IN THE COURT OF APPEAL OF TANZANIA
AT DAR ES SALAAM

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

CIVIL APPLICATION NO. 233/18 OF 2019

DAR ES SALAAM INSTITUTE OF TECHNOLOGY.....APPLICANT

VERSUS

DEUSDEDIT MUGASHA .....RESPONDENT

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

(Mwarija, Mkuye and Wambali, JJA)

dated the 25th day of April, 2019
in
Civil Reference No. 11 of 2016

RULING OF THE COURT

12th & 23rd June, 2020

KEREFU, J.A.:

By a notice of motion taken under Rules 66 (1) (a), (2) and (3) of the Tanzania Court of Appeal Rules, 2009 as amended (the Rules), the applicant is applying for review of the decision of this Court in Civil Reference No. 11 of 2016 dated 25th April, 2019 on the ground that the said 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 Novatus Rweyemamu, learned counsel for the applicant.

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. It is indicated that on 19th July, 2016, the applicant after being aggrieved by the decision of the High Court (Labour Division) in ICT Revision No. 33 of 2011, she lodged in this Court Civil Appeal No. 106 of 2016. Subsequently, the respondent lodged a notice of preliminary objection to the effect that the said appeal was time barred for being lodged after lapse of the period of time prescribed by the law.

Upon being served with the said notice of preliminary objection, the applicant lodged Civil Application No. 248 of 2016 seeking extension of time within which to lodge an appeal. The said application was strongly resisted by the respondent on the ground that it was intended to pre-empt the preliminary objection raised by the respondent. After hearing arguments by both parties on the said application, the single Justice of the Court Mjasiri, J.A (as she then was) accepted the respondent's argument and dismissed the application. Aggrieved, the applicant unsuccessfully lodged Civil Reference No. 11 of 2016. Undaunted, the applicant has re-approached the Court, but this time, as stated earlier, by way of an

application for review. In the notice of motion, the applicant has raised two grounds that: -

(1) The Court did not at all take into account the mandatory provisions of sections 3A and 3B of the Appellate Jurisdiction Act Cap. 141 R.E. 2019 as amended by the Written Laws (Miscellaneous Amendments) (No.3) Act 2018 which set out the overriding objective;

(2) If this Court had taken into account the overriding objective referred to in para (1) above, the Court:

(a) would have totally expunged the affidavit in reply by the respondent's advocate on the ground that the affidavit in reply aforesaid contravened the provisions of Article 13 (6) (b) of the Constitution of the United Republic of Tanzania, 1977 the legally established standard of proof beyond reasonable doubt in Criminal matters, and professional ethics and etiquette required of an advocate in Court;

(b) would have, after expunging the affidavit in reply as aforesaid, allowed the submission by the parties on the application by the applicant for extension of time;

(c) would not have found an intent by the applicant to pre-empt the respondent's preliminary objection by filing the application for extension of time; and

(d) would have, of its own motion (*suo motu*) made a decision on the alternative ground two of the Reference.

When the application was placed before us for hearing, the applicant was represented by Mr. Novatus Rweyemamu, learned counsel while the respondent had the services of Mr. Dennis Michael Msafiri, also 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. Rweyemamu argued that there is a manifest error on the face of record in the Court's decision for failure to take into account the mandatory provisions of sections 3A and 3B of the Appellate Jurisdiction Act Cap. 141 R.E. 2019 as amended (the AJA) that set out the principle of overriding objective. It was his contention that, since the amendments of the AJA introducing the said principle came into force prior to the lodgment of the applicant's application, the Court was duty bound to take judicial notice of the same and apply it in this matter. Based on our previous decisions in

Attorney General v. Marwa Magori, Criminal Appeal No. 95 of 1988 and **Chadha and Company Advocates v. Arunaben Chaggan Chita Mistry and 2 Others,** Civil Application No. 25 of 2013 (both unreported), Mr. Rweyemamu urged us to review our decision in Civil Reference No. 11 of 2016.

Mr. Rweyemamu also argued that, if the Court and the single Justice could have taken into account the said principle and fully read all the contents of the affidavit in reply filed by the respondent's advocate, she would have totally expunged the same for being prepared contrary to Article 13 (6) (b) of the Constitution of the United Republic of Tanzania, 1977. He specifically referred to paragraph 13 of the said affidavit, and argued that the same contains speculative arguments and criminal allegations against Mr. Datius Novath and advocates working in the firm styled as Kanywanyi, Mbakileki, Mtaki & Nditi Advocates which were not considered by the single Justice as observed by the Court at pages 21 and 22 of the record. According to him, if the single Justice could have considered the said paragraph, she would have expunged the said affidavit and allowed the parties to make submissions on the application for extension of time. To bolster his proposition, he cited cases of **VIP**

Engineering and Marketing Ltd v. Independent Power Tanzania Ltd, Civil Reference No. 6 of 2002 and **East African Development Bank Ltd v. Blue line Enterprises Ltd,** Civil Application No. 47 of 2010 (both unreported). Based on his submissions, Mr. Rweyemamu prayed for the application to be granted with costs.

In response, Mr. Msafiri 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 do not support an application for review but an appeal. He further challenged the long-written submissions by Mr. Rweyemamu which contained 26 substantive pages of long reasoning and arguments that he was trying to argue an appeal and not a review. According to him, since the issue of the single Justice's failure to consider the contents of paragraph 13 of the affidavit in reply was raised by the applicant and adequately considered and decided upon by this Court when determining Civil Reference No. 11 of 2016, it is not proper for the applicant to again raise the very same issue before the same Court on review. Mr. Msafiri also argued that the claim by the applicant that in deciding the matter the principle of overriding objective was not taken into

account has no merit because the said principle cannot be applied blindly against the mandatory procedural law.

It was the further view of Mr. Msafiri that, since the application is premised under Rule 66 (1) (a) of the Rules on manifest error on the face of the record, the applicant is required to show and identify in the impugned decision an obvious and indisputable error that warrants review of the same. He emphasized that, an application based on manifest error on the face of record should not involve a long-drawn process to arrive at a conclusion. He then said, it is clear from the ground and the submission by Mr. Rweyemamu that, the applicant has submitted an appeal under the name of review. To buttress his position, he cited the cases of **Chandrakant Joshubhai Patel v. Republic** [2004] T.L.R. 218, **Mathias Rweyemamu v. General Manager (KCU) Limited,** Civil Application No. 3 of 2014 and **Henry Muyaga v. Tanzania Telecommunications Company Ltd,** Civil Application No. 2 of 2014 (both unreported). On the strength of his arguments, Mr. Msafiri urged us to dismiss the application for lack of merit.

In rejoinder, Mr. Rweyemamu reiterated what he submitted earlier and prayed for the application to be granted.

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

From the outset, we wish to restate the principle governing review that a review is by no means an appeal in disguise because it is a matter of policy that litigation must come to an end. See the case of **Rizali Rajabu v. Republic,** Criminal Application No. 4 of 2011 (unreported). We are equally aware that under Rule 66 of the Rules this Court has jurisdiction to review its own decisions in any given case which is aimed at ensuring that a manifest error does not go uncorrected. See **Chandrakant Joshubhai Patel** (supra). The grounds on which this Court could review its own decisions are prescribed under Rule 66 (1) (a) – (e) of the Rules that: -

(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."

From the wording of 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. 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].*

Following the above authority and as clearly argued by Mr. Msafiri, for an application for review to succeed, the applicant must satisfy one if not all the conditions stipulated under Rule 66 (1) (a) – (e) of the Rules. It

is only within the scope of that Rule that the applicant can seek for the decision 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 that the decision of this Court has an error on the face of the record resulting in a miscarriage of justice. However, the entire affidavit in support of the application, apart from mentioning the documents attached to the said affidavit, there is no single paragraph which has specifically pointed out the said error on the face of the record. It is also on record that in his written and oral submission before us, the main claims by Mr. Rweyemamu are focused on the failure by the Court to take into account the principle of overriding objective and the omission by the single Justice to consider paragraph 13 of the reply affidavit by the respondent.

In addition, and as eloquently argued by Mr. Msafiri, the submissions by Mr. Rweyemamu focused on matters which could have been relevant before the single Justice when considering the application for extension of time, but not the current application. In the same vein, we have observed that, in his prayers found at page 26 of his written submissions Mr.

Rweyemamu urged us to expunge the affidavit in reply by the respondent and allow the parties to make submissions on the application for extension of time. With respect, we find the submissions by Mr. Rweyemamu to be misconceived because, if we do so, it will be like sitting on an 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, when faced with an akin situation 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 by Mr. Msafiri that the applicant has failed to justify the grant of this application, as the issue he had raised herein had already been determined by this Court in Civil Reference No. 11 of 2016. For the sake of clarity, we hereby reproduce the relevant part of the decision found at page 21 of the record, where the Court observed that: -

"We wish to observe that although the learned single Justice did not decide the application before her on the basis of paragraph 13 as asserted by Mr. Rweyemamu, we do not, with respect, find anything in the said paragraph which could have imputed criminal allegations against either Mr. Datius Novath or the Firm of learned advocates as alleged. It is in this regard that

we felt compelled to reproduce the said paragraph above for the purpose of clarity."

From the above extracted passage from the impugned decision, it is obvious that issues regarding paragraph 13 of the affidavit in reply by the respondent were raised by the applicant and adequately considered and decided upon by the Court. Re-opening the same at the point of review is like sitting in an 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,*' stated 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 iong-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, 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 raised by the applicant herein was already 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. Considering that this appeal originated from a labour dispute, we make no order as to costs.

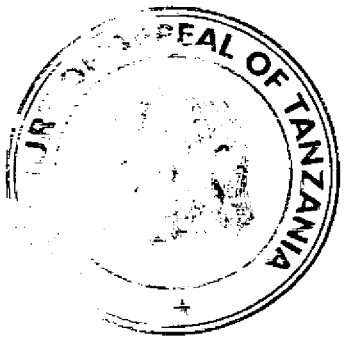
DATED at **DAR ES SALAAM** this 17th day of June, 2020.

A. G. MWARIJA
JUSTICE OF APPEAL

J. C. M. MWAMBEGELE
JUSTICE OF APPEAL

R. J. KEREFU
JUSTICE OF APPEAL

The ruling delivered this 23rd day of June, 2020 in the presence of Mr. Novatus Rweyemamu, learned Counsel for the Applicant and in the absence of the Respondent, is hereby certified as a true copy of the original.



A. H. MSUMI
DEPUTY REGISTRAR
COURT OF APPEAL