IN THE COURT OF APPEAL OF TANZANIA

AT DAR ES SALAAM

(CORAM: MUGASHA, J.A., NDIKA, J.A., And LEVIRA, J.A.)

CIVIL APPLICATION NO. 21/13/2017

EDGER KAHWILI ..... APPLICANT

VERSUS

1. AMER MBARAK
2. AZANIA BANCORP LTD } **..... RESPONDENTS**

(Application for review of the Judgment of the Court of Appeal of Tanzania at Dar es Salaam)

(Mjasiri, Juma and Mugasha, JJ.A)

dated the 28th day of July, 2016
in
Civil Appeal No. 154 of 2015

.....

RULING OF THE COURT

10th & 21st February, 2020

NDIKA, J.A.:

This is an application made under Rule 66 (1) (a) and (c) and (3) of the Tanzania Court of Appeal Rules, 2009 ("the Rules") for review of the judgment of the Court dated 28th July, 2016 in Civil Appeal No. 154 of 2015. The main thrust of the application is a contention that the said judgment is based on "a manifest error on the face of the record resulting in the miscarriage of justice."

The essential facts of the case and the context in which this matter has arisen are briefly as follows: Edgar Kahwili ("the applicant") sued Amer

Mbarak and Azania Bancorp Ltd. ("the first and second respondents" respectively) along with Mfima Auction Mart & General Trade Ltd. ("the auctioneer") in the District Land and Housing Tribunal of Iringa ("the trial tribunal"). The claim was for ownership and possession of landed property described as Plot No. 85, Zone II, located at Gangilonga, Iringa Municipality held under Certificate of Title No. 215002138.

It was common cause that the property in dispute initially belonged to a certain Thomas Kolimba who had mortgaged it to secure a loan advanced to him by the second respondent. Following Thomas Kolimba's default on repayment, the auctioneer, acting on the second respondent's instructions, offered the property for sale at a public auction where the applicant's bid in the sum of TZS. 2,600,000.00 was accepted. Although the applicant duly paid the whole purchase price, the auctioneer withheld the certificate of title. He later on learnt that the second respondent had rejected his bid on the ground that it was too low and thus it had directed the auctioneer to re-auction the property. As instructed, the auctioneer resold the property on 9th June, 2004 at a public auction. This time, the first respondent emerged the successful bidder.

In its judgment, the trial tribunal declared the applicant the lawful owner of the disputed property on the ground that he was the successful

bidder at the initial public auction. Aggrieved, the respondents appealed to the High Court of Tanzania at Iringa. That appeal bore no fruit as it was dismissed on the reason that it was time-barred. Undaunted, the respondents re-approached the High Court seeking extension of time to have the appeal re-filed, but the matter was struck out.

Being dissatisfied, the respondents appealed to this Court vide Civil Appeal No. 154 of 2015. When the appeal came up for hearing, the Court *suo motu* required the parties to address it on the propriety and regularity of the trial before the trial tribunal. It was manifest on the record that the assessors who sat with the presiding Chairman at the trial were changed in the course of the trial and that none of them gave their opinion on the case before the presiding Chairman handed down the judgment.

Having heard Mr. Bernard Shirima, learned counsel for the respondents (the then appellants), and Mr. Justinian Mushokorwa, learned counsel for the applicant (the then respondent), the Court held that the two infractions were a contravention of the mandatory requirements of section 23 (1) and (2) of the Land Disputes Courts Act, Cap. 216 RE 2002 (the "LDCA") and that they could not be waived under the curative provisions of section 45 of that law. In view of that, the Court, exercising its revisional powers, nullified all the proceedings and the decisions of the trial tribunal and the High Court.

The Court, then, left it open for either party in the case to re-institute the suit in any court of competent jurisdiction.

At the hearing of the application before us, the same counsel represented the parties. Initially in his written submissions in support of the application, Mr. Mushokorwa raised four issues for consideration: **one**, whether the trial tribunal's Chairman could not proceed and determine the case in terms of section 23 (3) of the LDCA even though both members of the tribunal were absent; **two**, whether it was correct for the Court to equate the scheme of assessors applicable to ordinary courts to the tribunal's scheme under the LDCA; **three**, whether the Court acted reasonably to nullify the entire proceedings of the trial tribunal; and **four**, whether the Court acted reasonably in not ordering a retrial of the matter while it did so in similar cases in **Awiniel Mtui & Two Others v. Stanley Ephata Kimambo (Attorney for Ephata Mathayo Kimambo)**, Civil Appeal No. 97 of 2015 and **Samson Njarai v. Jacob Mesoviro**, Civil Appeal No. 98 of 2015 (both unreported).

In his oral argument, Mr. Mushokorwa abandoned the first three issues and canvassed the fourth issue only. His contention was, in essence, that whenever the Court dealt with similar procedural infractions, it remitted the case to the tribunal concerned for retrial of the case after it had nullified the

vitiated proceedings and the decisions thereon. He illustrated that position by citing recent decisions of the Court in **Awiniel Mtui** (supra), **Samson Njarai** (supra), **Tubone Mwambeta v. Mbeya City Council**, Civil Appeal No. 287 of 2017 (unreported) and **Edina Adam Kibona v. Absolom Swebe (Sheli)**, Civil Appeal No. 286 of 2017 (unreported). He was also concerned that the applicant had no other recourse as he was barred by the law of limitation from instituting a fresh action the threshold twelve-years limitation having elapsed as the cause of action arose in 2004. On that basis, he urged us to vary the judgment under review by ordering that the matter be remitted to the trial tribunal for a fresh trial to be conducted.

Mr. Shirima valiantly opposed the application. He contended that the judgment sought to be reviewed contains no apparent error on its face and that the Court rightly directed that any of the parties was at liberty to recommence the action in any court of competent jurisdiction subject to the law of limitation. It was his further argument that the applicant had an option under the law to re-institute the action, a course that renders the present pursuit for review meaningless.

It bears restating, at the inception, that a review of a decision of the Court is by no means an appeal in disguise whereby an erroneous decision is examined and corrected. The power of review being residual and

circumscribed is only exercisable upon any of the grounds enumerated by Rule 66 (1) (a) to (e) of the Rules. As hinted earlier, the instant application is predicated upon the ground that the judgment under review was based on a manifest error on the face of the record resulting in the miscarriage of justice.

To be sure, the phrase "manifest error on the face of record resulting in injustice" was fully addressed by the Court in **Chandrakant Joshubhai Patel v. Republic** [2004] TLR 218 at 225. Having examined several authorities on the matter, the Court adopted from **Mulla on the Code of Civil Procedure** (14 Ed), pages 2335 – 2336 the following summarized description of that expression:

> *"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 be two opinions:*** *State of Gujarat v. Consumer Education and Research Centre (1981) AIR GU] 223] ...* ***Where the judgment did not effectively deal with or determine an important issue in the case, it can be reviewed on the ground of error apparent on the face of the record*** *[Basselios v.*

Athanasius (1955) 1 SCR 520] ... But it is no ground for review that the judgment proceeds on an incorrect exposition of the law [Chhajju Ram v. Neki (1922) 3 Lah. 127]. 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: Utsaba v. Kandhuni (1973) AIR Ori. 94. It must further be an error apparent on the face of the record. The line of demarcation between an error simpliciter, and an error on the face of the record may sometimes be thin. ***It can be said of an error that it 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*** *[Thungabhadra Industries Ltd v. State of Andhra Pradesh (1964) SC 1372]."* [Emphasis added]

See also the decisions of the Court in **P.9219 Abdon Edward Rwegasira v. The Judge Advocate General**, Criminal Application No. 5 of 2011, **Mashaka Henry v. Republic**, Criminal Application No. 2 of 2012, and **Elia Kasalile & 17 Others v. Institute of Social Work**, Civil Application No. 187/18/2018 (all unreported).

We have hinted earlier that in the instant case, it is the concluding portion of the judgment that is attacked on the ground that it is marred by a manifest error. We find it instructive to excerpt that part thus:

> *"**If any of the parties so wishes, he/she may recommence the action in the court of competent jurisdiction subject to the law of limitation.** We make no order as to costs since the anomaly was raised suo motu by the Court."*
> [Emphasis added]

Having reflected on the above excerpt, we hasten to say that we agree with Mr. Mushokorwa that our disposition of the appeal was riddled with a manifest error. To begin with, we wish to emphasise two points: first, that in our impugned judgment what we had found vitiated by the procedural ailments were the trial proceedings and the decision thereon as well as the subsequent proceedings before the High Court and the corresponding judgment; and secondly, that the nullification of the entire trial and appellate proceedings as well as the decisions thereon did not deface the pleadings on record that the parties had filed and exchanged at the pre-trial stage. It is thus an ineluctable inference that the suit before the trial tribunal necessarily remained alive but it stayed in abeyance. Evidently, our impugned judgment

overlooked this fact as it declared that it was open to either of the parties to re-institute the action in any court of competent jurisdiction.

More specifically, we agree with Mr. Mushokorwa that in our disposition of the appeal the subject of the impugned judgment, we ought to have followed the course we took in our four decisions that he cited. We have read them all. Indeed, they all concerned, in essence, similar procedural infractions that resulted in the trial and appellate proceedings as well as the decisions thereon being nullified. In each of the cases, we issued a consequential order for remittance of the suit to the respective trial tribunal for a fresh trial to be conducted before another Chairman and a new set of assessors. Looking at these cases objectively as against the instant matter, we see intrinsic similarities between them. Our legal system being one based on the application of the Doctrine of Stare Decisis requiring like cases to be treated alike, we are certainly bound to follow these decisions as there is obviously no sound reason for not doing so. For that reason, we are of the settled mind that the oversight alluded to above is a good cause for reviewing the judgment concerned. We thus find the application meritorious.

In the upshot of the matter, we grant the application. In consequence, we vacate our consequential order in the judgment dated 28th July, 2016 in Civil Appeal No. 154 of 2015 and, in terms of Rule 66 (6) of the Rules, we

substitute for it an order that the matter be remitted to the trial tribunal for the trial to be conducted afresh and expeditiously before another Chairman and a new set of assessors. Costs shall be in the cause.

It is so ordered.

DATED at **DAR ES SALAAM** this 19th day of February, 2020.

S. E. A. MUGASHA
JUSTICE OF APPEAL

G. A. M. NDIKA
JUSTICE OF APPEAL

M. C. LEVIRA
JUSTICE OF APPEAL

The Ruling delivered this 23rd day of February 2020, in the Present of the Applicant in person and Ms. Lydia Mbogoma Counsel for First and Second Respondents is hereby certified as a true copy of the original.

B. A. MPEPO
DEPUTY REGISTRAR
COURT OF APPEAL