IN THE COURT OF APPEAL OF TANZANIA

AT MWANZA

(CORAM: MKUYE, J.A., MWAMBEGELE, J.A. And LEVIRA, J.A.)

CIVIL APPLICATION NO. 173/08 OF 2020

1. **AMINA MAULID AMBALI**
2. **ROSE KASHINDE**
3. **MASAKI KASHINDE**

.....APPLICANTS

VERSUS

RAMADHANI JUMA..... RESPONDENT

(Review from the Judgment and order of the Court of Appeal of Tanzania, at Mwanza)

(Mwarija, Korosso, Kitusi, JJA.)

dated the 25th day of February, 2020
in
Civil Appeal No. 35 of 2019

.....

RULING OF THE COURT

4th & 7th May, 2021

MKUYE, J.A.:

In this application the applicants, Amina Maulid Ambali, Rose Kashinde and Masaki Kashinde (the 1st, 2nd and 3rd applicants respectively) have, by way of a notice of motion, moved this Court to review its decision dated 25/2/2020. The application has been brought under section 4 of the Appellate Jurisdiction Act, Cap 141 RE 2002 (the AJA) and Rule 66 (1) of the Tanzania Court of Appeal Rules, 2009 (the Rules).

The brief facts of this case are that, the respondent, Ramadhani Juma, had sued the applicants over ownership of a landed property on Plot No. 16 Block M with Certificate of Title No. 033013/24, L.O 28617 situated at Sukuma Street within Mwanza City. The applicants disputed the claim by the respondent contending that the said property was part of the estate of Juma Mwango who was the father of the respondent, the late Kashinde Juma and the 1st applicant's husband. They also claimed that the respondent registered the said property through fraudulent means. In its decision, the High Court found in favour of the respondent that he was the lawful owner thereof. Aggrieved, the applicants appealed to this Court but again they were not successful. Hence, they are now before this Court seeking the Court to review its decision. The applicants have predicated their application on the following grounds: -

1) *"That the decision is based on manifest error on the face of the record resulting in the miscarriage of justice the Court failing (sic) to see whether the gift given to the respondent by his late father was given by way of a "word will" or "written will".*
2) *The Court's decision is a nullity after the Court judgment and order differ on dated place, dates and differ on months.*

3) The judgment was procured illegally, or by fraud or perjury after the Court judgment made no order as to costs and the Court order dismissed the appeal with costs."

The application has been supported by a joint affidavit of all the applicants. They, also, in terms of Rule 106 (1) of the Rules filed a joint written submission in support of the application.

On the other hand, the respondent filed an affidavit in reply sworn by Mr. Constantine Mutalemwa, learned advocate. Likewise, he filed his written submission in reply.

When the application was called on for hearing on 4/5/2021, only the 2nd applicant entered appearance while the 1st and 3rd applicants did not appear in Court. The notices of hearing affirmed by the process server, one, Mohamed Said on 20/4/2021 indicated that the 1st applicant is seriously sick while the 3rd applicant's whereabouts are not known. On the other hand, the respondent was represented by Mr. Constantine Mutalemwa, learned advocate.

At the onset, Mr. Mutalemwa intimated to the Court that both parties had filed their written submissions. Having regard to the public policy that litigation must come to an end, he prayed to the Court to

determine the matter on the basis of such written submissions. He premised his prayer on Rules 106 (12) and 112 (4) of the Rules. Nevertheless, as he had lodged a notice of preliminary objection (PO) which was yet to be served on the applicants, he also prayed to withdraw it in order to pave way for the determination of the application on merit.

Upon there being no objection from the 2nd applicant, we marked the PO withdrawn and proceeded to grant leave for the matter to be determined on the basis of written submissions in terms of Rules 106 (12) and 112 (4) of the Rules. Having done so, we afforded an opportunity to the available parties to present their oral arguments in terms of the proviso to Rule 106 (12) of the Rules, which they did.

Upon being invited to elaborate their submissions, the 2nd applicant contended that the certificate of title which was the basis for the Court's impugned decision was fake. That, there was no signed will showing that the respondent was given the property as a gift. She added that they have been staying in the suit premises since 1961. Then, she urged the Court to consider their grounds for review and grant the application.

In reply, Mr. Mutalemwa took us to pages 6 to 7 of the typed Judgment of the Court where the Court found that the respondent was the lawful owner of the landed property because of the certificate of title he had produced unless it was proved that the same was not lawfully obtained. Apart from that, Mr. Mutalemwa contended that in review, it does not entail looking at evidence as it will be tantamount to a ground of appeal. He lastly, urged the Court to find that the application is devoid of merit and dismiss it with cost.

Having considered the grounds for review, the affidavits and the oral and written submissions from either side, we think, the issue for our determination is whether the application is merited. As alluded to earlier on, the applicants are challenging the Court's decision in that it is based on a manifest error and that it was obtained fraudulently.

An application for review is governed by Rule 66 (1) of the Rules which provides as follows: -

> *"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 miscarriage of justice;*

(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;

(e) The judgment was procured illegally, or by fraud or perjury".

The applicants have asserted in both affidavit and written submissions in support of the application that the decision of the Court was based on a manifest error on the face of the record resulting in the miscarriage of justice because of failure by both the trial court and the Court to see whether the landed property was given to the respondent by way of "word will" or "written will". Moreover, the Court failed to distinguish PW1 and PW2's evidence which was a lie.

On the other hand, the respondent has argued that the applicants are trying to re-argue their appeal as they are inviting the Court to re-hear and re-evaluate evidence afresh in view to establishing the errors. In support of his argument, he has cited to us the case of **Tlatla Saqware v. The Republic**, Criminal Application No. 2 of 2011 (unreported).

What amounts to an error on the face of the record was propounded in the case of the **African Marble Company Limited (AMC) v. Tanzania Saruji Corporation**, Civil Application No. 132 of 2005 (unreported) in which this Court citing **Mulla, Indian Civil Procedure** 14th Edition at page 2335-2336 stated as follows:

> *"An error apparent on the face of the record must be such as can be seen by one who writes 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 which there may conceivably be two options."*

See also **TUICO (on behalf of its members) v. The Chairman Industrial Court of Tanzania & Another,** Civil Application No. 114 of 2011, **Golden Globe International Services & Another v. Millicom (Tanzania) NV and Another,** Civil Application No. 195/01/ of 2017, **Philbert Kadabari v. Republic,** Criminal Appeal No. 1 of 2009 and **Pius Sangali and Another v. Tanzania Portland Cement Co. Ltd,** Civil Application No. 52 of 2012 (all unreported).

But again, it is important to note that the Court's power of review is required to be exercised in rare cases for the reason that the public policy demands that litigation must come to an end. This position was

taken by the Court in the case of **Tanzania Transcontinental Co. Ltd v. Design Partnership,** Civil Application No. 62 of 1996 (unreported) where it was stated as follows:-

> *"The Court will not readily extend the list of circumstances for review, the idea being that the* ***Court's power of review ought to be exercised sparingly and only in the most deserving cases, bearing in mind the demand of public policy for finality and for certainty of the law as declared by the highest Court of the land."***
> [Emphasis added]

(See also **Patrick Sanga v. Republic,** Civil Application No. 08 of 2011 (unreported)).

The necessity of finality of litigation in line with public policy that decisions must be certain and must be final in order to provide a closure has also been emphasized in the case of **Marcky Mhango and 684 Others v. Tanzania Shoe Company and Another,** Civil Application No. 37 of 2003 CAT (unreported).

In this case, we had an opportunity of perusing the grounds of appeal which were raised before the Court on appeal and we observed that the gist of the applicant's complaint was on the issue of the respondent being given the suit property as a gift and its transfer by him

without their knowledge. In its determination the Court did not make its finding based on whether or not the respondent was given the suit property under what type of will. In fact, the Court determined that issue on the ground that the respondent had tendered a certificate of title in respect of the suit property in his name as was rightly submitted by the learned counsel for the respondent. That is where the Court observed that where two persons have competing interests in a landed property, the person with the certificate thereof will always be taken to be the lawful owner unless it is proved that the certificate was not lawfully obtained. This being the case, we think, the applicants are raising a matter that was not the basis of this Court's findings as it was not addressed by the Court in which case, it does not qualify to be a ground of review as it may lead to opening a new trial through a back door. In the case of **The Hon. Attorney General v. Mwahezi Mohamed (as administrator of the Estate of the late Dolly Maria Eustace) and 3 Others,** Civil Application No. 314/12 of 2020 (unreported), the Court dealt with an issue brought for review while it was not raised in as a ground of appeal and it stated as follows:

> *"the issue...was not raised as a ground of appeal by the applicant and determined by the Court as admitted by both counsel for the parties. The*

Court could not decide on the issue which was not dealt upon by the High Court raised by the parties.

In our considered opinion this ground was raised as an afterthought and therefore it does not qualify to be a ground of review. ***It should be understood that, when the court sits in review, it cannot go beyond its decision to determine matters raised out of context.*** *Otherwise, to allow a new ground at this stage, it will be like re opening a new trial through the back door."* [Emphasis added]

Besides that, we have examined the nature of the ground the applicants have advanced concerning the manifest error that the Court failed to consider the type of will used to give the property to the respondent. However, we have no hesitation to find that it is not a manifest error envisaged in law. The applicants are attempting to refine the ground of appeal raised before the Court and determined. The ground before the Court was not based on the issue of the kind of will whether "word will" or "written will" that was used to hand over the property to the respondent. On this we wish to re-state what we stated in case of **Tlatla Saqware** (supra), where we cited with approval the

case of **Mirumbe Elias @ Mwita v. The Republic**, Criminal Application No. 04 of 2015 (unreported) and stated as follows: -

> *"The review should not be utilized as a backdoor method to unsuccessful litigants to re argue their case. Seeking the re-appraisal of entire evidence on record for finding the error, is tantamount to the exercise of appellate jurisdiction which is not legally permissible".*

With what we have discussed above we are satisfied that there is no manifest error which is apparent on the face of the record to warrant this Court review its decision as the purported ground for review does not fall within ground of review in terms of Rule 66 (1) (a) of the Rules and authorities cited above. At most, the applicants have raised a ground of appeal which this Court has no mandate to entertain.

In the 2nd ground of review, the applicants contend that the decision of the Court is a nullity as the Court's Judgment and the Order of the Court differ on dates, dated place and months. It is their argument that such error has amounted to a total confusion and that it is not a mere clerical error. The respondent has conceded that the judgment and order are at variance. Mr. Mutalemwa elaborated that while the Judgment of the Court is dated at Dar es salaam on 7/1/2020,

the Order issued by the Registrar is dated at Mwanza on 25/2/2020. However, the learned advocate for the respondent was of the view that the discrepancy is correctable.

On our part, we do not agree with both sides that the Judgment of the Court and the Order of the Registrar are at variance on the issue of the dated place, dates and even months. It has been a settled practice of the Court to date its Judgment at the place where the same was signed despite the fact that the respective case may have been heard at a different place. The logic behind that is not farfetched. It is meant to reflect the real date and place when and where the Judgment was signed by the Court. When the said Judgment is remitted for its delivery to the place where the case was heard, the Registrar who delivers it has to indicate the date when and the place where the same was delivered. In this case, what is reflected in the record of review was quite proper because the Judgment of the Court was dated at Dar es Salaam, the place where the same was signed by the Court on 7/1/2020 and the Order of the Registrar was dated at Mwanza on 25/2/2020 when the same was delivered to the parties. At any rate, even if it were a discrepancy, it is correctable in terms of Rule 42 (1) of the Rules. Even

with this conclusion, we find that this discrepancy does not qualify to be a ground for review. We dismiss it.

On the 3rd ground of review, the applicants have complained that the decision of the Court was procured illegally or by fraud or perjury on the ground that the Court did not allow costs but the Order of the Registrar shows that the appeal was dismissed with costs. The respondent conceded that while the Court in its Judgment dismissed the appeal with no order as to costs, in the Order by the Registrar the appeal was dismissed with costs. However, the learned advocate for the respondent was of the view that the discrepancy is correctable.

It is notable in the Judgment of the Court that it dismissed the appeal with no order as to costs. However, the Order of the Registrar which was issued subsequently shows the appeal was dismissed with costs. The issue here is whether the anomaly renders the judgment illegally or fraudulently procured as envisaged under Rule 66(1)(e) of the Rules.

Our understanding of the Order issued by the Registrar is that it is an extract of what the Court decided in the Judgment. In other words, it derives its origin from the Judgment and thus it has to conform with it.

This means that, since the order of cost did not originate from the impugned Judgment, then it has no effect as the judgment has remained intact.

Having examined closely the nature of the discrepancy, we agree with Mr. Mutalemwa that it is a simple error which can be rectified under Rule 42 (1) of the Rules. For clarity we take the liberty of reproducing it as hereunder:

> *"A clerical or arithmetical mistake in any judgment of the Court or any error arising in it from an accidental slip or omission may at any time, whether before or after the judgment has been embodied, in an order, be corrected by the Court, either of its motion or on the application of any interested person so as to give effect to what the intention of the Court was when the judgment was given."*

Thus, guided by the above cited provision of the law, we are satisfied that the discrepancy in this case, being not reflected in the Judgment of the Court but in the Order that was extracted by the Registrar, it is curable under Rule 42 (1) of the Rules and not by review as it does not fall under the dictates of Rule 66 (1) (e) of the Rules. Subsequently, we order that the Registrar should rectify the said Order

so as to reflect what was ordered by the Court and such rectification is to be effected within thirty (30) days from the date of delivery of this Ruling.

That said and done, we agree with Mr. Mutalemwa that the application for review is devoid of merit. It is accordingly dismissed. Given that the application revolves around a family dispute, we make no order as to costs.

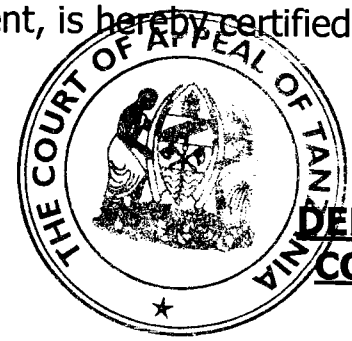
DATED at **MWANZA** this 7th day of May, 2021.

R. K. MKUYE
JUSTICE OF APPEAL

J. C. M. MWAMBEGELE
JUSTICE OF APPEAL

M. C. LEVIRA
JUSTICE OF APPEAL

This ruling delivered this 7th day of May, 2021 in the absence, of the 1st Applicant and in presence of 2nd and 3rd Applicants and in presence of Mr. Constantine Mutalemwa, the learned counsel for the Respondent, is hereby certified as a true copy of original.



E. G. MRANGU
DEPUTY REGISTRAR
COURT OF APPEAL