IN THE COURT OF APPEAL OF TANZANIA
AT MWANZA

(CORAM: MUGASHA, J.A., WAMBALI, J.A. And SEHEL, J.A.)

CIVIL APPLICATION NO. 25/8 OF 2019

SHADRACK BALINAGO..APPLICANT

VERSUS

FIKIRI MOHAMED @ HAMZA...1ST RESPONDENT
TANZANIA NATIONAL ROADS AGENCY (TANROADS)........2ND RESPONDENT
THE ATTORNEY GENERAL..3RD RESPONDENT

(Application for Review of the Judgment and Order of the Court of Appeal of Tanzania at Mwanza)

(Juma, C.J., Mugasha, J.A. And Ndika, J.A.)

Dated the 9th day of October, 2018
in
Civil Appeal No. 223 of 2017

RULING OF THE COURT

19th & 25th February, 2021.

WAMBALI, J.A.:

At the very outset, we wish to remark that the first respondent did not enter appearance. According to the information from the Court process server, he refused to receive the notice of hearing which required him to appear in Court for the hearing of the application. The Court was also informed that the first respondent also refused to receive the notice of motion and the supporting affidavit which was sent to him by the applicant as required in terms of Rule 55(1) of the Rules. He did not therefore, lodge an affidavit in reply in terms of Rule 56(1) of the Rules. In the circumstances, in terms of Rule 63(3) of the Rules, we ordered the application to proceed for hearing in the absence of the first respondent.

Despite the non-appearance of the first respondent, we note that in the High Court of Tanzania at Mwanza through Civil Case No. 5 of 2011 the applicant sued the respondents jointly for malicious prosecution. The allegation was strongly denied by the respondents in their respective written statements of defence. In short, before the suit was instituted, the applicant and the first respondent were involved in a wrangle over the operation of the nursery. The said wrangle led to the prosecution of the applicant in Criminal Case No. 388 of 2010 which was later withdrawn after the Director of Prosecutions (the DPP) entered *nolle prosequi*. The second respondent was joined in the suit for issuing a temporary permit to the first respondent to use a road reserve which was close to the applicant's premises. The third respondent was joined in compliance of the requirement of the law.

For the purpose of this ruling, we do not intend to reproduce extensively the facts which led to the parties dispute as the judgment of the Court which is the subject of this application for review is clear on what transpired before the dispute between the parties ended up in the High Court of Tanzania for determination.

However, it is important to state that in determining the case, the High Court framed four issues during the trial. These were; **one,** whether the first respondent's nursery blocked an easement and customers entrance to the appellant's shop. **Two,** whether the appellant was maliciously prosecuted. **Three,** if the first and second issues are answered in the affirmative, then whether the appellant is entitled to damages and reliefs as claimed. **Four,** to what relief are the parties entitled.

To support his case, the applicant testified as PW1 and was supported by Jane Lushinge Mayala (PW2) and tendered several exhibits.

On the adversary side, the first respondent testified as DW1 and was supported by one witness Hamisi Ndege Lubi (DW2) (a local leader). The second respondent's testimony was supported by Engineer Felix Mhina Ngaire (DW3).

The High Court carefully considered the evidence for the parties and at the height of the trial, answered all issues in the negative. Consequently, the applicant's suit was dismissed with costs.

As it were, the applicant was seriously aggrieved by the decision and sought to challenge it before this Court. In his memorandum of appeal in respect of Civil Appeal No. 233 of 2017, the applicant raised the following grounds of appeal:-

1. *That the learned trial judge erred in law and in fact by holding that the first respondent's garden did not block an easement and customers' entrance to the appellant's shop.*

2. *That, the learned trial judge erred in law by holding that the appellant was maliciously prosecuted.*
3. *That the learned trial judge erred in law by refusing to award damages to the appeal.*

In determining the appeal, the Court carefully considered the written submissions of the applicant which he adopted together with the list of authorities without further explanation. The Court also considered the oral submissions of the first, second and third respondents. After a thorough scrutiny of the evidence in the record, in the end, all the grounds of appeal were rejected. Consequently, the appeal was dismissed in its entirety with costs.

It seems the applicant was dissatisfied by the decision of this Court, hence the present application. The application is premised under section 4(4) of the Appellate Jurisdiction Act, Cap. 141 R.E. 2002 (the AJA) and Rule 66(1) (a) and (b) of the Tanzania Court of Appeal Rules, 2009 (the Rules). Initially, in the notice of motion and the supporting affidavit, the applicant had desired the Court to consider the following grounds of review against the Judgment of the Court:-

1. *The complained Judgment and order were based on a manifest error on the face of the record resulting in miscarriage of justice to the applicant. That the error is to the following effect:-*

   > *"The Court omitted to consider and deal with the applicant's submissions on the credibility of witnesses and on Ground No. 2 of the appeal."*

2. *The applicant was wrongly deprived of a full opportunity to be heard on the credibility of witnesses and on Ground No. 2 of the appeal.*

However, in the applicant's written submissions and the prayer he made orally during the hearing of the application, the applicant abandoned the second ground of review. Moreover, at page 8 of the applicant's written submissions, without the leave of the Court the applicant sought to rephrase or amend the first ground of review into the following issues:-

1. *The Court omitted to consider and effectively deal with or determine the appellant's written submissions on the credibility of witnesses.*
2. *The Court omitted to consider and effectively deal with or determine the appellant's written submissions on whether the appellant had promised the first respondent to destroy his garden and, if so, whether the appellant destroyed the 1st respondent's garden.*

3. *The Court omitted to effectively deal with or determine the appellant's written submissions on whether the determination of a criminal prosecution should only be conclusive to enable the accused to bring an action of malicious prosecution.*
4. *The Court omitted to consider and effectively deal with or determine the appellant's written submissions on whether the 1st respondent had reasonable and probable cause to make the report to the police that the appellant had stolen and destroyed his garden flower and trees worth Tshs. 15,625,000/=.*
5. *The Court omitted to consider and effectively deal with or determine the appellant's written submissions on whether the 1st respondent was actuated by malice in bringing the prosecution against the appellant.*
6. *The Court omitted to consider and effectively deal with or determine the appellant's written submissions on whether the appellant was also maliciously prosecuted by the 3rd respondent.*

Be that as it may, we find that most of the issues go beyond the scope of the first ground of review in which the complaint is that the Court did not consider and deal with the applicant's submissions on the credibility of witnesses in resolving ground two of the appeal.

At the hearing of the application, the applicant appeared in person, unrepresented. He adopted his notice of motion, affidavit, written submissions and a list of authorities he had lodged in Court earlier on. More importantly, he did not wish to explain the contents of his written submissions, but urged us to allow the application with costs on the basis of ground one of review.

On the other hand, the second and third respondents were represented by Ms. Subira Mwandambo and Ms. Subira Yongo both learned State Attorneys. Earlier on they lodged a joint affidavit in reply to oppose the application.

Responding to the applicant's written submissions in support of the application for review, Ms. Mwandambo stated that the applicant has not shown any error on the face of the judgment of the Court dated 9th October, 2018 to deserve the attention of the Court as required by the provisions of Rule 66(1) (a) of the Rules. She emphasized that the complaint of the applicant in ground two of the appeal was extensively dealt by the Court in its judgment and in the end, it became apparent that the applicant was not maliciously prosecuted. To support her submission on the necessity of the applicant to show the manifest error on the face of the record, the learned State Attorney made reference to the decision of the Court in **Chandrakant Joshubhai Patel v. The Republic** [2002] TLR 218.

On the other hand, Ms. Mwandambo argued that a close scrutiny of the applicant's application indicates that he is dissatisfied by the decision of the Court and therefore, he seeks to appeal against the same contrary to the requirement of the law. To bolster her submission she referred the Court to the decision in **Karim Ramadhani v. The Republic**, Criminal Application No. 25 of 2012 which was referred in **The Hon. Attorney General v. Mwahezi Mohamed** (as Administrator of the Estate of the Late Dolhy Marwa Eustace) **And 3 Others**, Civil Application No. 314/12 of 2020 (both unreported).

Ms. Mwandambo maintained that throughout the applicant's lengthy written submissions, he has completely failed to show the apparent error on the face of the record. She added that even the list of authorities relied by the applicant to support the application are distinguishable with the circumstances of this application. Ultimately, the learned State Attorney implored us to dismiss the application with costs.

Noteworthy, the applicant did not have anything to rejoin to Ms. Mwandambo's submission. He simply urged us to consider his written submissions and allow the application with costs.

On our part, we have careful perused the record of the application and considered the applicant's written submissions and the oral submissions of the learned State Attorney for the second and third respondents. In this regard, we are settled in our mind that the epicentre of the complaint of the applicant is that the Court did not consider his submissions on the credibility of witnesses in support of ground two of the appeal.

In the first place, we must state that it is most unfortunate that in his affidavit in support of the application, the applicant has not shown any apparent error in the judgment of the Court worth to be reviewed. The applicant has only repeated his complaint in ground one of the review in respect of ground two of the appeal as reflected in paragraph 23 of the affidavit without pointing out the apparent error or explaining its content. Notably, in paragraph 24 of the affidavit the applicant concludes that as a result of the defects in the judgment of the Court he has suffered great miscarriage of justices to the effect that he has been deprived of damages from the respondents resulting in malicious prosecution. Moreover, we note that the only specific paragraphs of his affidavit which deals with what transpired at the Court without showing the envisaged error on the face of the record are 20-24. In this regard, for the purpose of our deliberation and for the avoidance of doubt, we reproduce hereunder paragraphs 23 and 24 of the applicant's affidavit:-

> *"23. That, when I perused the Judgment and order of this Court in Civil Appeal No. 223 of 2017, I noted following defects:-*
>
> *a) The said Judgment and order were based on a manifest error on the face of the record resulting in miscarriage of justice to me. The error is to the effect that the court omitted to consider and deal with my submissions on the credibility of witnesses and on Ground No. 2 of the appeal.*
>
> *b) I was wrongly deprived of a full opportunity to be heard on the credibility of witnesses and on Ground No. 2 of the appeal.*
>
> *24. That, as a result of the foregoing defects in paragraph 21 above, I have suffered a great miscarriage of justice to the effect that have been deprived of damages from the respondents resulting from malicious prosecution."*

We wish to remark that paragraph 21 referred in paragraph 24 is not applicable. The alleged defects are stated in paragraph 23 we have reproduced above.

Furthermore, paragraphs 1-19 of the affidavit revisit the story of what transpired at the High Court in Civil Case No. 5 of 2011 until Civil Appeal No. 223 of 2017 was lodged in Court. We wish to observe here, albeit in passing, that it was not necessary for the applicant to extensively reproduce that history as the thrust of his complaint is against the Judgment of the Court which he seeks to have it reviewed for the alleged error.

In the present application, we note that in his written submissions the applicant complains bitterly that the Court did not consider the evidence of crucial witnesses before it decided to dismiss ground two of the appeal. At this juncture, for the purpose of our deliberation, we deem it appropriate to reproduce fully what the Court stated in resolving ground two of the appeal in respect of the credibility of witnesses. The relevant part of the Judgment is from pages 17-22:-

> *"... We note from the record of appeal that throughout his testimony spanning from page 105 to page 110, the appellant did not address this element. The only evidence on which to base the claim for malicious prosecution was produced rather cursory at pages 107 and 108 of the record of appeal thus:-*

"On 04.05.2010, I was apprehended by police and charged at District Court on two counts of stealing and damage to property. The value was Tshs. 15,675,000/=. I was remanded at Butimba Prison for six (6) days until I was bailed. Judgment was delivered on 13.07.2011."

Then, he tendered a copy of proceedings in Criminal Case No. 383 of 2010 (Exhibit P.E. 2) but made no attempt to explain to the trial court whether the prosecution was without any probable justification. The admitted proceedings (Exhibit P.E. 2) spanning over 5 pages, which we examined, have no bearing on the question at hand. On the adversary side, the first respondent's take at page 114 of the record of appeal reveals how and why he mounted the prosecution against his opponent:-

"In 2010 he (the appellant) went to the District Commissioner. ***I was not called but he inform me that I should take away the garden within 7 days. He promised to slash my trees and flowers. I reported to street chairman. After a few days I found all flowers were slashed****. It was in 2010. I reported again to the chairman.* ***The chairman and his team came to see the area and advised me to report to***

the police. I reported the same and the plaintiff was arrested*. Then he was sent to court by the police at Nyamagana District Court. The case was not heard inter parties. I sent him to court after he destroyed my properties. It was the court that decided the case. The plaintiff destroyed my properties. I filed the case for destroying my properties.* ***My duty after finding that my properties were destroyed was to go to the police.****"*

[Emphasis added].

As rightly observed by the learned trial judge in her judgment, the appellant did not cross-examine the first respondent on the above piece of evidence. We would, therefore, agree with the learned judge's inference that the appellant's failure to cross-examine the first respondent amounted to acceptance of the truthfulness of the appellant's account. We would also add that the testimony of DW2 Hamis Ndege Lubi, the so called street chairman, substantially dovetailed with that of the fist respondent on the aspect of reporting of the incident to the police.

In view of the fact that the prosecution occurred in the midst of the endorsing wrangle between the appellant and the first respondent over the operations of the nursery, that the *appellant strenuously made numerous well-documented attempts to cause cessation of the nursery operations and that at some point he threatened to destroy the nursery, any reasonable and objective person would think that there was a reasonable and probable cause of prosecuting the appellant. It is significant that on the evidence in the record, the first respondent's version stands unassailable.*

*Next, we consider the elements of malice. The appellant contended that the first respondent was actuated by malice when he set the legal machinery into motion. In **James Funke Ngwagilo** (supra), this Court defined malice thus:-*

*"Malice in the context of malicious prosecution is **an intent to use the legal process for some other than its legally appointed and appropriate purpose.** The appellant could prove malice by showing, for instance, that the prosecution did not honestly believe in the case which they were making, that there was no evidence at all upon which a reasonable tribunal could convict, that the prosecution was mounted for a wrong motive and show that motive."*

[Emphasis added].

In the instant case, the evidence on the record that we have reviewed earlier on how and why the prosecution against the appellant was mounted is a far cry from proof that the prosecution was instituted for a purpose other than finding and punishing the culprit that stole and destroyed plants at the nursery. The fact that the appellant had threatened to remove or slash the plants should the nursery operations not ceased was an obvious basis for apprehending and investigating him as a suspect.

Noteworthy, the Court concluded as follows in respect of the finding in ground two of the appeal:-

"The appellant may have been prosecuted by the first respondent and subsequently discharged upon by the DPP entering nolle prosequi, but we have no cause to differ with the High Court that there was no proof that the first respondent set the legal machinery against the appellant without reasonable and probable cause or that he was actuated by malice. Accordingly, we agree with the High Court's holding that the claim for malicious prosecution was without merit and so, we dismiss the second ground of appeal."

Admittedly, gauging from the deliberation of the Court reproduced above, it is not doubted, in our view, that in determining ground two of the appeal the Court substantially considered the evidence of both sides together with the oral and written submissions to arrive at the conclusion that the complaint of the applicant had no merit.

We further note that the Court plainly and thoroughly considered the credibility of the witnesses for the parties before it concluded that the applicant was not maliciously prosecuted. We are thus surprised by the complaint of the applicant that his written submissions were not taken into consideration.

We must emphasize that the Court could not go beyond the evidence of the parties in favour of the written submissions which went beyond the testimonies of the parties. We wish to remind parties what we stated in respect of the status of written submission in the **Registered Trustees of the Archdiocese of Dar es Salaam v. The Chairman, Bunju Village Government And 11 Others**, Civil Appeal No. 147 of 2006 (unreported) as follows:-

> *"... submissions are not evidence. Submissions are generally meant to reflect the general features of a part's case. They are elaborations or explanations on evidence already tendered. They are expected to contain arguments on the applicable law. They are not intended to be a substitute for evidence."*

Thus, as earlier stated, in determining the appeal the Court could not go beyond the evidence tendered by the parties in favour of the written submissions.

Therefore, based on the deliberation and determination of the Court in respect of ground two of the appeal, in the present application, the applicant was duty bound to show or point out any patent errors or mistake in the judgment of the Court. On the contrary, the applicant has, with respect, miserably failed to discharge that duty. It is regrettable that having carefully scrutinized the applicant's lengthy written submissions, there is nothing showing the error which is apparent in the Court's judgment to justify a review as required by law. All that the appellant has done, it seems to us, is to bitterly show his dissatisfaction with the holding of the Court in ground two of the appeal. As correctly submitted by the learned State Attorney for the second and third respondents, this is unacceptable, as it amounts to ask the Court to sit in its own appeal. It is in this regard that in **Karim Ramadhani v. The Republic** (*supra*) we emphasized as follows in respect of the requirement to comply with Rule 66(1) (a) of the Rules:-

> *"... It is not sufficient for the purposes of paragraph (a) of Rule 66(1) of the Rules, for the applicant to merely allege that the final appellate*

*decision of the Court was based on the '**manifest error on the face of the record'** if his elaboration of these errors disclose grounds of appeal rather than **manifest error on the face of the decision**..."*

[Emphasis added].

It follows that even where the applicant is dissatisfied with the judgment of the Court, like it seems the case in this application, that is not sufficient to deserve a review of the judgment of the Court. Indeed, the judgment of the Court may contain some minor errors here and there, which is not the case in the present matter, but that is not a justification for seeking review.

We wish in this connection to reiterate what the Court stated in **Peter Ng'homango v. Gerson A. K. Mwanga,** Civil Application No. 33 of 2002 (unreported) thus:-

"It is no gainsaying that no judgment, however elaborate it may be can satisfy each of the parties involved to the full extent. There may be errors or inadequacies here and there in the judgment. These errors would only justify a review of the Court's judgment if it is shown that the errors are obvious and patent."

In the present application though the settled position of the law is that to show the manifest error on the face of the record does not require long drawn argument (see **Chandrakant Joshubhai Patel v. The Republic** (*supra*)), even in the applicant's long drawn arguments in his 28 pages written submissions, he has completely failed to show the envisaged manifest error which has caused injustice on his part.

We thus regret that throughout his written submissions the appellant seems to require the Court to sit on appeal against its own decision contrary to the requirement of the law. He has completely failed to support his ground of complaint on the existence of manifest error in the judgment.

In **Peter Kidole v. The Republic**, Criminal Application No. 3 of 2011 (unreported), in an akin situation, the Court considered the application and stated in part as follows:-

> *"... The applicant is merely asking the court to revisit evidential, legal and factual matters. This is synonymous with asking the Court to sit on appeal against its own decision. This is not acceptable as the circumstances for review are clearly set out in Rule 66(1) of the Court Rules."*

Similarly, in **Lakhamshi Brothers Ltd v. Raja and Sons** [1966] 1 EA 313 being the decision of the erstwhile East African Court of Appeal which was quoted with approval by the Court in **Karim Kiara v. The Republic**, Criminal Application No. 4 of 2007 (unreported), it was stated as follows:-

> *"In a review the Court should not sit on appeal against same proceedings. In a review, the Court has inherent jurisdiction to recall its judgment in order to give effect to its manifest intention on what clearly would have been the intention of the Court had some matter not been inadvertently omitted."*

In the present application, we also firmly find that a litany of the list of authorities lodged by the applicant in support of his argument cannot assist him in any way to show that in the judgment of the Court there is a manifest error to deserve a consideration for review. Indeed, most of the authorities are highly distinguishable to the circumstances obtaining in the instant application as rightly stated by Ms. Mwandambo.

Overall, for purpose of seeking review, the applicant was supposed to show how the Judgment of the Court contain manifest error leading to miscarriage of justice instead of trying to appeal against it through the back door. It is in this regard that in **Efficient International Freight Ltd And Another v. Office DU THE DU Burundi**, Civil Application No. 23 of 2005 (unreported) the Court stated plainly that:-

"... a review is not a stage or step in the appeal process or structure. We say so because, yet again, of late it is apparent that some parties appear to think that once aggrieved by the outcome of an appeal there is always an automatic right of a review. As already alluded to, a review is only available in the circumstances shown above. A review is not available as an automatic remedy to an aggrieved appellant."

In the end, based on our deliberation above, we are constrained to state that the applicant's application has no merit. Consequently, we dismiss it with costs to the second and third respondents as the first respondent neither lodged an affidavit in reply nor appeared in Court.

DATED at **MWANZA** this 24th day of February, 2021.

S. E. A. MUGASHA
JUSTICE OF APPEAL

F. L. K. WAMBALI
JUSTICE OF APPEAL

B. M. A. SEHEL
JUSTICE OF APPEAL

This Ruling delivered this 25th day of February, 2021 in the presence of the Applicant in person and in the Absence of the first Respondent, Ms. Sabina Yongo, learned State Attorneys for the second and third Respondents, is hereby certified as a true copy of the original.

D. R. LYIMO
DEPUTY REGISTRAR
COURT OF APPEAL