IN THE COURT OF APPEAL OF TANZANIA
AT DAR ES SALAAM

(CORAM: MUGASHA, J.A., WAMBALI, J.A., and KEREFU, J.A.)

CIVIL APPLICATION NO. 350/01 OF 2019

AFRICAN BARRICK GOLD PLC.....APPLICANT

VERSUS

COMMISSIONER GENERAL,
TANZANIA REVENUE AUTHORITY ..... RESPONDENT

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

(Mugasha, Wambali and Kerefu, JJA.)

dated the 24th day of June, 2019
in
Civil Application No. 177/20 of 2019

RULING OF THE COURT

22nd & 29th July, 2020

KEREFU, J.A.:

This ruling is in respect of the application for review lodged by the applicant inviting the Court to review its own decision dated 24th June, 2019 in Civil Application No. 177/20 of 2019 dismissing the applicant's application for being misconceived. The application is made under section 4 (4) of the Appellate Jurisdiction Act, [Cap. 141 R.E 2019] (the AJA) and

Rules 66 (1) (a) and (b) of the Tanzania Court of Appeal Rules, 2009 (the Rules).

The notice of motion is supported by an affidavit which was duly sworn by Mr. John Daniel Kamugisha, learned counsel for the applicant. The respondent, on the other hand, opted not to file an affidavit in reply.

A brief background of this application as gathered from the record is to the effect that, the applicant was dissatisfied with the decision of the Tax Revenue Appeals Tribunal (Twaibu, J.) dated 9th July, 2015 in Tax Appeals No. 128 of 2013 hence she lodged Civil Appeal No. 144 of 2018 which is still pending before the Court. In addition, the applicant lodged Civil Application No. 177/20 of 2019 under Rule 4 (2) (a) of the Rules seeking to be granted leave to adduce additional evidence in Civil Appeal No. 144 of 2018. At the hearing of the said application, the Court invited the parties to address it on its propriety after noting that it was not predicated under Rule 36 (1) (b) of the Rules which is the specific Rule regulating the modality of parties applying to adduce additional evidence in respect of an appeal pending before the Court. In his submission, Mr. Kamugisha, who was representing the applicant argued, among others,

that the application was of peculiar nature and has been brought in a separate application under Rule 4 (2) (a) of the Rules because the impugned decision of the Tax Revenue Appeals Tribunal (the TRAT) was not adjudicated under its original jurisdiction. It was therefore his view that the application was properly before the Court. In response, Mr. Noah Tito, who appeared for the respondent opposed the application and, among others argued that since the applicant seeks leave to adduce additional evidence in respect of Civil Appeal No. 144 of 2018 she was supposed to predicate her application under Rule 36 (1) (b) of the Rules which is a specific Rule on that aspect. Mr. Tito added that, because the said application was lodged after the filing of the said appeal the applicant ought to have sought the guidance of the Court on that matter at the hearing of the pending appeal.

The Court having heard both sides, at pages 11 to 13 of its Ruling stated that: -

> *"Having considered the position of the law as to when the additional evidence may be adduced and the related pre-conditions our answer is in the negative. Moreover, we are inclined to say so, because,* ***One,*** *in the wake of the pending Civil Appeal No. 144 of 2018 that would be*

the proper forum for the applicant to address the Court on the question of adducing additional evidence in terms of Rules 36 (1) (b) of the Rules. ***Two,*** *to entertain and determine this application is tantamount to pre-empting and rendering superfluous the pending Civil Appeal No. 144 of 2018 where the applicant may utilize the opportunity to pursue an application for leave to adduce additional evidence.* ***Three,*** *since what is sought by the applicant can be addressed at the hearing of the pending appeal under the specific Rule 36 (1) (b) of the Rules, the present application predicated under Rule 4 (2) (a) of the Rules is indeed misconceived…In view of the aforesaid, we are constrained to dismiss the application with costs."*

Following the above decision, the applicant lodged the present application for review as indicated above. In the notice of motion, the applicant sought for the following orders, that: -

(a) *This Honourable Court be pleased to review and set aside the Ruling and its Order in Civil Application No. 177/20 of 2019 dated 24th June, 2019 ("Application") and restore the Application to be heard on merit; and*

(b) *The costs of and incidental to this application abide the result of this application.*

On the following grounds: -

(1) *That, the decision of the Honourable Court has serious manifest errors on the face of the record resulting in miscarriage of justice, as the Court dismissed the applicant's Application as misconceived for being predicated under Rule 4 (2) (a) of the Rules and ruled that the applicant can invoke Rule 36 (1) (b) of the Rules at the hearing of the pending Civil Appeal No. 144 of 2018 to apply to adduce additional evidence, which is an inapplicable Rule in the circumstances of this case;*

(2) *That, the applicant has been wrongly deprived of an opportunity to be heard when the Honourable Court ruled that the applicant's Application for leave to adduce additional evidence which was before it, be made at the hearing of the pending Civil Appeal No. 144 of 2018 but strangely, the Court dismissed (not struck out) with costs the application which effectively means it will no longer be open to the applicant to go back to the same Court and revive the matter which is already dismissed with costs;*

(3) That, the decision of the Honourable Court is erroneous as the Court ventured on its own and delved into the merits of applicant's Application when it considered the position of the law on when the additional evidence may be adduced and the related pre-conditions and ruled against the applicant without hearing the parties and thereby occasioning an egregious failure of the right to be heard;

(4) That, the decision is wrong in law for giving the applicant rights that are uncertain and subjective, which will lead to miscarriage of justice, since in effect the Honourable Court having ruled that the applicant's Application was improperly made under Rule 4 (2) (a) of the Rules and proceeded to dismiss it, the applicant cannot now make a similar application at the hearing of the pending Civil Appeal No. 144 of 2018, hence a failure of right to be heard;

(5) That, the decision of the Honorable Court is wrong in law in regarding the applicant's Application under Rule 36(1)(b) of the Rules, without considering the situation and circumstances of the case; and

(6) That, the decision of the Honourable Court has serious manifest errors on the face of record resulting in miscarriage of justice in that the Court overlooked the applicant's case and misapplied the legal import behind the application of Rule 4 (2) (a) of the Rules by narrowing it down.

At the hearing of the application, the applicant was represented by Mr. John Daniel Kamugisha, learned counsel while the respondent was represented by Mr. Noah Tito, learned State Attorney assisted by Ms. Grace Makao, also learned State Attorney.

Mr. Kamugisha commenced his oral submission by first adopting his written submissions he filed on 18th October, 2019. He then opted to jointly argue the grounds of his complaints in two categories. **One**, the 1st, 5th and 6th and **two,** the 2nd, 3rd and 4th grounds.

Submitting in support of the 1st, 5th and 6th grounds and in trying to show an error apparent on the face of record in the impugned Ruling, Mr. Kamugisha argued that, the Court after hearing the parties on the propriety or otherwise of the application, ought to have struck out the application for being incompetent instead of dismissing it because it did not hear the same on its merits. He added that, the Court did not only erroneously dismiss the application but it also imposed a condition to the

applicant to apply to adduce additional evidence at the hearing of the pending Civil Appeal No. 144 of 2018 in terms of Rules 36 (1) (b) of the Rules. He said, Rule 36 (1) (b) of the Rules is not applicable, because the decision of the TRAT which is subject of the pending appeal was determined by the TRAT while acting on its appellate jurisdiction and not original jurisdiction envisaged under that Rule. He thus insisted that, in the circumstances, the only applicable provision is Rule 4 (2) (a) of the Rules.

As for the 2nd, 3rd and 4th grounds, Mr. Kamugisha argued that the dismissal order was erroneously given because the Court did not hear the application on merits and it was thus impossible for the applicant to make a similar application before the Court or even at the hearing of the pending appeal, hence resulted into a serious miscarriage of justice as the parties were denied their rights to be heard on the matter. To buttress his position, he cited to us cases of **Joseph Ntongwisangu and Another v. The Principal Secretary Ministry of Finance and Another,** Civil Reference No. 10 of 2005 and **Emmanuel Luoga v. Republic**, Criminal Appeal No. 281 of 2013 (both unreported). He then finally prayed for the application to be granted with costs and urged the Court to modify its impugned decision and restore the Civil Application No. 177/20 of 2019.

On his part, Mr. Tito strongly opposed the application by arguing that the same is not befitting the provision of Rule 66 (1) (a) of the Rules because none of the applicant's grounds exposes any manifest error on the face of record. He contended that, the manner in which the application is crafted signifies the applicant's dissatisfaction with the impugned decision which he said, in any case, does not qualify to be a ground for review.

Specifically, on the 1st, 5th and 6th grounds, Mr. Tito argued that, Rule 4 (2) (a) of the Rules relied upon by the applicant can only be invoked when there is no other provision in the Rules to address such matter and the Court invited to direct on the modality to be used in the circumstances. He clarified that in that application the applicant believed that there is no applicable provision to address her matter that is why she predicated it under Rule 4 (2) (a) but the Court after hearing the parties, it found the application misconceived and directed the applicant to submit her request at the hearing of the pending appeal under Rule 36 (1) (b). It was the strong argument by Mr. Tito that, since the issue of applicability of Rules 4 (2) (a) and 36 (1) (b) in the applicant's application had already been determined by the Court, when considering Civil Application No. 177/20 of

2019, it was improper for the applicants to reopen the same. As such, he found all the authorities cited by Mr. Kamugisha in **Joseph Ntongwisangu and Another** (supra) and **Emmanuel Luoga** (supra) irrelevant and distinguishable from the current application.

As for the 2nd, 3rd and 4th grounds, Mr. Tito argued that it was proper for the Court to dismiss the application because it was submitted at the wrong forum as the Court was not seized with the record of the appeal. On the right to be heard, Mr. Tito argued that in the impugned decision the applicant was directed to go and be heard at the pending appeal but instead of complying she lodged this application. It was the strong argument of Mr. Tito that the applicant was supposed to implement the

directive of the Court and not otherwise. Based on his submission he urged us to dismiss the application with costs for being misconceived.

Having carefully considered the submissions made by the counsel for the parties and examined the record before us and in particular the impugned decision, the issue for our 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 **Chandrakant Joshubhai Patel v. Republic** [2004] TLR 218. However, Rule 66 (1) (a) to (e) of the Rules provides for the following circumstances under which such review can be done, 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."*

Therefore, since in the application at hand the review sought against the impugned decision is on the ground of a manifest error on the face of the record, we deem it prudent to restate what does such an error constitute. In the case of **Nguza Vikings @ Babu Seya and Another v. 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 somethlng 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, 1998, 14th Edition at pp 2335 – 6 defines a manifest error as: - *"An error on the face of record must be such as can be seen by one who writes and reads...".*

From the above authorities it is clear that the term an 'error on the face of record' signifies an error which is evident from the record of the

case and it does not require detailed examination, scrutiny and clarification either of facts or 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 **Chandrakant Joshubhai Patel** (supra)].

In the matter at hand, we have examined the six grounds raised by the applicant in the notice of motion together with the supporting affidavit and the submission made by Mr. Kamugisha, we are however unable to see anything akin to a manifest error on the face of record resulting in the miscarriage of justice as alleged by the applicant. It is on record that, the main argument of Mr. Kamugisha is that after finding that the application is incompetent the Court should have struck out the application instead of dismissing it. With respect, we find this line of argument to be wanting, because, as correctly argued by Mr. Tito, in its decision, the Court did not find the application incompetent but misconceived for being submitted at the wrong forum. For the sake of clarity, we deem it crucial to reproduce the decision of the Court found at pages 12 – 13 of the impugned decision, where the Court stated that:-

"...since what is sought by the applicant can be addressed at the hearing of the pending appeal under the specific Rule 36 (1) (b) of the Rules, the present application predicated under Rule 4 (2) (a) of the Rules is indeed misconceived...In this regard, as earlier stated at the hearing of Civil Appeal No. 144 of 2018 the applicant can invoke Rule 36 (1) (b) of the Rules to apply to adduce the additional evidence. We thus agree with Mr. Tito that this application is indeed misconceived. In view of the aforesald, we are constrained to dismiss the application with costs."

From the above extract, it is clear that the Court after observing that the application was submitted to the wrong forum, it dismissed it for being misconceived and directed the applicant to apply to adduce additional evidence at the appropriate forum, that is, at the hearing of the respective appeal where the Court will be seized with the record of appeal. In that regard, we are in agreement with Mr. Tito that decisions of the Court in **Joseph Ntongwisangu and Another** (supra) and **Emmanuel Luoga** (supra) relied upon by Mr. Kamugisha in his submission are irrelevant and

inapplicable in this matter because in those cases the Court found matters before it incompetent while in the matter at hand, the Court found that the application misconceived for being submitted at the wrong forum.

We must emphasize that, the basis of our decision was not only that the applicant could not approach the Court on a separate application under Rule 4 (2) (a) but also that, the applicant has to access the Court when the pending appeal is called on for hearing and apply to adduce additional evidence on the same under Rule 36 (1) (b) of the Rules. It is in this regard that the Court dismissed the applicant's application for being misconceived instead of striking it out.

We have thus noted with concern that, the applicant herein, instead of complying with the Court's directive to apply to adduce additional evidence at the hearing of the pending appeal, she decided to lodge this application, which we find, not only flooding the Court with unnecessary applications but also an abuse of the court process.

We even find the submission by Mr. Kamugisha under the 2nd, 3rd and 5th grounds unfounded, because in the impugned decision, as argued by Mr. Tito, the Court did not deny the applicant's right to be heard as both

counsel for the parties were given ample time and opportunity to address us as to why Rule 36 (1) (b) was not applicable. Based on their submissions and for purposes of facilitating smooth administration of justice, we categorically directed the applicant to utilize her right at the hearing of the pending appeal, because it is for the Court, when hearing the appeal, to decide whether to allow the respective party who seeks to adduce additional evidence to either submit the application formally or informally. As such, even the submission of Mr. Kamugisha that the pending appeal does not emanate from the decision of the Tribunal in its original jurisdiction is misplaced. (See **Sheikh Issa Seif Gulu and 3 Others v. Rajabu Mangara and 10 Others,** Civil Application No. 63 of 2007 (unreported) which is reproduced at page 9 of the impugned Ruling.

In the circumstances, we are satisfied that the applicant has not shown such obvious and apparent error on the face of record. It is therefore our respectful view that, since the Court dismissed the matter after finding the same misconceived and properly directed the applicant to be heard at the pending appeal in terms of section 36 (1) (b) of the Rules, which she has not complied with, then her 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. In this regard, we are entirely in agreement with Mr. Tito that the application is misconceived and is an abuse of court process.

For the foregoing reasons, we find no merit in the application and it is hereby dismissed with costs.

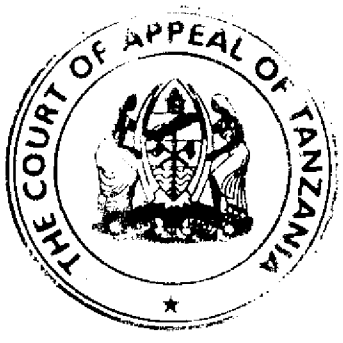
DATED at **DAR ES SALAAM** this 28th day of July, 2020.

S. E. A. MUGASHA
JUSTICE OF APPEAL

F. L. K. WAMBALI
JUSTICE OF APPEAL

R. J. KEREFU
JUSTICE OF APPEAL

The ruling delivered this 29th day of July, 2020 in the presence of Mr. John Kamugisha, learned Counsel for the Applicant and Mr. Noah Tito, learned State Attorney for the Respondent, is hereby certified as a true copy of the original.



G. H. HERBERT
DEPUTY REGISTRAR
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