IN THE COURT OF APPEAL OF TANZANIA

AT ARUSHA

(CORAM: MUGASHA, J.A., MWANGESI, J.A., And SEHEL, J.A.)

CIVILA APPLICATION NO.118/17 OF 2017

NJAKE ENTERPRISES LIMITED..... APPLICANT

VERSUS

TANZANIA SEWING MACHINE CO. LIMITED..... RESPONDENT

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

(Mjasiri,Mussa, & Juma, JJA.)

dated the 27th day of October, 2016
in
Civil Appeal No. 15 of 2016

RULING OF THE COURT

17th & 20th March, 2020

MUGASHA, J.A.:

The applicant has brought this application seeking a review of the Judgment of this Court (**MJASIRI, MUSSA, JUMA, JJJ.A**) in Civil Appeal No. 15 of 2016 which partially allowed the respondent's appeal. The application is by way of Notice of Motion brought under section 4 (4) of The Appellate Jurisdiction Act [CAP 141 RE.2002] (the AJA) and Rule 66 (1) of the Tanzania Court of Appeal Rules, 2009 (the Rules).

A brief background of this application as gathered from the documents accompanying it is to the effect that, in Land Case No. 22 of 2009, the High Court allowed the applicant herein to sell by public auction, a three storeys building on Plot No. 11 Block "A" area "F" within the City of Arusha. This was pursuant to the learned trial Judge concluding that the respondent herein had failed to repay the loan and did not transfer the Title Deed of the property of the applicant contrary to the terms of the agreement. Aggrieved, the respondent lodged an appeal to the Court which partially allowed it as follows:

> *"Due to the fact that the appellant still owes the respondent Tshs. 50,000,000/= and due to the fact that the respondent occupied the suit property for six or seven years and collected rent therefrom, the outstanding loan of Tshs. 50,000,000/= shall be offset against mesne profits which the respondent collected as rent from the suit property and owes its refund to the appellant.*
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> *The upshot from the foregoing is that this appeal partially succeeds. The judgment and the decree of the trial court ordering the sale of suit property by public auction or otherwise is set aside. The unpaid loan of Tshs. 50,000,000/= which is due to the*

respondent, is offset against the mesne profits we estimate to be Tshs. 50,000,000/= which the respondent owes the appellant."

It is the said decision which precipitated the present application whereby as earlier stated, the applicant is moving the Court to review its judgment on the grounds stated in the notice of motion as follows:

i. That having established that the obligation to account for the collected rent is placed on both the applicant and the respondent, the Court erred in its finding that the applicant collected rent for a period of six or seven years that entitled the respondent estimated *mesne* profit of TZS. 50,000,000/=.

ii. That the Court erroneously assumed the appellant to have collected rent from disputed property without any evidence and proof on record.

iii. That the Court erred in assuming that possession of the disputed property by the applicant is equivalent to collection of rent that entitled the respondent *mesne* profit.

iv. That the Court erred upon failure to decide whether claim of *mesne* profit required strict proof by the respondent.

v. That the Court erred in finding that the applicant gave a loan of Tshs 50,000,000/= to the respondent and not Tshs. 180,000,000/= contrary to the evidence on record.

The applicant further prayed the Court to vacate its judgment and make an order to dismiss Civil Appeal Number 15 of 2016.The application has been challenged by the respondent through the affidavit sworn by Mr. Richard Rweyongeza, the respondent's advocate.

At the hearing the applicant was represented by Messrs. Boniface Joseph and Ipanga Kimaay, learned counsel whereas the respondent had the services of Mr. Richard Rweyongeza, learned counsel.

Mr. Boniface submitted that, there was a manifest error on the face of the record because while the mortgage liability was discharged, the dispute involving the two banks namely NBC and CRDB was not effectively resolved. He added that while at page 3 of the impugned judgment the sum payable to CRDB was TZS. 45, 000,000/=, the Court erroneously concluded the sum to be TZS. 50,000,000/= which makes the impugned decision to suffer a manifest error on the face of record. Moreover, he contended that, another manifest error is the award of *mesne* profits at a sum of TZS. 50,000,000/= whereas no proof was availed by the

respondent be it during the trial or at the hearing of the appeal which is a subject of the impugned decision. In this regard, Mr. Boniface prayed for the grant of the application with costs and urged us to modify the impugned decision in the light of what he had submitted.

On the other hand, Mr. Rweyongeza strongly opposed the application arguing the same not befitting the province of Rule 66(1) (a) of the Rules because none of the grounds exposes any manifest error. He contended that, the manner in which the application is crafted signifies the applicant's dissatisfaction with the impugned decision which in any case, it does not qualify to be a ground for review. To back up this proposition, he referred us to the case of **GOLDEN GLOBE INTERNATIONAL SERVICES AND ANOTHER Vs. MILLICOM TANZANIA N.V AND ANOTHER** Civil Application 195/01 of 2017 (unreported).

Responding to the applicant's complaint on TZS. 45,000,000/= as sum payable to CRDB, he contended the same to be misconceived arguing that, the said sum was stated in the impugned judgment to display the position before the grant of the loan which later made the two banks to negotiate an agreement.He pointed out that prior to the negotiated agreement, CRDB had initiated execution proceedings against the applicant

herein which forced NBC to lodge objection proceedings on a claim that, the property was under mortgage from an earlier loan which the applicant had obtained from NBC. However, NBC withdrew the objection which paved way for CRDB to push through the execution of the decree and later settle out the NBC mortgage claim.

Regarding the *mesne* profit availed to the respondent, Mr. Rweyongeza argued that, the Court was justified to so order because the respondent had suffered an injury of some kind on account of the applicant's possession of the suit property for six or seven years. He concluded his submission by urging the Court to dismiss the application for being misconceived as it seeks to re-open the appeal for rehearing which is not the mandate of the Court.

In rejoinder, apart from submitting that the applicant was not in wrongful possession of the suit premises to warrant respondent's entitlement of *mesne* profits, he reiterated what he had earlier on submitted and urged the Court to grant the application.

After a careful consideration of the submissions of counsel for the parties and the record before us in particular the impugned judgment, the issue for determination is whether the applicant has made out a case

warranting a review on account of a manifest error on the face of record resulting in the miscarriage of justice.

There is no doubt that this Court in terms of section 4 (4) of the AJA, has jurisdiction to review its own decision in any case which is geared at ensuring that a manifest injustice does not go uncorrected. See- **CHANDRAKAT JOSHUBHAI PATEL Vs. REPUBLIC** [2004] TLR 218. However, since a residual remedy of review is limited in scope and it is by no means an appeal in disguise because it is a matter of policy that litigation must come to an end, the grounds on which this Court could review its decisions are at present limited to only five as prescribed under Rule 66 (1) (a) to (e) of the Rules namely:

> *" 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".

[See also- **RIZALI RAJABU Vs. REPUBLIC,** Criminal Application No. 4 of 2011 (unreported)]

Since in the present application the review is sought against the impugned judgment on the ground of a manifest error on the face of the record, we deem it prudent to restate what does such error constitute. In the case of **NGUZA VIKINGS @ BABU SEYA AND ANOTHER Vs. REPUBLIC,** Criminal Appeal No.5 of 2010 (unreported) we said:

> *"There is no dispute as to what constitutes a manifest error apparent on the face of record. It has to be such an error that is obvious and patent mistake and not something which can be established by a long drawn process of reasoning on points which may be conceivably be two opinions..."*

Moreover, **MULLA,** Commentary on the Indian Code of Civil Procedure, 1908, 14th edition at pp 2335-6 defines a manifest error as follows:

"An error on the face of record must be such as can be seen by one who writes and reads...."

[See also- **STATE OF WEST BENGAL AND OTHERS Vs. KAMAL SENGUPTA AND ANOTHER,** (2008) 8SCC 612 and **CHANDRAKAT JOSHUBHAI PATEL Vs. REPUBLIC,** [2004] TLR 218.].

The definitionby **MULLA** on what constitutes a manifest error was adopted with approval in the case of **AFRICAN MARBLE COMPANY LIMITED (AMC) Vs. TANZANIA SARUJI CORPORATION (TSC),** Civil Application No. 132 of 2005 (unreported). Therefore, it is clear that the term mistake or error on the face of the record by its very connotation signifies an error which is evident ***perse*** from the record of the case and it does not require detailed examination, scrutiny and clarification either of the facts or the legal exposition. Thus, if an error is not self-evident and its detection requires a long debate and process of reasoning, it cannot be treated as an error on the face of record. See- **CHANDRAKAT JOSHUBHAI PATEL Vs. REPUBLIC** (supra).

As gathered from the matters raised in the notice of motion and the submissions by its counsel, the applicant in essence is challenging the findings of the Court on its decision raised at the hearing of the appeal

thus stretching to the merits of Civil Appeal No. 22 of 2009 which was determined by the Court. The follow up question is whether this falls under the province of review. We deem it crucial to quote in *extenso*the impugned judgment on the determination on the issue of TZS. 50,000,000/- debt and the fate of the loan agreement worth TZS. 180,000,000/= in the wake of the applicant's complaint that it was not effectively determined. From page 17 to 19 of the impugned decision, sitting as an appellate Court itre-evaluated the evidence adduced at the trial and addressed the issueas follows:

> *"There is no doubt from the evidence of DW1 and her late husband were desperate to save their house from sale by the CRDB and NBC over Tshs, 50,000,000/= debt. It was their son in law (PW2) who looked up for the loan from his longtime friend (PW5). It was also PW2 who negotiated the small details of that loan.... Although the appellant company needed only Tshs, 50,000,000/= PW2 negotiated a far larger amount of Tshs. 180,000,000/= which he described in his evidence to be the amount that was required.... Although the title deed in the custody of the two banks belonged to his in-laws; PW2 still had the audacity to bargain it with PW5 in exchange for an amount of loan that was far in excess of Tshs. 50,000,000/= needed to pay off the two commercial banks...*

It seems to us that had the learned trial Judge evaluated the evidence of DW1 she would have noticed some doubts whether the appellant's directors had indeed received the whole amount of Tshs. 180,000,000/= when the agreement was signed.... Similarly, it was expected that after receiving the whole amount of Tshs. 180,000,000/= the appellant's directors would have the following day 18/1/2012, personally gone to the banks to clear the mortgage. But, the evidence on record shows that it was PW5 the director of the respondent lender company who actually paid Tshs. 50,000,000/= to settle off the outstanding mortgage to the commercial banks....

From the foregoing re-evaluation of evidence, we do not share the conclusion reached by the learned trial judge that after weighing the opposing evidence, the respondent company proved that it had honoured its obligation under the agreement to pay the full amount of the loan. The only evidence that is undisputed is the cheque for Tshs. 50,000,000/= which PW5 wrote to clear the appellant's mortgage liability and pave way for the returning of the Title Deed. Without proof that the money under the agreement was fully paid, we cannot conclude that the respondent company had performed its promises under the agreement...."

Subsequently, at page 21 of the impugned decision the Court concluded as follows:

"Having found that the whole contractual sum of Tshs. 180,000,000/= which the respondent was obliged to pay the appellant was not paid up in full, the respondent did not fully perform its promise under the agreement and should not pursue the remedy of obliging the appellant to transfer the suit property to the lender. However, the respondent partly performed its obligation by paying the CRDB a sum of Tshs. 50,000,000/= which led to release of the Title Deed. The appellant has the outstanding obligation to return back Tshs 50,000,000/= to the respondent."

In view of the aforesaid, it is glaring that the complaint raised by the applicant on the sum of TZS. 50,000,000/=paid to CRDB and TZS, 180,000,000/=contractual sum of Tshs. 180,000,000/= which the respondent was obliged to pay the appellantwas adequately addressed and determined by the Court in the impugned decision. Therefore, apart from this being beyond the scope of the province of review, the applicant counsel's assertion that the issue was not effectively dealt with and determined is farfetched.

Furthermore, parties locked horns on the propriety or otherwise of the *mesne* profits. While Mr. Boniface submitted that the respondent was not entitled to *mesne* profit on account of lacking proof, Mr. Rweyongeza

contended that, the decision of the Court on *mesne* profits was justified because the applicant was in possession of the suit premise for about six to seven years. To back up his proposition he referred us to section 3 of the Civil Procedure Act [CAP 33 RE.2002]. In this regard, Mr. Rweyongeza argued that, the issue of the propriety or otherwise of the *mesne* profit in this application is not a manifest error but rather the applicant's dissatisfaction on the impugned decision which does not qualify to be a ground for reviewrendering the application grossly misconceived as it seeks to move the Court to rehear the appeal which is not the domain of the Court.

We have gathered that, in the impugned judgment, at page 24 to 25 the Court addressed the issue of *mesne* profits and its source as follows:

> *"With regard to the question arising from the counterclaim whether the appellant in the instant appeal was entitled to mesne profit, the learned trial judge on page 398 found as undisputed that the respondent had indeed occupied the property and collected rent therefrom. But the learned trial judge declined to award mesne profits because the respondent's occupation was supported by a court's order and there was no supporting evidence.*

There are two reasons why we think that Mr. Rweyongeza is entitled to demand the respondent to pay mesne profits obtained during the respondent's occupancy of the suit property. ***First,*** *the respondent's director PW5 has conceded that rent was actually collected during the respondent's occupation. We think, the obligation to account for the rent that was collected was placed on both the appellant and the respondent as well. The* ***second*** *reason has to do with our finding that the respondent did not, on the balance of the probabilities, prove that PW5 had paid the full amount of Tshs. 180,000,000/=. Therefore, the respondent company had no justification to occupy and collect rent for six to seven years when it had not performed its obligation to pay the full amount of the loan.*

Due to the fact that the appellant still owes the respondent Tshs. 50,000,000/= and due to the fact that the respondent occupied the suit property for six or seven years and collected rent therefrom, the outstanding loan of Tshs. 50,000,000/= which is due to the respondent is offset against the mesne profit we estimate to be Tshs. 50,000,000/= which the respondent owes the appellant...."

In view of the aforesaid, in the impugned judgment the Court having re-evaluated the evidence before the trial court and concluding that the respondent was entitled to *mesne* profits, the issue was adequately

considered and conclusively determined. In this regard, in our considered view, what was raised by the applicant is indeed a mere disagreement with the view of the judgment and it cannot be the ground for the invoking the remedy of review. This was emphasized in the case of **MARCKY MHANGO AND 684 OTHERS Vs. TANZANIA SHOE COMPANY LIMITED AND ANOTHER,** Civil Application No. 19 of 1999 (unreported) as the Court said that, a decision of the Court cannot be simply varied at any time at the whims of the losing party without cogent reasons. We say so because the grounds fronted by the applicant demonstrate that, it is seeking a re-appraisal of the entire evidence on record for finding the error which is tantamount to the exercise of appellate jurisdiction which is not permissible. We are fortified in that account because the law frowns on utilizing review as a backdoor method to re-argue the unsuccessful appeal and that is why the power of review is limited in scope as it is normally used for correction of a mistake but not to substitute a view in law. (See **MEERA BHANJA Vs. NIRMALA KUMARI CHOUDURY** (1955) ISCC India) and **PETER NG'HOMANGO Vs. GERSON A.K. MWANGA** and **ANOTHER**, Civil Application No. 33 of 2002 (unreported).

To address what seems to the applicant's grudge against the impugned decision, the Court cannot entertain an application for review on the ground that one of the parties in the case conceived himself to be aggrieved by the decision. We say so because a lawfully determined appeal cannot be re-opened for hearing in a style that ignores the principles of administration of justice which demand that litigation must have a finality. See - **BLUE LINE ENTERPRISES LTD. Vs. THE EAST AFRICAN DEVELOPMENT BANK**, (EADB) (supra) and **RIZALI RAJABU Vs. REPUBLIC** (supra).

In view of what we have endeavoured to discuss, since the complaints raised in the notice of motion and at the hearing were adequately dealt with and answered, in our considered view, the intended re-opening, re-hearing and re-arguing of the second appeal falls short of constituting a ground for reviewing the impugned decision and it is an abuse of the court process. In this regard, we entirely agree with Mr. Rweyongeza that; the application is misconceived as applicant has not properly moved the Court to review its earlier decision. Apart from not meeting the required criteria warranting the review, the applicant has not made out a case for reviewing the Judgment.

In view of the aforesaid, the application is without merit and we accordingly, dismiss it with costs.

DATED at **ARUSHA** this 19th day of March, 2020.

S. E. A. MUGASHA
JUSTICE OF APPEAL

S.S. MWANGESI
JUSTICE OF APPEAL

B. M. A. SEHEL
JUSTICE OF APPEAL

This Ruling delivered on 20th day of March, 2020 in the presence of Mr. Matuba Nyerembe holding brief of Mr. Boniface Joseph, counsel for the Applicant and Ms. Neema Oscar holding brief of Mr. Richard Rweyongeza, for the respondent, is hereby certified as a true copy of the original.

B.A. Mpepo
DEPUTY REGISTRAR
COURT OF APPEAL