IN THE COURT OF APPEAL OF TANZANIA

AT BUKOBA

(CORAM: MUGASHA, J.A., MWANDAMBO And KITUSI, J.A.)

CIVIL APPLICATION NO. 354/04 OF 2019

YAZIDI KASSIM t/a YAZIDI AUTO ELECTRIC REPAIRS ..... APPLICANT

VERSUS

THE HON. ATTORNEY GENERAL..... RESPONDENT

(Application for Review from the Ruling/Order of the Tanzania Court of Appeal at Bukoba)

(Mbarouk, Mkuye, Wambali, JJ.A.)

dated the 30th day of August, 2018
in
Civil Appeal No. 215 of 2017

.....

RULING OF THE COURT

16th December, 2020 & 2nd February, 2021

KITUSI, J.A.:

This is an application for a review of our decision in Civil Appeal No. 215 of 2017 dated 30th August, 2018. The decision was prompted by a Preliminary Objection that had been raised by the respondent consisting of two points, the first being to the effect that the appeal was time barred because the certificate of delay which would have otherwise cured the time bar, was defective. The second point was that the appeal was bad because of an alleged incompetence of the parties.

The applicant had countered the preliminary objection by raising his own preliminary objection in the course of filing what he referred to as a Reply to the Preliminary Objection. However, the Court only considered the respondent's points of objection and noted that the certificate of delay was defective because it purported to exclude the days from the date of judgment to the date of issuance of a copy of proceedings to the appellant, instead of excluding the days from the date the copies were requested to the date when they were supplied to the appellant, as mandated by Rule 90 (1) of the Tanzania Court of Appeal Rules 2009, hereafter the Rules. On that basis it struck out the appeal.

That is the decision the applicant wants reviewed. Why? The notice of motion, which the applicant personally drew, cites eleven grounds supported by an affidavit and a lengthy written submission he filed 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 under Rule 66 (1) of the Rules.

In the instant application we are being moved under section 4 (4) of the Appellate Jurisdiction Act, [Cap. 141 R.E 2002], Rules 2, 48 (1) and 66 (1) (a), (b), (c) (e) and sub Rule (2) and (3) of the Rules. Although some of the provisions cited may not have been necessary, we proceeded with

the hearing ignoring the over citation because that is the contemporary position when the provision conferring us with the jurisdiction has been cited. We also ignored the unconventional style of the introductory part of the notice of motion which calls upon us in the following terms:

> *"1. This Hon. Court be pleased to call for the ruling/order dated 30th August, 2018 and proceedings in respect of Civil Appeal No. 215 of 2017 of the Court of Appeal and* ***review the same****, in order to rectify or correct mistakes or errors contained in the said ruling and order by* ***reversing or rectifying the same****. On the ground that: the ruling/order of the full Court dated 30th August, 2018 contains' errors and mistakes (sic) amounts to the miscarriage of justice on my part as highlighted hereby below and in paragraphs 1 up to 15 of the accompanying affidavit."(underlining ours)*

Unlike in an application for revision where the Court considers propriety of proceedings and decision of the High Court, in review the Court considers its own decision, therefore it has nothing to call for and rectify. It is the applicant who has a duty, not an easy one, to show that there is something glaringly wrong in the Court's own decision to justify it reviewing the same. We think the above cocktail suggests that the applicant had one eye on the Court's powers of revision which we normally

exercise when moved under Rule 65 of the Rules in respect of proceedings and decision of the High Court, and another eye on the Court's powers of review under Rule 66 of the Rules.

In addition, by citing Rule 66 (1) (a), (b), (c) and (e) of the Rules, the applicant must be taken to be alleging under (a), that there is an error manifest on the face of the record leading to an injustice, and under (b), that he was deprived of an opportunity to be heard. Under (c), the applicant has to demonstrate that the decision is a nullity, while under (e) he has a duty to establish that the decision was procured illegally or by fraud or perjury. It is, undoubtedly, an ambitious application.

At the hearing of the application, the applicant stood in person. For the respondent there was a team led by Ms. Mercy Kyamba, learned Principal State Attorney, who was assisted by Mr. Gerald Njoka and Ms. Mariam Matovolwa, both learned State Attorneys. An affidavit in reply contesting the application had earlier been filed, but there is no reply to the written submissions. We proceeded with hearing because, Rule 106 (10) (b) of the Rules, permits a party who has not filed written submissions to address the Court orally within a limited time.

We have decided to segregate the grounds into two groups for ease of understanding and disposal of the intricate issues involved. The first

group is that which contains grounds raising issues, in our view, not directly connected to the certificate of delay, and we intend to quickly dispose of these grounds. The second group will consist of grounds which raise issue with the Court's decision on the certificate of delay. These shall call for somewhat detailed deliberations.

The first ground in the first group is ground (a) which states: -

> ***"(a) That the Hon. court erred in law to hold that Civil Appeal No. 215 of 2017 was incompetent and as such there was no proper appeal capable of being disposed of by the court on its own merits basing on erroneous ground."***

Not only is this ground too general, but in the oral address, the applicant did not elaborate on it and we do not have the means of figuring out what he had in mind. Later, when dealing with ground (f), we shall demonstrate what we think is the essence of this complaint. Anyhow, the complaint does not fit in any of the grounds under Rule 66 (1) (a), (b), (c) and (e) of the Rules. Ms. Mercy Kyamba did not allude to this ground because there was nothing to respond to. Our conclusion is that ground (a) is general, unsubstantiated and one that does not fit in any of the grounds under Rule 66 of the Rules. At best, the complaint could constitute a

ground of appeal but, we have no such jurisdiction to sit in an appeal of our own decision. Therefore, it has no merit and we dismiss it.

The second ground under the first group is (b) which states: -

> ***"(b) That in striking out my appeal with costs, the Hon. Court mistakenly based its decision on a misrepresentation of facts of the record of appeal as revealed by the state of amended plaint, High Court's ruling dated 18th August, 2005 and the Judgment of this Hon. Court delivered on 5th October, 2011 which decision resulted in the miscarriage of justice on my part."***

In addressing this point, the applicant submitted that the Court acted on extraneous matters and relied on those matters to arrive at its decision against him. The learned Principal State Attorney made a general response that this ground does not qualify as a ground of review as provided under Rule 66 (1) of the Rules. With respect, we must agree with the learned Principal State Attorney, because we do not see any nexus between this ground and the decision being complained of. The issue for determination in Civil Appeal No. 215 of 2017 was whether the appeal was within time in view of the certificate of delay which was considered defective. We do not see how ground (b) referring to an amended plaint and decisions other

than the one under consideration, can be said to be relevant to that issue and the Court's ultimate decision. Again, as correctly submitted by Ms. Kyamba, this ground does not raise any of the factors for review under Rule 66 (1) of the Rules. Consequently, we find no merit in this ground and dismiss it.

The third ground under this category is ground (d) which goes thus: -

> ***"(d) That the Hon. Court went wrong in law to entertain the Respondent's purported preliminary objection by deciding the same in his favour not only without giving due regard to the Applicant's reply referred as an Appellant therein that had been filed before this Hon. Court on 24th August, 2018 vide ERV No. 19379101, but also without giving him an opportunity of right to be heard on his preliminary objection on points of law raised earlier in his rejoinder filed on 11th September, 2017 vide ERV No. 16296163 and for completely ignoring matters that were presented by him for the consideration of the Hon. Court and determine the same."***

At the hearing, the applicant made a two-side argument on this ground. First, he submitted that since the respondent had not filed any written submissions in terms of Rule 106 of the Rules, she had no right of

audience. Secondly, he submitted that he had the right to reply to the preliminary objection because there is a decision of this Court which suggests an amendment to Rule 107 of the Rules to make room for the other party to reply to a notice of preliminary objection. He therefore maintains that the Court ought to have considered and determined his preliminary objection. On her part, Ms. Kyamba, submitted that the point raised in the preliminary objection was one of law therefore the respondent had the right to address it even if she had not filed any written submissions.

In the written submissions filed in support of this application, the applicant did not cite to us the case that he argues recommends amendment to Rule 107 of the Rules so as to provide room for the other party to file a reply. That decision was cited in the reply to the preliminary objection which we cannot go into at the moment, but even then, we are not aware yet of any such amendment to Rule 107 of the Rules. The settled law is still that once a party raises a preliminary point of objection the other party may not do anything meant to pre-empt it. See the decisions in **Method Kimomogoro v. Registered Trustees of TANAPA** Civil Application No1 of 2005 and **Godfrey Nzowa v. Seleman Kova & Tanzania Building Agency,** Civil Appeal No. 3 of 2014 (unreported). In

the case of **Mary John Mitchell v. Sylvester Magembe Cheyo & Others**, Civil Application No. 161 of 2008, the Court reaffirmed the position that had earlier been taken by a single judge of the Court in **Kimomogoro** (supra) which stated: -

> *"This Court has said in a number of times that it will not tolerate the practice of an advocate trying to preempt a preliminary objection either by raising another objection or trying to rectify the error complained of".*

In view of the foregoing, what was done by the applicant subsequent to the notice of preliminary objection being raised was unwarranted and the Court cannot be faulted for having ignored it. As regards the respondent's right of audience, we respectfully agree with the learned Principal State Attorney that the point raised in the notice was a jurisdictional issue. It is a long-established principle that issues of jurisdiction may be raised at any time thus, the parties have a duty, not only a right, to raise and address such issues at any time. The case of **John Sangawe v. Rau River Village Council** [1992] T.L.R 90, will demonstrate this point. In that case the applicant had lodged a notice of motion to move the Court to strike out a notice of appeal, but before addressing that application on the date of the hearing, the applicant orally

moved the Court to make a ruling on whether the High Court had the jurisdiction under section 63 (1) of the Magistrates Courts Act 1984, to entertain a suit based on land held under customary tenure. Since this was a question of jurisdiction, despite being raised informally at that late hour, the parties were heard on it and a ruling was made.

In addition to the above, we are unable to place this ground in any of the pigeon holes under Rule 66 (1) of the Rules, and neither has the applicant demonstrated that it fits in any. We accordingly dismiss it.

The foregoing applies to ground (j) which states: -

> ***"(j) That the Hon. Court mistakenly struck out my appeal with costs basing on the so-called preliminary objection of the Respondent, without taking into consideration that the said preliminary objection legalistically speaking was not before the court at all as it had not been filed properly as required by the mandatory provisions of the law."***

This ground is the same as the preliminary objection the applicant had raised against the respondent's preliminary objection. With respect, it seems to us that as far as the applicant is concerned, a review and an appeal are synonymous, because we fail to find any rationale why he has such little regard to the factors for review under Rule 66 (1) of the Rules to

the extent of raising an objection against the respondent's objection in these proceedings. We are aware of the settled law that a review is not to be taken as an appeal in disguise, and the applicant should be so advised. Therefore, for the reasons shown in the course of disposing ground (d) above, we find no merit in this ground and dismiss it too.

Next is ground (f). This ground raises the following complaint: -

> ***"(f) That the learned three Judges of the Hon. Court erred in law by indulging themselves in framing and recording issues and deciding the same, without taking into account that the said function was vested to the trial court and that it had already been performed by the trial Court and confirmed by the Court of Appeal on 5th October, 2011 and worse still without according me an opportunity of right to be heard and address the court over those issues."***

With respect, the grounds raised by the applicant are at times hazy and his submissions cannot easily be linked to the grounds. For instance, the applicant's reference under (f), to a decision dated October 2011 and that he was denied an opportunity to be heard has no bearing whatsoever to the decision dated 30th August 2018 in Civil Appeal No 215 of 2017, the subject of this application. As already stated above, in that appeal there

was only one issue whether the appeal was within time, therefore the complaint that the Court took upon itself to frame issues, is not supported by the record. Incidentally, grounds (a), (b) and (f) arise from the following background. The second point of preliminary objection raised issue with the competence of the parties. There is suggestion that before the High Court, Mwangesi, J. (as he then was) whose decision Civil Appeal No. 215 of 2017 was seeking to challenge, the applicant had sued three persons namely; C. 451 S. Sgt. Ramadhani, Idelfonce Emil and the Attorney General. Yet, Civil Appeal No. 215 of 2017 cited only the Attorney General as the respondent. Rightly or wrongly, these facts might be the ones that informed the second point of preliminary objection alleging incompetence of the parties.

The applicant has dedicated over 5 pages of his written submissions to this point, raising all manner of complaints of injustice having been caused. He has submitted at length and cited cases to justify his choice of parties but, in our view, all this is storm in a tea cup because the Court did not decide on the second point of preliminary objection. Part of the Court's ruling at page 6 reads: -

> *"He further urged us to find that the defect found in the Certificate of delay renders the appeal incompetent. He*

therefore, prayed for this incompetent appeal to be struck out with costs. ***Mr. Matuma then prayed not to argue his 2nd preliminary objection as it might be taken to have been fiied in the alternative."*** (Underlining ours*).*

So, the applicant's passion in pursuing the issue of the competence of the parties when that issue was abandoned, is as surprising as it is misconceived. For the reason that the second point of preliminary objection was neither argued nor decided upon, the complaint raised under ground (f) as well as grounds (a) and (b) is dismissed for being misconceived.

That is all for the first group. We now turn to the second group beginning with ground (c) which reads: -

"(c) That the court erred in law to dismiss Civil Appeal No. 215 of 2017 on the ground of defectiveness of the certificate of delay which decision was reached in (sic) forgetness of the existence of its previous decisions entered in the case of ***D. T. Dobie Company (T) Ltd v. N. B. Mwatebeie*** *[1992] T.L.R. at page 152 and the case law of* ***African Marble Company Ltd Vs. Tanzania Saruji Corporation*** *[1999] T.L.R. at page 309 as well as* ***National Social Security Fund Vs. New Kilimanjaro Bazaar Ltd*** *[2005] T.L.R. at page 160."*

We shall consider this ground along with grounds (e) and (i), because we consider them to be kindred. Even the applicant treated them as so in his written submissions. Ground (e) goes thus: -

> ***"(e) That the Hon. three Justices of Appeal erred in law to depart from the aforementioned previous decisions of the Court, without not only assigning reasons for doing so, but also without taking into account that the Court of Appeal can only depart from its own previous decisions in the process of resolving a conflict in the decision of the court which function is vested only to the full bench."***

And ground (i) reads: -

> ***"(i) That the Hon. Court erred in law to strike out my appeal with costs on the ground that it had been premised on defective certificate of delay, by relying on irrelevant and distinguishable unreported decisions of the Court whose circumstances are quite different from the ones surrounding the, current case."***

We shall commence this part by repeating the time-tested caveat stated in the case of **Chandrakant Joshubhai Patel v. Republic** [2004] T.L.R 218: -

> *"...that no judgment can attain perfection but the most that courts aspire to is substantial justice. There will be*

errors here and there, inadequacies of this or that kind and generally no judgment can be beyond criticism. Yet while an appeal may be attempted on the pretext of any error, not every error will justify a review".

Obvious from that statement is the principle that while an aggrieved party has a wide scope of challenging a decision by way of appeal, he does not enjoy similar freedom in a review because a review is a remedy that may be exercised on very limited conditions. We have asserted this position time and again, such as in **Blue Line Enterprises Limited v. East African Development Bank,** Civil Application No. 21 of 2012, and; **Jayantkumar Chandubhai Patel @ Jeetu Patel and 3 Others v. The Attorney General and 2 Others,** Civil Application No. 160 of 2016 (both unreported). In the latter case it was stated: -

"Before dealing with the substance of this application, it bears restating that a review of decision of the Court is by no means an appeal in disguise whereby an erroneous decision is reheard 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..."*** *(emphasis supplied).*

First of all, our understanding of grounds (c), (e) and (i) is that they seek to fault the Court's decision for being arrived at upon application of wrong principles. We shall not, at the moment, consider whether the Court applied correct principles or not, rather we shall have to determine first whether this is a ground for review. We shall also take these grounds as falling under Rule 66 (1) (a) of the Rules, that is, the decision was based on an error manifest on the face of the record, or under Rule 66 (1) (c) of the Rules, that is, the decision is a nullity.

Typical of him, the applicant submitted quite at length on the complaint falling under grounds (c), (e) and (i), but in essence all that boils down to one issue whether the Court departed from its previous position on the certificate of delay and whether it did so competently. The applicant submitted that the Court departed from the position in the cases of **D.T. Dobie Company (T) Ltd (supra)**, **African Marble Company Ltd** (supra) and; **National Social Security Fund** (supra). He further submitted that if the Court had to depart from that position, it ought to have been a full bench constituting five or more members.

In response, Ms. Kyamba submitted, referring to page 14 of the impugned decision, that the Court assigned reasons for not following the previous cited decisions by stating that the circumstances were different.

Specifically, in reference to the case of **D.T. Dobie** (supra) it stated that the case was on completeness of the record not on the certificate of delay. The learned Principal State Attorney concluded by submitting as an alternative, that this complaint does not qualify as a ground of review.

In our deliberation we pose the question whether this complaint is an error manifest on the face of the record that resulted in an injustice. What amounts to an error apparent on the face of the record has long been established as being an error which is easy to spot at a glance without a long process of argument being involved. See our decisions in **Chandrakant v. Republic** (supra), **SP Christopher Bageni v. The Director of Public Prosecutions**, Criminal Application No. 63/01 of 2016 (unreported) **AMI Tanzania Limited v. OTTU on behalf of P.L. Assenga & 106 Others,** Civil Application No.151 of 2013 and **Jayantukumar Chandubhai Patel** (supra) (all unreported).

We have considered the rival submissions on these grounds, and we find ourselves inclined to agree with the learned Principal State Attorney. First of all, it is not true that the Court departed from its earlier decisions on the certificate of delay, but as correctly submitted by Ms. Kyamba, it found the cases not relevant to the facts before it. We do not consider this to be an appropriate occasion for us to demonstrate principles of

precedent, but it suffices to say that cases are followed when they are considered to be relevant under the circumstances of the case being determined. And that when the Court does not follow its previous decision on account of circumstances being different, it cannot be said to have departed from that decision. This is exactly what the Court stated at page 14 of the impugned decision, when it observed that the cases cited by the applicant were inapplicable in the circumstances of the case before it. Secondly, we agree with Ms. Kyamba again that the applicant has not demonstrated that this complaint is an error manifest on the face of the record. What is clear to us is that the applicant holds an opinion different from that of the Court, which cannot be a basis for reviewing a decision of the Court. That is what we stated in **Jayantukumar Chandubhai Patel** (supra) when we reproduced a paragraph from **Mulla on the Code of Civil Procedure** (14th Ed): -

> *"But it is no ground for review that the judgment proceeds on an incorrect exposition of the law...A mere error of law is not a ground for a review under this rule. That a decision is erroneous in law is no ground for ordering review...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".*

Before we conclude this part, it has occurred to us that we should reproduce the following paragraph to remind litigants that there is always a desire that litigation should come to an end.

> *"Parties are not permitted to begin fresh litigation because of new views they may entertain of the law of the case or new versions which they present as to what should be a proper apprehension, by the Court of the legal result... If this were permitted, litigation would have no end except when legal ingenuity is exhausted".*

See **Blue Line Enterprises Limited** (supra) quoting from **Haystead v, Commisssioner of Taxation** [1920] A.C 155 at page 166. It was reproduced in many of our other decisions such as **Emmanuel Konrad Yosipati v. Republic,** Criminal Application No. 90/07 of 2019 (unreported). In addition, there is this duty on the part of Courts of last resort, stated in **Ezekiel Kapugi v. Abdallah Mambosasa**, Civil Application No. 135 of 2016, quoting **Raja Prithwi Chand Lall Chaudhary v. Sukhraj Rai** (AIR 1941 SCI). We reproduce only a part which says: -

"There is a salutary maxim which ought to be observed by all courts of last resort: ***Interestei republicae ut sit finis litium****... It concerns the State, that there be an end of law suits..."*

In our conclusion, we find grounds (c), (e) and (i) to be without merit because the applicant has not demonstrated any error let alone an obvious one in the decision, nor has he shown that the said decision was a nullity. We dismiss these grounds.

Next, we shall consider grounds (g) and (h) together because we think they are related too. Ground (g) reads: -

"(g) The Hon. Court mistakenly upheld the so called preliminary objection by striking out my appeal with cost without taking into account that the pin pointed said anomaly in the certificate of delay (sic) were merely a minor omissions which do not go to the root or substance of the matter, and as such they ought to have been ignored or overlooked or allow for amendment or rectifying the said appeal/ certificate of delay as prayed for by the applicant herein".

And ground (h) states: -

"(h) That after finding out that the said appeal was incompetent for being grounded on a certificate of delay said to be defective the court went wrong in law

to strike out the same with costs without directing its mind to the laid down procedure governing the matter at hand for failure to allow to rectify the said errors and allowing me to reinstitute the struck out appeal easily without any further payment of court fees".

The applicant submitted that although he still believes that the certificate of delay was valid, if the Court was disposed to find it defective, the defect was minor and so it should not have struck out the appeal. He cited several decisions of the Court in which appellants were given an opportunity to rectify the defects. They include **A.A.R Insurance (T) Ltd v. Beatus Kisusi,** Civil Appeal No. 67 of 2015 (unreported); **Maneno Mengi Ltd and 3 Others v. Farida Said Nyamachumbe and the Registrar of Companies** [2004] T.L.R 391 and; **Hemed Rashid Hemed v. Mwanasheria Mkuu and Others** [1997] T.L.R 35. He submitted that the Court should have ignored the defect or it should have ordered an amendment.

Submitting further, the applicant argued that preparation of a certificate of delay being a duty of the Registrar of the High Court, any defect on it should not have been blamed on the party. On this point he cited the case of **21st Century Food and Packaging Ltd v. Tanzania**

Sugar Producers Association and 2 Others [2005] T.L.R 1. Specific to ground (h), the applicant submitted that the Court should have allowed him to go rectify the defect and re - institute the appeal without payment of any fees. He backed up this argument with several cases, including **Robert John Mugo (Administrator of the estate of the late John Mugo Maina v. Adam Mollel,** Civil Appeal No. 2 of 1990 (unreported); **Tanganyika Cheap Store v. National Insurance Corporation (T) Ltd** [2005] T.L.R 338 and; **Haruna Mpangaos and 902 Others v. Tanzania Portland Cement Co. Ltd,** Civil Appeal No. 10 of 2007 (unreported). In his oral submission at the hearing, the applicant prayed that we grant him extension of time within which to rectify the defect in the certificate of delay by invoking Rules 2 and 4 of the Rules as well as section 3A and 3B of the Appellate Jurisdiction Act, [Cap 141 R.E 2002 (the AJA)].

Ms. Kyamba's response to these submissions was brief. She submitted that once an objection has been raised, the person against whom it is raised cannot be allowed to amend the very defect that is being objected to. Generally, she submitted that all grounds that are relied upon by the applicant are grounds of appeal as opposed to grounds for a review. She prayed for the dismissal of the application with costs.

Incidentally, before commencement of the hearing of this application, we had put to the applicant the question whether he considered a review to be the best option in the circumstances of this case. We did so mindful of the fact that in many a case parties have gone back to the Registrar of the High Court, obtained correct certificates of delay and instituted their appeals afresh. However, the applicant insisted that he would pursue the application for review. Now here he is, asking to be allowed to do the very thing he would have done if he had not insisted on this application.

We are not going to mince words, grounds (g) and (h) are outright misconceived and destined to fail. As rightly argued by the learned Principal State Attorney, what is raised under grounds (g) and (h) could be suitable grounds of appeal, but they are not grounds of review. None of the cases cited by the applicant were decided by the Court sitting to consider an application for review, therefore they are quite of no assistance to him. For instance, in **Maneno Mengi Limited** (supra), there were two certificates of delay in respect of the same appeal and the Court held that the Registrar had no power to issue the second certificate of delay before withdrawing the earlier. The holding that not every omission is fatal was in respect of appellant's failure to furnish an address of service, so it has nothing to do with a defective certificate of delay. We have consistently

held that even the overriding objective principle which the applicant wishes to rely on, does not bring back to life a dead appeal. See for instance, the case of **Njake Enterprises Ltd v. Blue Rock Ltd & Another,** Civil Appeal No. 69 of 2017 (unreported). If anything, holding No. (v) in the case of **Maneno Mengi Limited** (supra) deals the application a blow instead of supporting it. The Court stated: -

> *"(v) An advocate's lack of diligence and inaction is no good ground for circumventing the clear provisions of the Rules; had the advocate for the appellant exercised diligence, he would have discovered that a drawn order was not included soon after the copy of the proceedings was received and would have taken necessary steps to correct the defect before expiry of the 60 days limit, but now the appeal was clearly time barred in terms of rule 83 (1) of the Rules".*

Rule 83 (1) of the Rules applicable then, is the same as Rule 90 (1) of the current Rules. By extension, we find the applicant to have lacked diligence in Civil Appeal No. 215 of 2017 and he cannot invoke Rule 66 (1) of the very Rules he violated, to come to rectify the error in the certificate of delay.

The case of **Tanganyika Cheap Store** (supra) is even more irrelevant to the instant scenario because it related to the Registrar's powers under the Civil Procedure Code, Cap 33 R.E 2002 and whether or not he could sign a decree on behalf of a judge.

Therefore, unlike in the cases that have been cited by the applicant, the issue here is whether the decision of the Court in Civil Appeal No 215 of 2017 should be reviewed on the ground that it did not provide the applicant with an opportunity to rectify the certificate of delay or still, on the ground that it did not order that in re - instituting the appeal, the applicant should do so without payment of any fees. In resolving the instant issue, we have decided to take refuge in the Court's decision in the case of **AMI Tanzania Limited v. OTTU on behalf of P.L Assenga & 106 Others,** (supra) which cited its earlier decision in **Peter Kidole v. Republic**, Criminal Application No. 3 of 2011. The latter case adopted principles developed in an Australian case of **Autodesk Inc v. Dyson (No. 2)** – 1993 HCA6; 1993 176 LR 300. Those principles are: -

> *"(i) The public interest in the finality of litigation will not preclude the exceptional step of reviewing or rehearing an issue when a court has good reason to consider that, in its earlier judgment it has proceeded on a misapprehension as to the facts or the law.*

(ii) As this court is the final court of appeal, there is no reason for it to confine the exercise of jurisdiction in a way that would inhibit its capacity to rectify what it perceives to be an apparent error arising from some miscarriage in its judgment.

(iii) It must be emphasized however, that the jurisdiction is not to be exercised for the purpose of re agitating arguments already considered by the court, nor is it to be exercised simply because seeking a rehearing has failed to present the argument in all its aspects or as well as it might have been put. ***The purpose of the jurisdiction is not to provide a back-door method by which unsuccessfui litigants can seek to re- argue their cases".*** *(emphasis provided).*

To be noted from the first principle, is that a review is an exceptional step, and we do not see anything in the present application, warranting our taking that exceptional step. As stated earlier, the application is built on very thin grounds some of which, like (g) and (h), have left us wondering whether the applicant's interest is really pursuit of substantial justice or he is just satisfying his curiosity. That he has dared to ask us at this stage to extend time for him to rectify the defects, goes a long way to tell how the applicant has allowed his imaginations to run wild. Initially the applicant

left the mainstream and pursued the tributaries ignoring our caution. The powers of review cannot be so abused by giving him extension of time or by directing that he should not pay court fees when and if he decides to re institute the appeal. We accordingly dismiss grounds (g) and (h) for want of merit.

Last is ground (k), which in our view is somehow related to the last two. It says: -

> ***"(k) That in view of what has been stated in ground no. (j) above in awarding the costs of the case/ purported preliminary objection to the Respondent, the Hon. Court erred in law to exercise its discretion as it wished, without taking into account the set conditions provided under the rules and principles of law governing awarding costs of the case to the successful party".***

The applicant is faulting the Court for awarding the respondent costs, and wants us to review that decision, on the ground that the Court wrongly exercised its discretion. In his brief submission on this he submitted that the Court should have exercised mercy on him because he is a victim. This ground deserves no more than a quick reminder that one cannot succeed

in an application for review unless he meets the conditions provided under Rule 66 (1) of the Rules and, by any stretch of imagination, the issue of award of costs cannot be one of them. This ground is dismissed too for lacking merit.

In the end we dismiss this application with costs.

DATED at **DAR ES SALAAM** this 25th day of January, 2021.

S. E. A. MUGASHA
JUSTICE OF APPEAL

L. J. S. MWANDAMBO
JUSTICE OF APPEAL

I. P. KITUSI
JUSTICE OF APPEAL

This Judgment delivered on 2nd day of February, 2021 - linked via video conference at Bukoba in the presence of the applicant in person and Mr. Gerald Njoka, learned State Attorney for the respondent, and is hereby certified as a true copy of the original.

B. A. MPEPO
DEPUTY REGISTRAR
COURT OF APPEAL