IN THE COURT OF APPEAL OF TANZANIA

AT TANGA

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

CIVIL APPLICATION NO. 207/12 OF 2020

NATIONAL BANK OF COMMERCE LTD ..... APPLICANT

VERSUS

NURBANO ABDALLAH MULLA ..... RESPONDENT

(Application for review of the decision of the Court of Appeal of Tanzania at Tanga)

(Mziray, Mwambegele and Kerefu, JJ.A.)

dated the 8th day of April, 2020
in
Civil Appeal No. 283 of 2017

.....

RULING OF THE COURT

04th & 10th June, 2021

KOROSSO, J.A.:

In this application, brought by way of notice of motion under section 4(4) of the Appellate Jurisdiction Act, Cap. 141 R.E 2002 (the AJA) and Rule 66(1)(a) and (b), (2), (3) and (4) and Rule 48(1) and (2) of the Tanzania Court of Appeal Rules, 2009 (the Rules), the applicants, the National Bank of Commerce Limited wish this Court to review its own decision in Civil Appeal No. 283 of 2017 dated 8/4/2020. The notice of motion is supported by an affidavit sworn by Denis Maringo, learned Advocate.

Briefly, the background to the matter is that in 2006 the respondent consented to the mortgage of a house on plot No. 81 KBXVI Raskazone area with certificate of title No. 1034, within Tanga Municipality and Region (the suit property) for an overdraft of 100,000,000/= which was extended to Unicord Tanzania Limited by the applicant. On 14/3/2009, the respondent received a notice of default with demand for Tshs. 50,490,205/03. As the debt remained unpaid, to recover the money, subsequently the suit property was auctioned and sold to one Hemedi Mndeme through the offices of Comrade Auction Mart. Dissatisfied with the sale, the respondent instituted a suit in the High court in Land Case No. 204 of 2015. The suit was determined *ex parte* in favour of the respondent upon failure by the applicant to file a written statement of defence. The sale of the suit property was declared null and void. Aggrieved, the applicant lodged an appeal in this Court, Civil Appeal No. 283 of 2017, where the Court upheld the decision of the High Court, hence the instant application.

There are mainly two grounds of review in the current application premised on rule 66 (1) (a) and (b) of the Rules which have been articulated in the notice of motion and the affidavit in support in paragraphs 5, 6 and 7. Essentially, compressed they are as follows:

1. That the decision of the Court subject of this review is marred by some significant apparent errors on the face of the record.

2. The applicant was deprived an opportunity to be heard on vital aspects of the case.

The respondent on the other hand opposed the application through an affidavit in reply sworn by Wilson Edward Ogunde, learned Advocate. In essence, the deponent challenges the grounds relied upon by the applicant contending that they are misconceived, inconsistent and seeking the Court to re-hear the appeal and thus not meriting for the Court to exercise its power of review.

At the hearing, the appellant was represented by Mr. John Ignace Laswai, learned counsel whereas, the respondent enjoyed the services of Mr. Wilson Edward Ogunde, learned counsel.

At the onset, Mr. Laswai adopted the contents of the notice of motion and its supporting affidavit. When amplifying on ground 1, he contended that the impugned decision of this Court under scrutiny contains patent errors on the face of the record warranting this Court to invoke its powers of review. According to the counsel for the applicant, the manifest errors discerned are: One, concluding that the suit property was a matrimonial home in disregard of the documentary evidence that

on its registration did not necessitate spousal consent. Two, that in view of the fact that the applicant's name was the only one on the certificate of title of the suit property, the Court should have invoked the presumption that the property belonged to the applicant and found that his interest on the suit property did override all other interests. Three, the Court dealing and deliberating on the issue as to whether or not the disputed property was a matrimonial property without hearing the applicant who had earlier on abandoned the respective ground of appeal. Four, when deciding the applicant's appeal whose decision is a subject of the current application, the Court overlooked findings in its own previous decision in **Gabriel Nimrod Kurwijila vs Theresia Hassan Malongo,** Civil Appeal No. 102 of 2018 (unreported).

The learned counsel argued further that despite being aware that in determining an appeal the Court is not barred from re-evaluating evidence, in the instant case, the applicant's main contention is that he was denied an opportunity to be heard on the above pointed out aspects and in addition, in its judgment, the Court made a conclusion on its own that the Mortgage Financial (Special Provisions) Act which was brought to the attention of the parties during hearing, was not operative at the time when the mortgage undertaking arose. Lastly, he contended that the

Court did not address the arguments and legal authorities that counsel for submitted in writing upon being granted leave to do so. The learned counsel concluded his submissions by imploring us to review our decision in favour of the applicant.

Mr. Ogunde on the other hand, began his submissions by adopting the affidavit in reply filed. Confronting the first ground, he differed with the counsel for the applicant on what transpired in Court regarding the 1st ground of appeal which had been abandoned by the applicant during hearing. He contended that, the said ground was abandoned because it was covered in the 2nd ground and this in essence necessitated the determination of the issue as to whether or not the suit house was a matrimonial home. It was thus agreed that the abandonment was not an impediment to the disposal of the 2nd ground which was determined after hearing the parties. The learned counsel thus argued that the issue whether the suit was a matrimonial home or not was covered in the deliberations of the appeal and that is why the Court (Page 7 paragraph 2 of the judgment) said that the two grounds were seen to be considered as they were, even after the first ground was abandoned.

Moreover, Mr. Ogunde reasoned that the applicant's complaint that there was no evidence in the trial court with regard to the suit property

being a matrimonial home is what led the Court to re-evaluate the evidence (seen at pages 8 and 9 of the judgment). He argued that when the Court deliberated on the said issues, reference was made to the pleadings before the trial court together with the evidence adduced at the trial. On this account, the Court was satisfied that the suit property was a matrimonial home and thus this is not a manifest error apparent on the face of the record to warrant a review.

He contended further that what can be discerned from the applicant's submissions together with the content of the notice of motion and the affidavit is that the applicant was dissatisfied with the impugned decision. He beseeched the Court to find that there is no manifest error apparent on the record and as such, the grounds advanced do not fit a review in terms of Rule 66(1) of the Rules.

To reinforce the above assertion, he cited the case of **Tanganyika Land Agency Limited and 7 Others vs Manohar Lal Aggrwal,** Civil Application No. 17 of 2008 (unreported) which expounds what constitutes grounds for a review of the decision of the Court. He argued that the case cited by the applicant's counsel, that is, **Gabriel Nimrod Kurwijila vs Theresia Hassan Malongo** (supra) is distinguishable. He contended that even for the sake of argument, the said decision is taken to be in

conflict with the impugned decision, processing a review is not the appropriate remedy. According to Mr. Ogunde, what would have been expected is for the applicant's affidavit to show clearly the manifest error. He invited us to find that the application is unmerited and consequently dismiss it with cost.

Having carefully assessed and analyzed the notice of motion, rival affidavit and oral submissions, it is not in dispute that in an application for review of the decision of this Court, the applicant must establish any of the grounds articulated under Rule 66(1)(a) – (e) of the Rules as provided thus:

> *"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."*

The instant application is predicated on Rule 66(1) (a) and (b), with complaints that, the impugned judgment contains manifest error on the face of the record resulting in the miscarriage of justice and that the applicant was wrongly deprived of an opportunity to be heard. What constitutes a manifest error on the face of record resulting in miscarriage of justice was discussed in **Chandrakant Joshubhai Patel vs Republic** [2004] T.L.R. 218 at page 225 (though decided before the enactment of Rule 66 of the Rules as it is now), where this Court quoted with approval an excerpt from Mulla, 14th edition stating:

> *"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... 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 review under this rule. That a decision is erroneous in law is no ground for ordering review."*

Various decisions of this Court have reiterated the above position including, **Tanganyika Land Agency Limited and 7 Others vs Manohar Lal Aggrawal** (supra) where the Court in considering the meaning of "*an error apparent on the face of the record*" stated:

"Such an error must be an obvious and patent mistake and not something which can be established by a long-drawn process of reasoning on points which there ma conceivably be two opinions, that a decision is erroneous in law is no ground for ordering a revies. Thus, the ingredients of an operative error are that first, there ought to be an error; second, the error has to be manifest, on the face of the record, and third, the error must have resulted in miscarriage of justice."

The question to be answered is whether the complaints raised by the counsel for the applicant constitute a manifest error on the face of the record envisaged by Rule 66(1)(a) of the Rules. The applicant's counsel contended that the error was occasioned by the Court deliberating and making a finding on a ground which was abandoned by the applicant. Our examination of the impugned judgment shows that at page 3, the Court acknowledged the fact that Mr. Maringo learned counsel, who appeared for the appellant (now the applicant) at the appeal hearing, did abandon the first ground of appeal.

Thereafter, the Court narrated the arguments presented by the learned counsel for the applicant/appellant at page 3-5 of the judgment. What is recorded includes the learned counsel inviting the Court to make a clear clarification of the phrase matrimonial property and matrimonial

home. After the counsel for both parties had presented their arguments, the Court stated at page 7 of the judgment, that there were two contentious issues in the appeal, that is, one, whether the mortgaged property was a matrimonial home and two, whether consent was required in the subsequent overdraft facilities extended to Unicord Tanzania Limited.

Having considered the submissions of the learned counsel on the contentious issues as to what was a matrimonial home under the law and whether spousal consent was required for an overdraft facility to the applicant, the court at page 12-13 stated:

> "... *We are certain that failure of the appellant to obtain consent from the respondent for the second overdraft facility was in contravention of the mandatory requirement under section 114 of the Land Act as the appellant knew for sure that the respondent was the wife of the mortgagor. In that respect it was expected for the appellant to seek consent just like what she did in the first overdraft facility... In addition, as rightly held by the trial court, the provisions of section 161(3) of the Land Act imposes a duty on a spouse who holds a dwelling house in his name to undertake a disposition by mortgage after obtaining consent form the other*

spouse... it is clear in our minds that even if the mortgaged property is under the name of one spouse alone, the h/she cannot deprive the other spouse his right over the mortgaged property..."

Thus, it is glaring that parties were heard and the applicant was not condemned without hearing and the Court was justified to determine the issue in relation to the disputed property being a matrimonial home. Therefore, since the parties were heard, the applicant was not denied a right to be heard in the Court's determination on what constituted a matrimonial home and the required spousal consent by them in the respective disposition. We thus find no manifest error on the Court's decision and consequently no miscarriage of justice was occasioned.

On incident one, two and four of ground 2, this need not detain us. The complaint against the Court's failure to follow **Gabriel Nimrod Kurwijila's case** (supra) is, as submitted by Mr. Ogunde not the same as proving existence of an error manifest on the decision. At best, all things being equal it goes to an error in the decision which is not a ground for a review.

Again, on the issue of submissions, arguments and authorities filed by parties not being considered, these are not one of the instances

establishing existence of an error apparent on the face of the record and warranting a review. In this regard we find this complaint misconceived and we reject it.

With regard to incident number 3, it is clear at page 10 of the judgment acknowledged and observed to be aware of the 2008 amendments ushered in through the enactment of the Mortgage Financing (Special Provisions) Act, 2008 but opted and correctly so not to consider them for reasons stated therein. We do not think there was any injustice occasioned since the contentious issues were argued and determined. Therefore, it cannot be said that the parties were deprived of the right to be heard on a matter which was not substantive in the determination of the appeal.

Before we conclude, we wish to reiterate our stand in **Patrick Sanga vs Republic**, Criminal Application No. 8 of 2011 (unreported), that there must be an end to litigation in line with Public Policy. The Court discouraged resourcefulness of litigants in using review to disguise efforts to appeal by moving the Court to reevaluate evidence as if sitting on an appeal on its own judgment which is not permissible.

In the premises, for reasons we have assigned above, the application is dismissed for being untenable in law. The respondent is awarded costs.

Ordered Accordingly.

DATED at **TANGA** this 10th day of June, 2021.

S. E. A. MUGASHA
JUSTICE OF APPEAL

W. B. KOROSSO
JUSTICE OF APPEAL

L. J. S. MWANDAMBO
JUSTICE OF APPEAL

The Ruling delivered this 10th day of June, 2021 in the presence of Mr. Yona Lucas holding brief for Mr. Makarious Tairo, learned counsel for the Applicant and Mr. Ahmad Abdallah Holding brief for Mr. Wilson Ogunde, counsel for Respondent, is hereby certified as true copy of the original.

F. A. MTARANIA
DEPUTY REGISTRAR
COURT OF APPEAL