IN THE COURT OF APPEAL OF TANZANIA
AT BUKOBA

(CORAM: JUMA, C.J., MWAMBEGELE, J.A., And KEREFU, J.A.)

CIVIL APPLICATION NO. 156/04 OF 2020

TWAHA MICHAEL GUJWILE.....APPLICANT

VERSUS

KAGERA FARMERS COOPERATIVE BANK LTD..... RESPONDENT

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

(Mmilla, Mziray and Kwariko, JJ.A.)

dated the 12th day of December, 2019
in
Civil Application No. 541 of 2018

RULING OF THE COURT

23rd & 26th August, 2021

KEREFU, J.A.

By a notice of motion taken under section 4 (4) of the Appellate Jurisdiction Act, Cap. 141 of the Revised Edition, 2019 and Rule 66 (1) (a), (b), (c), (e), (2) and (3) of the Tanzania Court of Appeal Rules, 2009 (the Rules), the applicant is applying for review of the decision of this Court in Civil Application No. 541/04 of 2018 dated 12th December, 2019 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, which the applicant personally drew, indicates two main grounds with ten (10) sub-grounds supported by an affidavit with nineteen (19) paragraphs and a lengthy written submission he filled well ahead of the date of hearing. We are aware that to qualify as grounds of review, all these have to fit in one of the grounds stipulated under Rule 66 (1) of the Rules. Having perused the notice of motion, we have observed that, some of the provisions cited may not have been necessary, as the ground upon which the review is sought is based on Rule 66 (1) (a) of the Rules, which can conveniently be paraphrased as follows: -

(1) That, the decision of the Court was based on a manifest error on the face of record resulting in a miscarriage of justice on the following issues: -

(a) That, the Court dismissed the application for stay of execution with costs based on the mere ground that, the applicant did not give security for the due performance of the decree without considering that under the circumstances surrounding this matter there was no need to give any security;

(b) That, the application for stay of execution was wrongly dismissed with costs without adhering to the binding previous decisions entered by the same Court over an issue awarding costs; and

(c) That, in determining the application, the Court failed to comply with the overriding objective principle.

The application is resisted by an affidavit in reply deposed by Mr. Gerald Felix Njoka, learned State Attorney in the office of the Solicitor General. Essentially, the respondent contends that all issues complained of by the applicant as errors on the face of the record do not constitute grounds for review to warrant the Court to exercise its jurisdiction to review the impugned decision.

However, 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, way back in 2011, the respondent herein, instituted a suit before the District Land and Housing Tribunal for Kagera at Bukoba (the DLHT), against the applicant seeking to recover a total of TZS 27,357,134.40 resulting from the loan of TZS 30,000,000.00 which was advanced to the applicant by the respondent on 18th October, 2008. The respondent also prayed for payment of TZS 6,000,000.00 being loss of income from business and the costs for the case. At the time of obtaining the said loan, the applicant was alleged to have mortgaged his residential house with

Certificate of Title No. 15079 situated at Plot No. 313, Kyanyi within Bukoba Municipality.

The applicant disputed the respondent's claim as he contended that he had already deposited a big sum of money to liquidate the loan. However, at the end of the trial, the DLHT decided the matter in favour of the respondent and ordered that the registered mortgage be attached for sale to realize the outstanding loan and other accrued costs thereto.

Aggrieved, the applicant unsuccessfully appealed to the High Court of Tanzania at Bukoba. Still dissatisfied, on 9th February, 2017, the applicant lodged a notice of appeal in this Court against the decision of the High Court. It is alleged that during the pendency of the intended appeal, the applicant was threatened by the respondent's attempt to execute the decree emanating from the impugned decision. As such, the applicant lodged Civil Application No. 541/04 of 2018 in this Court praying for an order for stay of execution of the said decree pending the hearing and determination of the intended appeal. However, the said application was dismissed with costs on account of the applicant's failure to make any firm undertaking to furnish security for the due performance of the decree

sought to be challenged. Hence, the applicant lodged the current application as indicated above.

At the hearing of the application, the applicant appeared in person, unrepresented whereas the respondent was represented by Mr. Solomon Lwenge, learned Senior State Attorney assisted by Mr. Gerald F. Njoka, learned State Attorney. It is noteworthy that the counsel for the respondent did not file reply written submissions and he thus addressed us in terms of Rule 106 (10) (b) of the Rules.

Upon taking the floor, the applicant clarified that, the main issue for the review is on the security for the due performance of the decree sought to be stayed in Civil Application No. 541/04 of 2018. Though, he admitted that, in his affidavit in support of that application, he did not make any firm undertaking to furnish security for the due performance of the said decree, he faulted the Court for having dismissed the said application with costs on account of that failure on his part. He argued that the Court failed to consider that, under the circumstances, there was no need to give such security because the loan had already been discharged way back on 25th June, 2011.

The applicant also faulted the Court for dismissing his application with costs as he argued that, if the Court was of the view that furnishing of that security was a necessary condition, it would have ordered him to furnish the same or striking out the application with no order as to costs. By so doing, the Court departed from its previous decisions, he argued. To support his proposition, he cited the case of **Africhick Hatchers Limited v. CRDB Bank PLC,** Civil Application No. 98 of 2016 (unreported).

On the last issue, the applicant faulted the Court for failure to apply the overriding objective principle which requires the courts to deal with substantive justice as opposed to technicalities. He then made a lengthy submission which is however not relevant to the current application. Finally, he prayed that the application be allowed with costs.

In response, Mr. Njoka strongly resisted the application by arguing that, the application has not met the threshold enshrined under Rule 66 (1) of the Rules and so, the Court should dismiss the application. He clarified that, to constitute an error apparent on the face of record, the mistake complained of should not be discerned from a long-drawn process of reasoning but rather, it should be an obvious and patent mistake. To bolster his proposition, Mr. Njoka cited the case of **Chandrakant**

Joshubhai Patel v. Republic, [2004] TLR 218. He then argued that, in the current application, the issues for review stated in the notice of motion and applicant's affidavit are but an attempt to re-open the application for stay of execution, as matters complained of herein, have already been determined by the Court. Specifically, and in respect of the issue of security for due performance of the decree, Mr. Njoka referred us to pages 7 to 10 of the impugned decision and argued that, the said matter was considered and correctly decided upon by the Court after the applicant had admitted that he had not indicated in his affidavit his firm undertaking to furnish the security for the due performance of the decree. As such, Mr. Njoka distinguished the case of **Africhick Hatchers Limited** (supra) relied upon by the applicant by arguing that the facts in that case are not relevant to the circumstances of the current application, as in that case, the applicant had clearly indicated his firm undertaking in his affidavit in support of the application, which is not the case herein.

As regards the issue of costs, Mr. Njoka argued that, awarding costs to parties or otherwise, is a discretion of the Court depending on the circumstances of each case. On this, Mr. Njoka cited the case of **Yazidi Kassim t/a Yazidi Auto Electric Repairs v. The Hon. Attorney**

General, Civil Application No. 354/04 of 2019 (unreported) and argued that, since the costs were properly awarded under the discretion of the Court, the same cannot be subjected for review.

Lastly, Mr. Njoka challenged the submission made by the applicant to fault the Court for failure to apply the overriding objective principle in that application. He contended that, since the applicant had not cumulatively complied with the conditions for an application for stay of execution, the said principle was not applicable. On the basis of his submission, Mr. Njoka urged us to dismiss the application with costs.

In his brief rejoinder, the applicant reiterated his previous prayer urging us to allow the application with costs.

On our part, having examined the record of the application, the written and oral submissions advanced by the parties, the issue for our determination is whether the grounds advanced by the applicant justify the review of the Court's decision.

To start with, we wish to note that the Court's power of review of its own decisions is provided for under section 4 (4) of the AJA whereas the

grounds upon which a review can be successfully sought are stated under Rule 66 (1) of the Rules. The said Rule provides that: -

> "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."*

Going by the above cited provisions, it is clear that, though the Court has power and unfettered discretion to review its own decision, 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 decides to exercise this jurisdiction, should not by any means open invitation to revisit the evidence and re-hear the appeal *" [Emphasis added].*

From the above authority and as argued by the learned counsel for the respondent, for an application for review to succeed, the applicant must satisfy any one of the conditions stipulated under Rule 66 (1) of the Rules. It is only within the scope of that Rule that the applicant can seek the judgment of this Court to be reviewed. Therefore, the next question for our determination is whether the applicants' alleged manifest error is apparent on the face of the impugned decision.

Before venturing in responding to the said question, we find it prudent, at this juncture, to restate the meaning of the phrase *'apparent error on the face of record'* as stated by the Court in **Chandrakant Joshubhai Patel** (supra) that: -

"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].

- See also **Issa Hassani Uki v. Republic,** Criminal Application No. 122/07 of 2018, **Mbijima Mpigaa and Another v. Republic**, Criminal Application No. 3 of 2011 and **Edson Simon Mwombeki v. Republic,** Criminal Application No. 06/08 of 2017 (all unreported).

It is clear from the cited cases that for an error to warrant review, it must be a patent error on the face of the record not requiring long-drawn arguments to establish it.

In the instant application, 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, in the contents of the supporting affidavit where the said allegations are clarified, the applicant has failed to point out the said errors. Furthermore, in his written submissions together with his oral account before us, the applicant's main complaint is his dissatisfaction with the decision of this Court on the issue of security for the due performance of the decree. As argued by Mr. Njoka, since the said issue was adequately

considered by the Court when determining that application, it is improper for the applicant to invite the Court to re-asses and re-evaluate the same. To justify this point, we have revisited the impugned judgment of the Court and observed that, at pages 9 to 10 of the record of the application, indeed, the Court had considered that matter and concluded that: -

> *"...That, implies that he* ***has fulfilled only two out of the three conditions and completely ignored to address the third important condition referring to security for the due performance of such decree*** *as may ultimately be binding upon him. Thus, the application is not meriting because as earlier on pointed out these conditions are required to be fulfilled cumulatively. We have mentioned that in a rejoinder to the respondent's counsel's oral submission, the applicant admitted this fact, but said that he has a three-acre farm valued at TZS 40,000,000.00 situated in Bukoba Municipality and was prepared to offer it as security.* ***That information however, is not helpful because it does not amount to a firm undertaking as it was not covered in his affidavit in support of the application.****" [Emphasis added].*

From the above extract, we are in agreement with the submission of Mr. Njoka that the issue raised by the applicant was adequately considered and decided upon by the Court. Re-opening the same at the point of review is to sit on 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 v. Manohar Lai Aggrwal,** Civil Application No. 17 of 2008**,** the Court 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."*

In addition, and discouraging litigants from resorting to review as disguised appeals, and underscoring the end to litigation, in **Patrick Sanga v. Republic,** Criminal Application No. 8 of 2011 we emphasized that: -

> *"The review process should never be allowed to be used as an appeal in disguise. There must be an end to litigation, be it in civil or criminal proceedings. A call to re-assess the evidence, in our respectful opinion, is an appeal through the back door.* ***The applicant and***

> ***those of his like who want to test the Court's legal ingenuity to the limit should understand that we have no jurisdiction to sit on appeal over our own judgements.*** *In any properly functioning justice system, like ours, litigation must have finality and a judgment of the final court of the land is final and its review should be an exception. That is what sound public policy demands." [emphasis added].*

As intimated above, the application before us does nothing less than inviting the Court to re-hear the application afresh which is contrary to the cherished public policy that litigation must come to an end.

On the issue of costs, we wish to point out that, we are in agreement with the submission of Mr. Njoka that, it is settled law that costs of, and incidental to all civil actions are awarded in the discretion of the Court. This is in terms of Rule 114 of the Rules. In the case of **Tanzania Fish Processors Limited v. Eusto K. Ntagalinda,** Civil Application No. 6 of 2013 (unreported) the Court emphasized that costs, ordinarily, follow the event, unless otherwise decided. In exercise of its discretion to award costs, the Court is generally enjoined to award costs to a successful party on the basis of the principle that "costs follow the event." Nonetheless, it is also trite that the Court may, in its discretion, withhold costs to a

successful party on any justifiable ground. We even find the claim by the applicant, that the Court had departed from its previous decisions in awarding costs, not being supported by the record.

Regarding the applicability of the overriding objective principle, we are again in agreement with the submission of Mr. Njoka that the same could have not been applied blindly against the mandatory provisions of the procedural law which go to the very foundation of the matter. Having failed to comply with the mandatory requirements for an application for stay of execution, the applicant would not have been rescued by the said principle. In this regard, we are guided by our previous decisions in **Njake Enterprises Limited v. Blue Rock Limited and Another,** Civil Appeal No. 69 of 2017 and **Mondorosi Village Council and 2 Others v. Tanzania Breweries Limited and 4 Others,** Civil Appeal No. 66 of 2017 (both unreported), that the overriding objective principle cannot be applied blindly against the mandatory provisions of the procedural law which goes to the very foundation of the case.

In the circumstances, and for the foregoing reasons, we see no merit in the applicant's application to warrant this Court to review its decision.

Accordingly, this application fails in its entirety and it is hereby dismissed with costs.

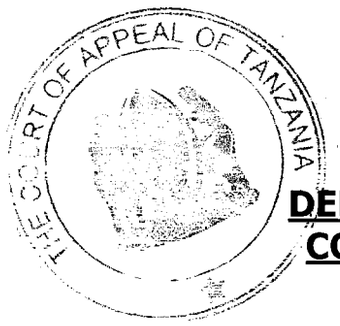
DATED at **BUKOBA** this 26th day of August, 2021.

I. H. JUMA
CHIEF JUSTICE

J. C. M. MWAMBEGELE
JUSTICE OF APPEAL

R. J. KEREFU
JUSTICE OF APPEAL

The Ruling delivered this 26th day of August, 2021 in the presence of the applicant appeared in person and Mr. Gerald Njoka, learned State Attorney for the Respondent, is hereby certified as a true copy of the original.



F. A. MTARANIA
DEPUTY REGISTRAR
COURT OF APPEAL