IN THE COURT OF APPEAL OF TANZANIA
AT TANGA

(CORAM: JUMA, C.J., SEHEL, J.A. And MAIGE, J. A.)

CIVIL APPLICATION NO. 129/12 OF 2020

DAMATICO GENERAL SUPPLY.....APPLICANT

VERSUS

MAWENI LIMESTONE LIMITED.....RESPONDENT

(Application for Review from the decision of the Court of Appeal of Tanzania, at Tanga)

(Mwarija, Wambali, Korosso, JJ.A.)

dated the 17th day of February, 2020
in
Civil Appeal No. 28 of 2018

.....

RULING OF THE COURT

11th & 13th May, 2022

SEHEL, J.A.:

In this application the Court is asked to review its decision in Civil Appeal No. 28 of 2020 dated 17th February, 2020 on ground that there is an error manifest on the face of the record resulting in the miscarriage of justice against the applicant. The applicant has highlighted the errors in the notice of motion as follows:

> *"i) The Court oversighted the testimony of DW1 and terms and conditions in exhibit*

P3 in determining the specific damages awarded by the Court.

ii) The Court was forgetful and failed to award or impose commercial interest on the decretal sum awarded by the Court.

iii) The Court overlooked the contractual value in awarding general damages."

The above errors were expounded further in the affidavit in support of the application sworn by Dankton Ludovick, the Managing Director of the applicant.

Briefly, the facts giving rise to the present application are as follows; in the High Court of Tanzania at Tanga (the trial court), the applicant filed a suit against the respondent for breach of supply agreement of iron ore. According to the evidence on record, the parties entered into a supply contract on 31st December, 2014 through a Local Purchase Order (exhibit P1) whereby the applicant had to supply to the respondent three thousand metric tonnes (3000 MT) or above of iron ore per month at the price of TZS. 173,000.00 per ton for a period of one year. The terms for payment were that the first 500 MT of iron ore would be paid immediately upon delivery at the respondent's site and the rest of

3000 MT would be paid within thirty (30) days after delivery of the iron ore at the respondent's site. The applicant started to supply the iron ore to the respondent's site. However, on 11th January, 2015, the respondent terminated the supply contract alleging breach that the supplied iron ore weighing a total weight of 138.83 MT did not meet the agreed quantity and quality standards. It was also the case of the applicant that it hired equipment, namely; excavator, bulldozer, wheel loader and three trucks (exhibits P2, P3 and P4, respectively) to facilitate it in performing the supply agreement.

Following that termination, the applicant filed a suit against the respondent claiming the following reliefs: payments of TZS. 28,340,756.20 being total costs of the iron ore supplied to the respondent; specific damages of TZS. 522,350,800.00; damages resulting to acts and/or omission constituting breach of the agreement of TZS. 6,228,000,000.00; interest at commercial rate per annum of the outstanding amount from the date of filing the suit till the date of judgment; interest on the decretal sum at the court rate from the date of judgment till payment in full; costs of the suit; interests on costs at the

rate of 7 percent per annum from the date of a ruling on taxation till payment in full and other reliefs that the court may deem fit to grant.

On the other hand, the respondent, in its written statement of defence, disputed the claim and raised a counter claim to the effect that it incurred loss of TZS. 5,815,760,000.00 due to delay of supply of the iron ore.

At the end of the trial, the High Court entered judgment in favour of the applicant and dismissed the counter claim. It awarded the applicant the following reliefs:

> *"1. TZS. 28,340,756.20 as total price and costs of the iron ore supplied;*
> *2. TZS. 306,799,600.00 as specific damages for the expenses incurred by the applicant in execution of the agreement;*
> *3. TZS. 4,000,000,000.00 as general damages for the breach of contract;*
> *4. Interest at commercial rate of 12 percent per annum from the date of filing the suit to the date of judgment;*
> *5. Interest on the decretal sum at the court*

rate from the date of judgment till payment in full; and

6. *Costs of the suit."*

Aggrieved by that decision, the respondent filed to the Court, Civil Appeal No. 28 of 2020, the subject of the present application. The appeal was partly allowed. The Court confirmed the award of TZS. 28,340,756.20 for the supplied iron ore but set aside the award of TZS. 306,799,600.00 and substituted it with TZS. 71,799,600.00 since some of the items like the claim of TZS. 207,000,000.00 for hiring equipment as per exhibit P2, P3 and P4 was found not to have been proved. It also reduced the award of general damages from TZS. 4,000,000,000.00 to TZS. 100,000,000.00 as it was found that, when assessing general damages, the High Court considered factors which were not directly relevant to the circumstances of the case and not supported by evidence. Further, the Court allowed the ground challenging the award of commercial interest rate at 12 percent on non-liquidated damages hence the same was set aside.

Believing that there are errors on the face of record, the applicant has now preferred the present application for review on the grounds reproduced herein.

At the hearing of the application, Ms. Annette Kirethi and Dr. Alexander Nguluma, both learned advocates, appeared for the applicant and respondent, respectively.

Submitting on the application, Ms. Kirethi first adopted the notice of motion and the affidavit in support of the application. In trying to show that the Court oversighted the testimony of PW1 and the terms and conditions of exhibit P3, she argued that the Court overlooked the evidence contained in exhibits P2, P3 and P4. Otherwise, it would have realized that the responsibility of mobilizing equipment to the site was upon the owner and not the applicant. She added that the evidence of PW1 was not challenged when he said that he hired a low bed truck for the purpose of executing the supply agreement. She argued further that, exhibit P3 is contrary to what the Court observed at page 29 of the judgment that there was no evidence suggesting that the hirer declined to refund. She explained, exhibit P3 stipulates in clear terms that once payment is made, there shall be no refund. In that regard, she argued,

there was proof that the applicant hired the equipment thus the Court ought to have affirmed the award of specific damages.

Addressing the Court regarding contractual interest, Ms. Kirethi referred us to the case of **Njoro Furniture Mart Ltd v. Tanzania Electric Supply Co. Ltd** [1995] T.L.R. 205 where it was held that interest is payable at the rate of seven (7) percent or such other rate, not exceeding twelve (12) percent, per annum as the parties may expressly agree in writing.

Concerning the award of general damages, Ms. Kirethi contended that the Court overlooked the contractual value of the supply agreement and did not take into consideration that the agreement was terminated at early stage of its implementation. On this item, she also argued that the Court went further to look into matters which were not subject of appeal. For instance, she said, at page 27 of the judgment, the Court deliberated the issue of capacity of PW1 which was not one of the grounds of appeal and none of the parties discussed it. She contended that, had the Court taken into all the cumulative factors in assessing general damages, the Court would not have altered the award.

On the basis of the foregoing submission, Ms. Kirethi urged the Court to allow the application with costs.

On his part, Dr. Nguluma opposed the application by first adopting the affidavit in reply. He then made his submission by generally responding to all the three items listed by the applicant in the notice of motion. Dr. Nguluma was firm that the three items do not qualify to be errors manifest on the face of record since the errors listed under the notice of motion and expounded further in paragraph 7 of the affidavit requires the Court to go through exhibits P2, P3 and P4 and the evidence of PW1 for it to see whether there was an error. He contended that the route taken by the applicant is tantamount to a challenge of the decision of the Court through a back door because the Court has no jurisdiction in review to appraise the admitted exhibits and the evidence of PW1. He said that, when the Court, sat as a first appellate court, re-evaluated the entire evidence on record including the evidence of PW1 and exhibits P2, P3 and P4 and subjected it to critical analysis and ultimately arrived at its own decision as it was held in the case of **the Registered Trustees of Joy in the Harvest v. Hamza K. Sungura**, Civil Appeal No. 149 of 2017 (unreported). He argued, the claim that the Court misapprehended

the evidence such that it reduced the award of general damages and declined to award specific damages and commercial interest rate does not qualify to be a manifest error on the face of record as it cannot be decided without re-evaluating the evidence. Relying in the case of **Golden Globe International Services Ltd & Another v. Millicom Tanzania N.V & 4 Others**, Civil Application No. 441/01 of 2018 (unreported), he argued that a review is not an appeal in disguise.

He added that the pointed-out errors are neither obvious nor self-evident whereas a manifest error on the face of the record must be easily seen when someone runs and reads it. It does not require a long-drawn process of reasoning as it was done by the counsel for the applicant. To fortify his submission, he referred the Court to the case of **Chandrakant Joshubhai Patel v. The Republic** [2004] T.L.R. 218. With that submission, Dr. Nguluma urged the Court to find that the application is baseless deserving to be dismissed with costs.

In rejoinder, Ms. Kirethi reiterated her earlier submission that there was an error on the face of the record and that the Court raised some new aspects when dealing with the appeal thus prejudiced the applicant. She thus urged the Court to allow the application with costs.

Having heard the arguments for and against the application for review, we find that the issue before us is whether there is a manifest error on the face of the record resulted in the miscarriage of justice to the applicant that would warrant the Court to review its own decision. An error on the face of record is one of the grounds for review provided under Rule 66 (1) of the Tanzania Court of Appeal Rules (the Rules) which reads:

> *"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."*

Since the present application is premised under the heading of manifest error on the face of the record, we find it prudent to define as to what amounts to an error manifest on the face of the record.

Luckily, the Court has, in numerous decisions, lucidly explained as to what is an error manifest on the face of the record. For instance, in the case of **Chandrakant Joshubhai Patel v. Republic** (supra), the Court fully adopted the definition provided in MULLA, 14th Edition pp. 2335-36 as follows: -

> *"An error apparent on the face of the record must be such that 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 options...Where the judgment did not effectively deal with or determine an important issue in the case, it can be reviewed on the ground of error apparent on the face of the record...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 not 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. 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."

See also **Tanganyika Land Agency Limited & 7 Others v. Manohar Lai Aggrawal**, Civil Application No. 17 of 2008 and **East African Development Bank v. Blueline Enterprises Tanzania Limited**, Civil Application No. 47 of 2010 (both unreported).

It follows that, under Rule 66 (1) (a) of the Rules, a manifest error on the face of the record must be so obvious such that it strikes in the eyes immediately after looking at the records and it does not require a long-drawn process of reasoning on points where there may be possibly two opinions. As rightly submitted by Dr. Nguluma, it is an error which is patently clear and self-evident such that it does not require any extraneous matter to show its existence and it must have resulted into miscarriage of justice.

Furthermore, the record referred in Rule 66 (1) is either '*the judgment*' or '*order*' and not the evidence adduced during trial or decisions of subordinate court(s) (see the case of **The Hon. Attorney General v. Mwahezi Mohamed (as administrator of estate of the late Dolly Maria Eustace) & 3 Others**, Civil Application No. 314/12 of 2020 (unreported)).

Let us now relate the above position of the law to the application at hand. We shall start with items (i) and (iii) in the notice of motion where the applicant complains that the Court oversighted the evidence of PW1 and exhibits P2, P3 and P4 and that overlooked the contractual value in awarding general damages. For a start, we concur with the applicant and it is on record that the agreements for hiring excavator, bulldozer, wheel loader and three trucks were admitted in evidence as exhibits P2, P3 and P4. This fact was also appreciated by the Court as can be seen at page 26 of the judgment. It should also be noted that the Court fully considered the evidence of PW1 and exhibits P2, P3 and P4 and at the end it did not find substance in the applicant's claim. Moreover, when deliberating a ground that the High Court awarded exorbitant general damages of TZS. 4,000,000,000.00, the Court reappraised the entire evidence to satisfy

itself as to whether the High Court was in line with the settled principle of the law in awarding general damages. After the Court had considered the general principle on award of general damages, it arrived to a conclusion that the High Court took into account factors which were not directly associated to the circumstances of the case hence the Court reduced the amount awarded.

Nevertheless, Ms. Kirethi is now trying to impress upon the Court to go back to the evidence and reappraise it in order to arrive to a different conclusion, while the Court is sitting in review jurisdiction. We are of the view that this is a serious misconception of the underlying objective for review because the purpose of review is normally to correct a mistake apparent on the face of the judgment or order. Essentially, as rightly argued by Dr. Nguluma, the applicant was trying to invite the Court to exercise the appellate jurisdiction through a back door which is against the object of review.

In **Lakhamshi Brothers Ltd v. R. Raja & Sons** [1966] E.A. 313 it was held and rightly so, in our considered view, that:

> *"The court had inherent jurisdiction to recall its judgment in order to give effect to its manifest*

intention on to what clearly would have been the intention of the court had some matter not been inadvertently omitted, ***but it would not sit on appeal against its own judgment in the same proceedings****."(emphasis added)*

The power of the Court in review is limited to re-examination and reconsideration of its judgment or order with a view to correct or improve it if it is proved by an applicant that the judgment or order was arrived as a result of a manifest error on the face of the record which resulted in the miscarriage of justice; or a party was wrongly deprived of an opportunity to be heard; or the court's decision is a nullity; or the court had no jurisdiction to entertain the case; or the judgment was procured illegally, or by fraud or perjury (see Rule 66 (1) of the Rules). It does not extend into re-considering its own decision on merit or else it would amount to the Court sitting in appeal against its own decision which is not permissible. In other words, review is not a substitute of an appeal and it cannot be used as a backdoor method to unsuccessful litigants to re-argue their case. Consequently, we are satisfied that the complaints concerning oversight and overlook are not merited for review. We thus

find that items (i) and (iii) in the notice of motion are not within the ambit of Rule 66 (1) (a) of the Rules.

We have a similar view concerning item (ii) in the notice of motion where the applicant complains that the Court was forgetful and failed to award or impose commercial interest on the decretal sum awarded by the Court. We find that this is a ground of appeal. Of course, we are aware that the applicant was not an appellant in the appeal but we believe that the argument could have been well covered by the applicant in its submission when responding to the grounds of appeal. Having gone through the judgment of the Court, specifically at page 41, we note that the Court effectively dealt with and determined the award of commercial interest. In determining it, the Court applied the principle stated in the case of **Njoro Furniture Mart Ltd v. Tanzania Electric Supply Co. Ltd** (supra) to hold that the commercial interest rate of 12 percent was wrongly awarded as it noted that there was no express agreement by the parties for the same to be awarded. Given that the issue was adequately considered by the Court but the applicant still wants this Court to reconsider at the review stage by applying the same principles that were earlier on considered to arrive to a different view, we take that the

applicant is using the review process as an appeal in a second bite. It is the position of the law that a review is not an appeal or '*a second bite*' by a party in the aftermath of the dismissal of his/her appeal (see, for instance, **Miraji Seif v. The Republic**, Criminal Application No. 2 of 2009 and **Robert Moringe @ Kadogoo v. The Republic**, Criminal Application No. 9 of 2005 (both unreported)). We therefore find that item (ii) in the notice of motion has no merit.

In the end, we wish to echo as to what we said in the case of **Tanganyika Land Agency Limited & 7 Others v. Manohar Lal Aggrawal** (supra) that:

> *"For matters which were dealt with and decided upon appeal, the fact that one of the parties is dissatisfied with the outcome is no ground at all for review. To do that, would, not only be an abuse of the court process, but would result to endless litigation. Like life, litigation must come to an end."*

As already observed, there is nothing in the present application which would warrant the exercise of our review powers laid out in Rule 66 (1) (a) of the Rules.

In view of what we have discussed, we agree with the learned advocate for the respondent that the application has no merit. We accordingly, dismiss it with costs.

DATED at **TANGA** this 13th day of May, 2022.

I. H. JUMA
CHIEF JUSTICE

B. M. A. SEHEL
JUSTICE OF APPEAL

I. J. MAIGE
JUSTICE OF APPEAL

This Ruling delivered this 13th day of May, 2022 in the presence of Mr. Emmanuel Kiariro holding brief for Ms. Aneth Kirethi, the learned counsel for the Applicant and Ms. Frida Akaro holding brief for Mr. Alexander I. Nguluma, learned counsel for the Respondent, is hereby certified as a true copy of the original.

R. W. CHAUNGU
DEPUTY REGISTRAR
COURT OF APPEAL