**IN THE COURT OF APPEAL OF TANZANIA**

**AT IRINGA**

**(CORAM: LILA. J.A., KITUSI., J.A And MWAMPASHI., J.A.)**

**CIVIL APPLICATION NO. 487/13 OF 2020**

**ISAYA LINUS CHENGULA (**as administrator of the Estate of the late **LINUS CHENGULA) .....APPLICANT**

**VERSUS**

**FRANK NYIKA (**as Administrator of the Estate of the late **ASHERI NYIKA) .....RESPONDENT**

**(Application for Review of the decision of the Court of Appeal of Tanzania at Iringa)**

**(Mziray, Mwambegele and Mwandambo, JJ.A.)**

**Dated the 19th day of May, 2020**

**in**

**Civil Appeal No. 131 of 2018**

**.....**

## RULING OF THE COURT

*29th & 31st March, 2022*

**MWAMPASHI, J.A.:**

This application by a notice of motion is basically brought under section 4 (4) of the Appellate Jurisdiction Act [Cap. 141 R.E. 2019] (the AJA) and rule 66 (1) (a), (b), (c) and (d) of the Tanzania Court of Appeal Rules, 2009 (the Rules). It seeks to review the decision of this Court (Mziray, J.A, Mwambegele, J.A and Mwandambo, J.A), dated 19.05.2020, in Civil Appeal No. 131 of 2018. The application is supported by an affidavit sworn by Mr. Rutebuka Samson Anthony, learned advocate for the applicant. On the other hand, the respondent

resisted the application by filing an affidavit in reply sworn by Mr. Frank Nyika, the administrator of the respondent's estate.

The application has its roots in the decision of the High Court of Tanzania at Iringa in Land Case No. 6 of 2010 wherein, the respondent successfully sued the applicant for trespass to land. Aggrieved by the High Court decision, the applicant appealed to this court in Civil Appeal No. 131 of 2018, which was dismissed with costs on 19.05.2020. Still aggrieved, the applicant has, thus, filed the instant application seeking for the review of the decision on the following grounds: -

1. *That, the judgment be reviewed as it is based on a manifest error on the face of the record resulting in the miscarriage of justice.*
2. *That, the Applicant was wrongly deprived of an opportunity to be heard.*
3. *That, the judgment be reviewed as it is a nullity.*
4. *That, the Court had no jurisdiction to entertain the case.*

Given the nature of the grounds on which the application is based and for ease of reference, we find it apposite to reproduce, at this stage, part of the supporting affidavit in which the background of the application at hand is narrated and the amplification of grounds for the

application, is given. That part of the supporting affidavit goes as follows: -

5. *That, Asheri Nyika before his death filed a suit on 16th February, 2010 by himself A copy of the plaint is attached herewith as Annexture "LC-3" for which leave of this Court is craved to form part of the Affidavit.*

6. *That, in his plaint, he claimed for general damages to the tune of Tanzanian Shillings Sixty Million (60,000,000/=).*

7. *That, in the plaint, he never stated the value of the disputed property.*

8. *That, on 4th July, 2013 the advocate for the Respondent one Ms. Kivuyo informed the trial court that Asheri Nyika had passed away on 25th June, 2013 as a result prayed for longer adjournment so that the family could appoint the Administrator and was granted. A copy of the proceedings of the Trial Court is attached herewith as Annexture "LC-4" for which leave of this Court is craved to form part of the Affidavit.*

9. *That, on 20th March, 2014 the Advocate for the Respondent one Rwazo informed the Trial Court that the Advocate for the Applicant one Mkwata had also passed away.*

10. *That, on the same date as per paragraph 9 above, Advocate Rwazo informed the Trial Court that the Administrator of the deceased Asheri Nyika had already been appointed and as a result of the appointment prayed to amend the plaint.*

11. *That, when he applied for amendment, the Applicant and his Advocate were absent, however, the amendment was granted and the Applicant was not heard on that particular aspect.*

12. *That, the amendment brought by the Respondent changed the substantial facts of the case which was not before the amendment.*

13. *That, among the amendments made which was not allowed by the Trial Court was to insert the jurisdiction facts in paragraph 9 of the amended plaint that the Trial Court had jurisdiction because the value of the subject matter was over seventy million. A copy of the amended plaint is attached herewith as Annexture "LC-5" for which leave of this Court is craved to form part of the Affidavit.*

14. *That, before the amendments, the trial court had no jurisdiction to entertain the matter as per paragraph 3 of Asheri Nyika's plaint.*

15. *That, the Trial Court had no jurisdiction to order for amendment granted on 20th March, 2014.*

16. *That, as a result of the above facts, the decision of this court is a nullity.*

17. *That, the Respondent at page 23 of the proceedings of the Trial Court was cross examined as to his status in the case as to who he was and replied that he was the administrator, however, no letters of administration was produced in Court and thus had no locus standi to prosecute the matter.*

It should also be noted, as it will become vivid in the course of this ruling, that we have taken pain and reproduced the larger part of the supporting affidavit, not only for ease of reference but also because what is deposed therein is essentially what the applicant's advocate has repeated in his submissions before us in support of the application. It is also on the said averments in the supporting affidavit that our decision in determining whether the grounds and facts stated therein are in line with the tenets of rule 66(1) of the Rules, will be based. We should also, at this point, restate the settled position of the law that our powers in review, are confined and strictly limited within rule 66(1) of the Rules. From the nature of the instant application, this is the position that will guide us in the determination of the application.

At the hearing of the application, Mr. Edson Mbogoro, learned advocate, represented the applicant whereas the respondent, had the services of Ms. Antonia Agapiti, also learned advocate.

In his submission in support of the application, Mr. Mbogoro began by abandoning the second ground. He then combined the remaining grounds and argued them together on account that they all boil down to the single issue on jurisdiction which, he argued, can be raised at any time or stage of proceedings. He also pointed out that his arguments

would be pegged on the fact that, had the facts deposed in the supporting affidavit been brought to the attention of this Court when Civil Appeal No. 131 of 2018 was being heard, the appeal would not have been decided the way it was decided. It was further contended that the High Court had no jurisdiction to entertain the respondent's suit because the amended plaint on which the High Court acted, was invalid for including matters outside the High Court's order for the amendment. It was explained by him that while the amendment allowed was for the administrator of the respondent's estate to be added to the case in place of the deceased plaintiff, the amendments made, extended to inserting facts on the value of the subject matter which were missing in the first plaint. Mr. Mbogoro also complained that the place where the cause of action arose was changed from Iringa to Makambako, Njombe. It was thus, argued that the amendments which were made without leave of the High Court did not only change the case but they also purported to vest the High Court with jurisdiction which it did not have before the amendments were made.

Mr. Mbogoro further argued that the amendments made to the plaint without leave of the High Court affected the jurisdiction of the High Court rendering the proceedings and its judgment a nullity. He

went further by contending that our judgment in Civil Appeal No, 131 of 2018 is also a nullity because it dealt with a nullity. It was insisted that the errors on the amendments made to the first plaint touched the issue of jurisdiction, that the errors are apparent on the face of the record and also that the errors occasioned failure of justice. Mr. Mbogoro also contended that the errors cannot be mitigated or saved by the overriding objective principle because they go to the issue of jurisdiction.

To bolster his submissions, Mr. Mbogoro cited a number of authorities including. **Mwananchi Communication Limited and Two Others v. Joshua K. Kajula and Two Others**, Civil Appeal No. 126/01 of 2016, **Jovent Clavery Rushaka and Another v. Bibiana Chacha**, Civil Appeal No. 236 of 2020, **Prof. T.L. Maliyamkono v. Wilhelm Sirivester Erio,** Civil Appeal No. 93 of 2021 (all unreported) and *The Code of Civil Procedure,* D.F. Mulla, 12th Ed.

Finally, Mr. Mbogoro prayed for the application to be granted by declaring the High Court decision a nullity for lack of jurisdiction, quashing the said decision together with the relevant proceedings and also by setting aside our decision in Civil Appeal No. 131 of 2018.

At the very outset, Ms. Agapiti, made it clear that she was not supporting the application. Having adopted the affidavit in reply and the list of authorities she had earlier filed, she argued that review should be pegged on grounds listed under rule 66(1) of the Rules. She also submitted that the facts and issues being raised in support of the grounds raised in the instant application were neither raised during hearing and determined in the decision of this Court sought to be reviewed nor in the High Court. To cement her argument that the issues being raised are new and cannot be entertained at this stage, Ms. Agapiti referred us to the case of **Hotel Travertine Limited and Two Others v. National Bank of Commerce Limited Hotel** [2006] T.L.R. 133.

It was further argued by Ms. Agapiti that the issue on the jurisdiction of the High Court, which is associated to the amendments that were made to the plaint and on which Mr. Mbogoro has based his argument for the application, is immaterial because besides the fact that it is being raised for the first time in this application, the applicant acted on that amended plaint by filing his written statement of defence and participating in the trial without any objection being raised by him. She

therefore argued that the issue cannot amount to an error apparent on the face of the record.

In her further submissions, Ms. Agapiti insisted that the application at hand is just an appeal in disguise. She also contended that the applicant has totally failed to identify any error apparent on the face of the judgment of this Court instead he has attacked the High Court proceedings which is not within the scope of rule 66(1) of the Rules. She insisted that errors under rule 66(1) should be on the face of the impugned judgment of this Court and not on the face of any other record. To buttress her argument, Ms. Agapiti referred us to the cases of **Said Haruna Mapeyo v. Republic**, Criminal Application No. 21/01 of 2020, **National Bank of Commerce Ltd v. Nurbano Abdallah Mulla,** Civil Application No. 207/12 of 2020 and **Golden Globe International Services Ltd and Another v. Millicom Tanzania N.V and Others,** Civil Application No. 441/01 of 2018 (all unreported). It was lastly contended by her that all cases cited by Mr. Mbogoro are irrelevant to the matter at hand and that the application should therefore be dismissed with costs for being baseless.

In his brief rejoinder, Mr. Mbogoro reiterated his stand that their case is exceptional because it is raising the fundamental issue of

jurisdiction which can be raised at any time and stage of proceedings. He insisted that the amendment of the plaint on the value of the subject matter was not only made without the High Court leave but it was purposely and strategically made to cloth the High Court with jurisdiction which was lacking in the first plaint. When prompted by the Court to tell what reliefs are being sought by the applicant should the application be granted, Mr. Mbogoro stated that the applicant prays for the High Court judgment and proceedings to be quashed and also for the judgment of the Court to be set aside.

Having heard the arguments advanced by the counsel for the parties for and against the application and also having examined the grounds of review, supporting affidavits and the lists of authorities, we are of the view that under the circumstances of this application, the issue for our determination has been narrowed to a simple issue; whether the grounds raised by the applicant on the notice of motion and as amplified in the supporting affidavit, justify the review of the Court's decision under rule 66(1) of the Rules.

Before venturing into the determination of the above posed issue, we should start with restating the Court's powers in review and the relevant guiding principles. The Court derives its power to review its own

decisions from section 4(4) of the AJA and rule 66(1) of the Rules. Whereas under the AJA, it is simply provided that the Court shall have power to review its own decisions, rule 66(1) of the Rules goes further by not only giving such powers to the Court but by also listing and limiting the grounds on which the Court can review its own decisions. It is provided under that provision that:

> "66(1) *The Court may review its judgment or order, but no application for review shall be entertained except on the following grounds-*
>
> *(a) the decision was based on a manifest error on the face of the record resulting in the miscarriage of justice; or*
>
> *(b) a party was wrongly deprived of an opportunity to be heard; or*
>
> *(c) the court's decision is a nullity; or*
>
> *(d) the court had no jurisdiction to entertain the case; or*
>
> *(e) the jurisdiction was procured illegally, or by fraud or perjury.*

As on the scope of rule 66(1) of the Rules, this Court in **Twaha Michael Gujwile v. Kagera Farmers Cooperative Bank Ltd**, Civil Application No. 156/04 of 2020 (unreported) observed that: -

> *"... for an application for review to succeed, the applicant must satisfy one of the conditions stipulated under Rule 66 (1) of the Rules. It is only within the scope of the Rule that the applicant can seek the judgment of this Court to be reviewed".*

The phrase "*manifest or apparent error on the face of the record*" under rule 66(1)(a) of the Rules, has been subjected to intense discussion. In the case of **Chandrakant Joshubhai Patel v. Republic** [2004] T.L.R. 218, the Court stated that: -

> *"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..... 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 .... It can be said of an error that it is apparent on the face of the record when it is obvious and self evident and does not require an elaborate argument to be established....".*

Further in the case of **Rizali Rahabu v. Republic**, Criminal Appeal No. 4 of 2011 (unreported) the Court observed that:

*"First, we wish to point out that the purpose of review is to re-examine the judgment with a view to amending or correcting an error which had been inadvertently committed which if is not reconsidered will result into a miscarriage of justice".*

Most important and relevant to the instant case is the question of what record is referred to under rule 66(1) of the Rules. The Court had an opportunity to address and give an answer to that question in the case of **The Hon. Attorney General v. Mwahezi Mohamed (as administrator of Estate of the late Dolly Maria Eustace) and Three Others**, Civil Application No. 314/12 of 2020 (unreported), thus: -

*"Rule 66(1) of the Rules is very clear that, the Court may review its "**judgment**" or "**order**", which means, for the Court to determine [an] application for review all it needs to have before it is the impugned decision and not the evidence adduced during trial or decisions of subordinate court(s) as submitted by Mr. Malata. We need to emphasize here that, the record referred in review is either the "**judgment** " or **"order"** subject of review".*

Guided by the above position on what kind of the record is referred to under rule 66(1) of the Rules, and applying the position to the instant case, the answer to our narrowed down issue on whether the grounds raised by the applicant which are wholly premised on the High Court's record and not on the impugned Court decision, justify the review of the Court decision under rule 66(1) of the Rules, becomes obvious and clear. As rightly argued by Ms. Agapiti, our judgment in Civil Appeal No. 131 of 2018 dated 19.05.2020, the subject of this application, and which under rule 66(1) of the Rules, was the record supposed to be attacked for containing manifest errors on its face or for being a nullity or for having been rendered by the Court with no jurisdiction, is in the instant application left intact. There is nothing in the supporting affidavit and even in the submissions by Mr. Mbogoro that substantially fault the judgment of the Court.

As we have pointed out above, looking at the supporting affidavit and even considering the arguments by Mr. Mbogoro and the prayers made by him, it becomes plainly clear that this application is misconceived. The applicant's attacks are on the High Court proceedings and decision. He also prays for the High Court decision to be quashed which is not within the ambit of rule 66(1) of the Rules. Issues on the

plaint being amended to include new matters without leave of the High Court, are issues that are outside the scope of our powers in review under rule 66(1) of the Rules. In review, we have no power and cannot dare to poke our noses into the record of the High Court. It should be emphasized that under rule 66(1) of the Rules, the error on the face of the record referred thereto, is an error on our record, that is, on the judgment or ruling of this Court, not of any other record. In review, under rule 66(1) of the Rules, the Court re-examines its own decision so as to correct any error apparent on it and not on the record of lower courts as Mr. Mbogoro tried hard to impress on us.

As we have intimated above, the impetus of the argument by Mr. Mbogoro that the application can be granted under rule 66(1) of the Rules is not only on the assertion that the application is unique but mainly on the argument that the issue of jurisdiction has been raised in support of the application. We entirely agree with Mr. Mbogoro that jurisdiction is fundamental as it goes to the very root of the court's authority or power to adjudicate maters before it. It is also trite position of the law that issues of jurisdiction can be raised at any time or stage of proceedings. However, the question that has taxed our minds is whether such an issue can be raised at review stage or not. Basing on

the settled position that jurisdictional issues can be raised at any time and stage of proceedings, we are of the considered view that such an issue can also be raised at review stage. We however, hasten to state that when an issue of jurisdiction is raised in review it must be in relation to the record of the Court and not otherwise. The jurisdictional issue raised at review stage must be apparent on the face of the record of the Court, that is, on the face of the judgment or ruling of the Court sought to be reviewed. With respect, we do not agree with the learned advocate that such an issue can be raised in that manner as a ground for review. In the case at hand the jurisdictional issue being raised relate to the record of the High Court which is outside the scope of our powers under rule 66(1) of the Rules. The argument by Mr. Mbogoro on jurisdictional issue therefore fails for the above given reasons.

Likewise, the argument by Mr. Mbogoro that the Court should exercise its power under rule 66(1) of the Rules on account that had the facts in regard to the amendments of the plaint been made known to the Court, the impugned judgment would not have been decided in the respondent's favour, is misconceived. Discovery of new and important matter or evidence can be raised as a ground for review in the High

Court and not in this Court. Order XLII rule 1(1) of the Civil Procedure Code [Cap. 33 R.E. 2019] provides thus:

> "1(1) *Any person considering himself aggrieved-*
>
> *(a) by a decree or order from which an appeal is allowed, but from which no appeal has been preferred; or*
>
> *(b) by a decree or order from which no appeal is allowed, and who,* ***from the discovery of new and important matter or evidence*** *which, after the exercise of due diligence, was not within his knowledge or could not be produced by him at the time when the decree was passed or order made, or on account of some mistake or error apparent on face of the record, or for any other sufficient reason, desires to obtain a review of the decree passed or order made against him, may apply for a review of judgment to the court which passed the decree or made the order".*
>
> [Emphasis added].

In the circumstances, and for the above given reasons, we find the application misconceived mainly because the applicant sought to move

us re-examine the proceedings and decision of the High Court, and quash it, which is not within our powers under rule 66(1) of the Rules. That being the case, the application has no merits and it is hereby entirely dismissed with costs.

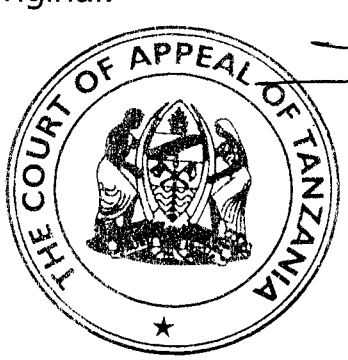
**DATED** at **IRINGA** this 31st day of March, 2022.

S. A. LILA
**JUSTICE OF APPEAL**

I. P. KITUSI
**JUSTICE OF APPEAL**

A. M. MWAMPASHI
**JUSTICE OF APPEAL**

This Ruling delivered on 31st day of March, 2022 in the presence of Mr. David Mwakibolwa hold brief for Mr. Edson Mbogolo, learned counsel for the applicant who is also holding brief for Ms. Antonia Agapit, learned counsel for the respondent, is hereby certified as a true copy of original.




E. G. MRANGU
**DEPUTY REGISTRAR**
**COURT OF APPEAL**