IN THE COURT OF APPEAL OF TANZANIA

AT DAR ES SALAAM

(CORAM: MMILLA, J.A., MKUYE, J.A. And SEHEL, J.A.)

CIVIL APPLICATION NO. 266/01 OF 2016

MURTAZA MOHAMED RAZA VIRANI.....APPLICANT

VERSUS

MEHBOOB HASSANALI VERSI.....RESPONDENT

(Application for Review from the decision of the Court of Appeal of Tanzania at Dar es Salaam)

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

dated the 12th day of August, 2016
in
Civil Appeal No. 41 of 2015

RULING OF THE COURT

11th February & 20th April, 2020

MKUYE, J.A.:

By a notice of motion made under section 4(4) of the Appellate Jurisdiction Act, Cap. 141 R.E. 2002, and Rules 4(1) (2)(a), 48(1), (2) and 66(1)(a) and (b) of the Tanzania Court of Appeal Rules 2009 (the Rules), the Court is moved to review its decision in Civil Appeal No. 41 of 2015 dated 12th August 2016 (Mbarouk, Mussa and Juma, JJ,A. as they then were). The notice of motion is supported by an affidavit duly affirmed by

Murtaza Mohamed Raza Virani, the applicant. The application is opposed by an affidavit in reply sworn by Mr. Thomas Eustace Rwebangira, the learned advocate for the respondent. Both parties had earlier on filed written submissions in terms of subrules (1) and (8) of Rule 106 of the Rules respectively which they adopted together with their respective affidavits to form part of their oral submissions.

In order to appreciate the background of this application, we find it appropriate to narrate the facts leading to this application. They are as follows:

The applicant and Mrs. Rubab Mohamed Virani Raza who is not a party to this application, (the borrowers) entered into a loan agreement with the respondent whereby the respondent extended to them, as shown in a Loan Agreement executed by the parties on 17/6/2000, USD 100,000.00. As a security for the loan the borrowers executed a deed of transfer of the property known as Block 186017, parcel 5 with Title No. 186017/16. The Loan Agreement referred to above was drawn and attested by Advocate Kesaria. Unfortunately, the borrowers failed to honour the repayment of the loan as such the respondent through Advocate Kesaria instituted a suit, Civil Case No. 281 of 2002 against them

(the borrowers). The said advocate also appeared in court on 6/12/2002 on behalf the respondent.

On the other hand, the applicant filed a Written Statement of Defence (WSD) resisting the suit and raised a preliminary objection to the plaint objecting, Advocate D. Kesaria to represent the respondent for the reason that he was the one who drew and attested the documents relating to the Loan Agreement. He, nevertheless, admitted to have received USD 85,000.00 issued to him in three instalments though contrary to the Agreement.

Meanwhile, the applicant prayed for leave which was granted to amend the WSD in which he still insisted for the disqualification of Mr. Kesaria but at this time he refused to have been given money by respondent. This precipitated the respondent to raise an objection against the amended WSD in that the applicant derogated from his previous WSD in which he had admitted receipt of the part of the amount claimed. The preliminary objection raised by respondent was heard by way of Written Submission whereby the issue relating to disqualification of Advocate Kesaria as per section 7 of Notary Public and Commissioner for Oaths Act, Cap 2 R.E 2002 resurfaced as was argued by Advocate H.A. Magonya.

After hearing both sides on the preliminary objection, on 24/7/2003 the High Court (Kimaro, J. as she then was) upheld the preliminary objection and struck out the amended WSD as it deviated from the previous WSD; and also disqualified Mr. Kesaria from representing the respondent. (It is noteworthy that this fact was not brought forward during the hearing of the appeal by this Court). Thereafter, the matter was fixed for pretrial conference on 20/8/2003 but, since the presiding judge was bereaved, it was adjourned and fixed for mention on 4/9/2003. On that date, the advocate for the applicant was not ready to proceed with hearing for having been engaged only on the previous day and prayed for adjournment but the judge refused the prayer. This culminated into the applicant's advocate withdrawing from the conduct of the case which also led to the advocate for respondent to pray for judgment on admission. The High Court entered a judgment on admission against the applicant for the amount of USD 85,000 as shown at page 80 of the record of review.

The applicant being aggrieved appealed to this Court vide Civil Appeal No. 41 of 2018 on among other grounds that:

> *"1. Upon disqualifying Mr. D. Kesaria, under section 7 of the Notaries Public and*

Commissioners for Oaths Act, Cap. 12, the honourable judge erred in law in acting on the plaint drawn and filed by Mr. D. Kesaria and in upholding the submissions he had filed on behalf of the Respondent.

2. *The Honourable Judge erred when she failed to strike out the plaint and the written submissions of the respondent for being drawn and filed by advocate D. Kesaria, whom the court declared incompetent to act for the respondent.*

3. *The Honourable Judge erred in law and in fact when she struck out the entire amended Written Statement of Defence of the Appellant on the ground that the Appellant could not amend the facts he had pleaded and instead plead new facts.*

4. *The Honourable Judge erred in law and in fact in restricting the nature and parameters of the Appellant's amendment to his Written Statement of Defence ex post facto when leave was granted for complete amendment."*

After having considered the appeal, the Court found that the appellant was not afforded opportunity to state if he acceded to the prayer by the other party for judgment on admission and allowed the appeal to that extent. In relation to grounds 1 and 2 it said:

> *"...upon the first two grounds, counsel for the appellant seeks to impress that having disqualified Advocate Kesaria, the Judge was, additionally, obliged to expunge from the record all the pleadings and submissions, including the plaint, which were drawn, filed or made by the Advocate. It is noteworthy that, at the hearing before the High Court, counsel did not go so far as to request the court to expurgate Mr. Kesaria's pleadings and submissions* ***but, as we have, again, hinted upon, the prayer came through an objection raised by the second defendant in the aftermath of the High Court Ruling and the same stands unresolved. To the extent that the matter stands unresolved before the High Court we refrain from making any stand on the first two grounds."***
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> [Emphasis added]

The Court went on to nullify and set aside the judgment on admission. It also remitted the matter to the High Court to rehear and determine the prayer for judgment on admission with a further direction to hear and determine the preliminary objection raised by the second defendant and such other preliminary points as may arise in the course of the pleadings. Still undaunted, the applicant has come to this Court on an application for review on the following grounds:

> *"(1). The refusal to decide grounds numbers 1 and 2 are based on mistakes of fact that the matters raised in the said grounds stood unresolved in the High Court while in fact the said matters had been resolved; and*
>
> *(2). The Court declined to decide grounds numbers 3 and 4 holding that they relate to the Ruling given on 24/07/2003 which the Court said is distinct from and is not contemplated in the judgment and decree given on 4/9/2003 thereby depriving the applicant itself the opportunity of correcting the errors in the Ruling dated 24/7/2003. That Ruling had merged in the judgment and*

decree dated 4/9/2003 which was being challenged in the appeal.

(3). It is necessary for the proper administration of justice to give directions as to whether and when can the applicant appeal against the errors in the interlocutory ruling dated 24/7/2003.

(4). It is important for the Court of Appeal to give an authoritative decision on the extent to which an advocate can represent a litigant in a matter in which he has acted for the parties."

In paragraphs 3, 4, 5, 6 and 7 of the affidavit affirmed by the applicant, he has averred and reiterated what is stated in the grounds of the application that the Court did not resolve grounds 1 and 2 relating to the validity of the pleadings and written submissions prepared by Mr. Kesaria, learned advocate on account that the same issue has been raised in the preliminary objection by the second defendant which was yet to be determined by the High Court, though in fact the said Preliminary Objection was determined by the High Court on 14/1/2004.

The applicant's complaint on grounds 3 and 4 is on the Courts' refusal to resolve them for the reason that they were related to interlocutory Ruling given on 24/7/2003 and distinct from the judgment on admission given on 4/9/2003 and hence, not contemplated in the appeal which before the Court.

As was hinted earlier on, the application is resisted by the respondent through the affidavit and the written submission in reply.

When the application was called on for hearing, the applicant appeared in person, unrepresented; whereas the respondent had the services of Mr. Eustace Rwebangira, learned advocate.

Submitting in support of the application after having adopted the notice of motion, affidavit and the written submission in support thereof the applicant amplified some pertinent issues as follows: **One,** the Court acted under a mistake of fact when it declined to strike out the pleadings and written submissions prepared by advocate Kesaria on account that the same issue was raised through a preliminary objection by the 2nd defendant and was yet to be determined while the same had already been determined only that such information was not availed in Court. **Two,** the

Court found that he did not go as far as requesting the court to expurgate the pleadings and submissions prepared by Mr. Kesaria without hearing the applicant.

On his part, after having adopted the affidavit and written submission to form part of the submission, Mr. Rwebangira lucidly submitted that the applicant had not shown any manifest error on the face of the record as required under Rule 66(1)(a) of the Rules arguing that the mistake of fact raised by the applicant is not among the grounds for review envisaged under the said Rule but rather a ground of appeal. He added that the Court decided the appeal based on the notice of appeal which was against the decision in Civil Case No. 281 of 2002 dated 4/9/2003, the grounds of appeal, written submissions and the oral submission by Mr. Shayo who in arguing the appeal had consolidated grounds 1 and 2, 3 and 4 together; and in fact, Court decided them in the same arrangement as shown at page 15 of the Judgment of the Court. Thus, he said, the Court could not have resolved an issue which was unresolved by the High Court adding that the Court was not informed of the existence of the decision of Hon. Kalegaya, J. on the issue though the applicant knew of its existence. Neither was the said Ruling furnished in court.

Mr. Rwebangira stressed that the preliminary objection before the High Court related to the disqualification of Advocate Kesaria only. It did not involve expunging the pleadings and written submissions prepared by him. Hence, the applicant cannot be heard to have not been heard. In the end, he implored the Court to dismiss the application with costs.

In rejoinder, the applicant argued that their complaint was on the submissions prepared by Mr. Kesaria and that they could not have appealed against interlocutory order.

As we have already alluded to earlier on, the applicant has predicated his application on among other provisions under Rule 66(1) (a) and (b) of the Rules which provides:

> *"(1). The Court may review its judgment or order, but no application for review will be entertained except on the following grounds namely that:*
>
> *(a) the decision was based on a manifest error on the face of the record resulting in the miscarriage of justice;*

(b) a party was wrongly deprived of an opportunity to be heard;

(c) N/A

(d) N/A

(e) N/A"

In the case of **Chandrankant Joshubhai Patel v Republic,** [2004] TLR 218, it was emphasized that Court has inherent powers to review its decision in the following circumstances (though not 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."

With regard to what the manifest error on the face of the record means, an attempt to define it was made in the case of **Nguza Vikings @ Babu Seya & Another v. Republic**, Criminal Application No. 5 of 2010 (unreported), where the Court stated that:

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

Also, in the case of **African Marble Company Limited (AMC) v. Tanzania Saruji Corporation (TSC)**, Civil Application No. 132 of 2005 (unreported), the Court quoting with approval the definition of manifest error from **Mulla, Indian Code of Civil Procedure**, 14th Edition pages 2335 – 2336 stated as hereunder:

"An error 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."

In this case, it is contended that the manifest error is based on the mistake of fact which led the Court to refrain from determining the fate of the pleadings and written submission which were prepared by Advocate Kesaria and reach at the decision it reached. The applicant argued that,

had the Court known that the preliminary objection in Civil Case No 281 of 2002 had been determined, it could not have refrained from deciding it. On the other hand the learned counsel for the respondent has controverted it arguing that the Court made its decision on the issue that was before it.

On our part, we have dispassionately considered the arguments from both sides. In the first place we agree with Mr. Rwebangira that the decision sought to be impugned based on the issue and the material that was availed before the Court. There was no issue of expungement of the documents prepared by Mr. Kesaria. Hence, the Court could not have gone as far as expunging the alleged documents which was not even the issue at the High Court.

Be it as it may, at this juncture we wish to stress that any application for review must fall under any of the grounds provided for under Rule 66(1) (a) to (e) of the Rules. And, in case of the manifest error on the face of the record under Rule 66(1)(a) of the Rules, it must be something that does not need a long-drawn process of reasoning from the opposing parties. In this case, the mistake of fact raised by the applicant which led the Court to refrain from determining the fate of the documents prepared

by Mr. Kesaria is not among the grounds envisaged under the said Rule. It does not fall under the manifest error on the face of the record. At most, it is something which will require evidence to be adduced and evaluation thereof which may lead to different opinions. As it is, it looks like a ground of appeal in disguise to enable a decision which is erroneous to be heard and corrected. (See **Karimu Kiara v. Republic** Criminal Application No. 4 of 2007 **Gasper August Urio v. Republic,** Criminal Application No. 3 of 2013 (A R); and **Ghati Mwita v. Republic** Criminal Application No. 3 of 2013 (all unreported)). This, however, is restricted so as to abide to the public policy that litigations must come to an end. (See **Chandrakant Joshubhai Patel v. Republic** [2004] TLR 218.

Consequently, we agree with Mr. Rwebangira 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. This ground is thus devoid of merit and we hereby dismiss it.

With regard to the other ground that the applicant was deprived an opportunity to be heard, we have examined and considered the grounds of appeal which were fronted in the Court as reproduced at pages 9 to 12 of the record of appeal together with the written submissions prepared by Mr.

Shayo, who was the learned counsel for the applicant and we have found that such contention is devoid of merit.

Indeed, as was rightly submitted by Mr. Rwebangira, in the notice of appeal as shown at pages 131 of the record, the applicant had indicated to appeal against the whole decision in Commercial Case No. 218 of 2002 dated 4/9/2003 and nothing more. In the Memorandum of Appeal at pages 2 to 3 of the record of appeal the applicant had complained against the High Courts' Judge acting on the Plaint and written submissions filed by Mr. Kesaria; failure to strike out such documents having being drawn by Kesaria who was declared incompetent; striking out the applicant's amended Written Statement of Defence in that he could not have amended the facts he had pleaded earlier on and thus restricting the nature and parameters of amended WSD while leave was granted for complete amendment.

We are also aware that, in the written submission in support of the appeal, Mr. Shayo combined grounds 1 and 2 together; and grounds 3 and 4 together and the issue of expunging the pleadings and written submissions was not canvassed. And nothing in that regard was discussed by the Court.

Having examined the Court's decision, we are in agreement with Mr. Rwebangira that the Court determined the grounds of appeal in the same arrangement proposed by Mr. Shayo as shown at pages 15 to 16 of the record and grounds 1 and 2 were determined together. As we had quoted earlier on in relation to grounds 1 and 2 the Court stated that it could not decide the issue of expunging the pleadings and written submissions filed by Mr. Kesaria as the issue was yet to be resolved by the High Court; and remitted back the matter to it with a direction to hear and determine the second defendant's preliminary objection and such other preliminary points as may arise in the course of the pleadings. When we prompted the applicant if the Court was informed that the said issue had been resolved, he conceded that it was not. He did not even give any plausible explanation why he was not able to do so.

In the circumstances, we have found no reason to fault the Court as it decided the appeal which was before it according to the available material presented before it. In this regard, the applicant cannot be heard now to complain that he was denied the right to be heard. The record bears that the applicant had an opportunity to inform the Court of such decision at that particular time and not at this stage.

In view of the foregoing, we are settled in our mind that the applicant has not satisfied the required standard for review of the decision in terms of Rule 66(1)(a) and (b) of the Rules. In the event, we find the application to be devoid of merit and dismiss it with costs.

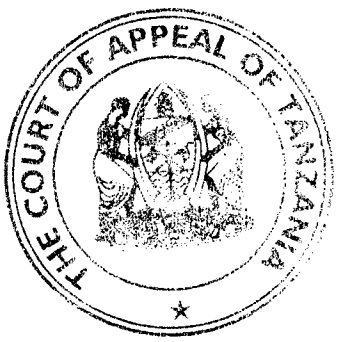
DATED at **DAR ES SALAAM** this 16th day of April, 2020.

B. M. MMILLA
JUSTICE OF APPEAL

R. K. MKUYE
JUSTICE OF APPEAL

B. M. A. SEHEL
JUSTICE OF APPEAL

The Ruling delivered this 20th day of April, 2020 in the presence of the appellant in person and absent of the respondent dully served, is hereby certified as a true copy of the original.



B. A. MPEPO
DEPUTY REGISTRAR
COURT OF APPEAL