandon the second, third, fourth and fifth grounds and decided to argue only the first ground.

In support of the first ground, Mr. Mnkonje argued that there is manifest error on the face of record in the Court's decision, because though the Court found that the applicant is entitled to an alternative plot of the same size and amenities, it did not order for the refund and compensation of an unexhausted improvements made by the applicant on the disputed plot. It was his strong contention that, the applicant was not properly and fairly restituted to her original position before the disputed plot was leased to the second respondent. Mr. Mnkonje elaborated by submitting that, in acquiring the disputed plot, the applicant had paid the local land owners and other requisite compensation to the satisfaction of the Ministry of Lands. After being granted the lease, the applicant incurred additional expenses for preparation of the site plans and constructions, among others. He thus insisted that, being given an alternative land without payment for all expenses incurred by the applicant in developing the disputed plot does not amount to *restituo ad integrum.*

When probed by the Court, as to whether the said unexhausted improvements on the disputed land were made by the applicant prior to or after

the revocation of the lease, Mr. Mnkonje submitted that, the applicant is claiming for compensation of both unexhausted improvements effected on the disputed plot prior to and after the revocation. He however admitted that the Court was correct when it found that the payment of compensation of TZS. 28,000,000.00 by the learned trial judge did not have any basis, as the same was not the pleaded amount. He thus emphasized that, after making that finding, the Court was required to grant the applicant fair compensation as prayed for in the plaint. To bolster his position he cited the case of **Attorney General v. Lohay Akonaay and Joseph Lohay** [1995] TLR 80 where it was held that:-

> *"...Fair compensation is not confined to unexhausted improvements; where there are no unexhausted improvements but some effort has been put into the land by the occupier, that occupier becomes entitled to protection under Article 24 (2) of the Constitution and fair compensation is payable for deprivation of property and land..."*

Relying on the above authority, Mr. Mnkonje urged us to invoke the Court's powers under Rule 4 (2) (a) and (b) of the Rules and grant the prayers sought by the applicant in the notice of motion.

In response, Ms. Makame strongly resisted the application by arguing that, the applicant has not met the threshold enshrined under Rule 66 (1) (a) of the Rules, as what has been submitted in the notice of motion cannot be determined by this Court without evaluating the evidence tendered before the trial court. In amplification, Ms. Makame argued that, the main issue raised by the applicant before the trial court in Civil Case No. 119 of 2015 was on the revocation of the lease and payment of compensation for unexhausted improvements made by the applicant on the disputed plot. She said that, during the trial the applicant failed to adduce concrete evidence to prove her claims on the payment of the said compensation, thus the trial court awarded her only TZS. 28,000,000.00 that was earlier on deposited by the second respondent into the account of the Director General Zanzibar Investment Promotion Authority. She said, an award of the said amount did not have any basis, as it was never pleaded for, as properly found by this Court during the appeal. It was therefore the strong argument of Ms. Makame that, since the issue of compensation was raised by the applicant and adequately considered and decided upon by this Court, when determining the applicant's appeal, it is not proper for the applicant to again raise the very same issue before the same Court on review. As such, Ms. Makame requested this Court to dismiss the application for lack of merit.

On the similar line of argument, Mr. Mohamed also opposed the application by arguing that, a review is not an automatic right but is available only in exceptional circumstances enumerated under Rule 66 (1) of the Rules. He referred to the definition of '*manifest error*' in the Black's Law Dictionary, 7th Edition and argued that, for an error to be considered a '*manifest error*' it needs to be '*obvious*' and '*apparent*' on the face of the record. Mr. Mohamed emphasized that, for the application of this nature to succeed, the applicant is required to show and identify in the impugned judgment an obvious and indisputable error that warrants review of the said decision. He said, it is clear from the ground and submission by Mr. Mnkonje that, the applicant seeks to submit another ground of appeal under the name of review. To support his position he referred us to the case of **Omary Makunja v. Republic,** Criminal Application No. 22 of 2014 (unreported) and argued that manifest error on the face of record should not involve a long drawn process to arrive to a conclusion.

Mr. Mohamed argued that, the issue raised by the applicant herein was the subject matter during the trial and was adequately considered and decided upon by this Court at the appeal, but in this application, the applicant is trying to invite this Court to re-open the appeal through the back door which is contrary to Rule

66 (1) of the Rules. On the strength of his arguments, Mr. Mohamed submitted that, the applicant has not made out any case to justify a review and prayed for the application to be dismissed with costs.

In rejoinder submission, Mr. Mnkonje reiterated what he had submitted earlier and prayed that this application be granted as prayed.

On our part, having examined the record of the application, the written and oral submissions advanced by the learned counsel for the parties, we should now be in a position to confront the issue in the application which is on whether or not the ground advanced by the applicant is adequate to justify the review of the Court's decision.

To start with, we wish to note that Rule 66 of the Rules empowers the Court to review its own decision. In particular, Rule 66 (1) of the Rules provides for the circumstances under which such review can be done. It states 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."

The spirit of this Rule seems to have been taken from the decision of **Chandrakant Joshubhai Patel v. Republic,** [2004] TLR 218, which was decided before the promulgation of the Tanzania Court of Appeal Rules, 2009. Going by the above cited provisions, it is clear that, though the Court has power and unfettered discretion to review its own decision but the said power and discretion should be exercised within the specific benchmarks prescribed under Rule 66(1). In the case of **Minani Evarist v. Republic,** Criminal Application No. 5 of 2012 (unreported) the Court while interpreting the applicability of Rule 66 (1) of the Rules stated that:-

> *"We are settled in our minds that the language of Rule 66 (1) is very clear and needs no interpolations.* ***The Court has unfettered discretion to review its judgment or order, but when it decide to exercise this jurisdiction, should not by any means open invitation to revisit the evidence and re-hear the appeal"*** [Emphasis added].

Following the above authority and as clearly argued by the learned counsel for the respondents, for an application for review to succeed, the applicant must satisfy one if not all the conditions stipulated under Rule 66 (1) of the Rules. It is only within the scope of that Rule that the applicant can seek for the judgment of this Court to be reviewed.

As intimated above, in the instant application, the ground for the review indicated in the notice of motion is premised under Rule 66 (1) (a) where the applicant is alleging that the decision of this Court has an error on the face of record resulting in a miscarriage of justice. However, the contents of paragraphs 7, 9, 10 and 15 of the supporting affidavit where the said allegations is clarified, the applicant has failed to point out the said error on the face of record, but his claims are focused more on evidence and her dissatisfaction with the decision of this Court, which is not one among the conditions enumerated in Rule 66 (1). In

addition, in his written and oral submissions before us, Mr. Mnkonje criticized the judgment of the Court on matters of evidence yet he failed completely to justify on how it was based on a manifest error on the face of record resulting in a miscarriage of justice. In another vein, Mr. Mnkonje urged us, in event we disagree with him, to depart from that Rule and instead, invoke the Court's power under Rule 4 (2) (a) and (b) to re-open the matter. With respect, we are unable to agree with him on this point because, **first,** the provisions of Rule 4 (2) (a) can only be invoked by this Court if there is no specific provision in the Rules or any other written law governing the matter in dispute. In the matter at hand, as we have already indicated, the application is governed by Rule 66 (1) which is clear, elaborate and adequate. **Second,** if we do so, it will be like sitting in another appeal of our own decision, which will be improper. The erstwhile Court of Appeal of East Africa in **Lakhamshi Brothers Ltd v. R. Raja Sons,** [1966] E.A 313, the observed that:-

> "***In 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.***" [Emphasis added].

In addition, in **M/s. Thunga Bhandra Industries Ltd v. the Government of Andra Pradesh,** AIR 1964 SC. 1372 cited with approval by the Court in **Tanganyika Land Agency Limited and 7 Others v. Manohar Lal Aggrawal**, Civil Application No. 17 of 2008 (unreported), it was held that: -

> *"A review is by no means an appeal in disguise whereby an erroneous decision is reheard and corrected* ***but lies only for patent error without engagement in elaborated argument to establish it.****"* [Emphasis added].

Therefore, a review is by no means an appeal, but 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. It is at this juncture we are in agreement with the submissions of the learned counsel for the respondents that the applicant has failed to justify the grant of this application, as the issue of compensation he had raised herein has already been determined by this Court in the impugned judgement. To justify this point, we have examined the impugned judgment of the Court in Civil Appeal No. 119 of 2015

and observed that, at page 24 of the record of the application, indeed, the Court considered the said matter and concluded that: -

> *"Regarding the alternative grounds of appeal on compensation, the learned judge was clear in his finding that there was no evidence to substantiate the alternative prayer for compensation."*

From the above extract from the impugned judgment, we are in agreement with the submission of the learned counsel for the respondents that the issue of compensation raised by the applicant was adequately considered and decided upon by the Court. Re-opening the same at the point of review is sitting in another appeal of our own decision which is contrary to the spirit of Rule 66 (1). In the case of **Tanganyika Land Agency Limited and 7 Others (supra)** the Court at page 9 aptly stated that: -

> *"For matters which were fully dealt with and decided upon on appeal, the fact that one of the parties is dissatisfied with the outcome is no ground at all for review. To do that would, not only be an abuse of the Court process, but would result to endless litigation. Like life litigation must come to an end."*

We are mindful of the settled legal position in respect of what amounts to a manifest error on the face of record that it must be *'apparent'* and *'obvious,'*

incapable of drawing two opinions. See for instance the decisions of this Court in **Chandrakant Joshubhai Patel** (supra) and **African Marble Company Limited AMC v. Tanzania Samji Corporation (TSC),** Civil Application No. 132 of 2005 (unreported). Specifically, in **Chandrakant Joshubhai Patel** (supra), the Court, when considering what amount to the phrase '*apparent error on the face of record,'* and said: -

> *"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****...".* [Emphasis added].

As indicated earlier and eloquently argued by the counsel for the respondents, the applicant has not shown such obvious and apparent error on the face of record. It is therefore our respectful view that, since the matter of compensation submitted by the applicant has already been considered and

determined by this Court, the applicant's dissatisfaction with the finding of the Court cannot be said to constitute an error apparent on the face of record so as to justify a review.

For the foregoing reasons, we find no merit in the application and it is hereby dismissed. Each party to bear its own costs.

DATED at **ZANZIBAR** this 11th day of December, 2019.

A.G. MWARIJA
JUSTICE OF APPEAL

G.A.M. NDIKA
JUSTICE OF APPEAL

R. J. KEREFU
JUSTICE OF APPEAL

The Ruling of the Court delivered this 12th December,2019 in the presence of Mr. Suleiman S. Abdulla who was holding brief for both the applicant and the second respondent and Mr. Abubakar Omar State Attorney for the first respondent, is hereby certified as a true copy of the original.

A.H. MSUMI
DEPUTY REGISTRAR
COURT OF APPEAL