IN THE COURT OF APPEAL OF TANZANIA
AT DAR ES SALAAM

(CORAM: NDIKA, J.A., KENTE, J.A. and MAKUNGU, J.A.)

CIVIL APPLICATION NO. 41/16 OF 2021

JITESH JAYANTILAL LADWA .....1ST APPLICANT
INDIAN OCEAN HOTELS LIMITED .....2ND APPLICANT
VERSUS

DHIRAJILAL WALJI LADWA .....1ST RESPONDENT
CHANDULAL WALJI LADWA.....2ND RESPONDENT
NILESH JAYANTILAL LADWA.....3RD RESPONDENT

[Review from the decision of the Court of Appeal of Tanzania at Dar es Salaam]

(Mkuye, Sehel And Kitusi J.J.A.)

Dated the 24th day of December, 2020
in
Civil Application No. 154 of 2020

RULING OF THE COURT

25th April & 18th May, 2022

KENTE, J.A.:

Before this Court is an application for review of its ruling in Civil Application No. 154 of 2020. The application is made under Rule 66(1) and (2) of the Tanzania Court of Appeal Rules 2009 (henceforth "the Rules") and is supported by an affidavit deponed by Mr. Jitesh Jayantilal Ladwa, the first applicant herein. Before getting down to the nitty gritty of the application, we find it appropriate at this earliest opportunity, to

preface our ruling with a brief statement of the factual background giving rise to the present application.

The facts leading to the dispute between the parties as found by the trial court and confirmed by this Court in its impugned ruling were briefly as follows. Pursuant to section 233(1) and (3) of the Companies Act, Cap 212 R.E. 2002, the present respondents namely Dhiraljal Walji Ladwa, Chamdulal Walji Ladwa and Nilesh Jayantilal Ladwa petitioned the High Court (Commercial Division) sitting at Dar es Salaam seeking the following substantive orders and prayers:

1. An order declaring that the conduct and operations of the 1st respondent were unlawful and prejudicial to the interest of the company and the petitioners as shareholders, directors and members of the company.

2. An order restraining the 1st respondent permanently from taking part in the management of the affairs of the company and an order directing the management of the company to be placed in the hands of the petitioners.

3. An order directing and authorising civil proceedings to be brought for, and on behalf of the company by any of the petitioners or the petitioners jointly to compel the 1st respondent make good all loses and business distortions incurred (sic) as a result of misappropriation of the company's funds and mismanagement of the company by the 1st respondent.

4. An order compelling the first respondent to vacate the office and business premises to be used by the company only and relocate his personal business ventures from the company's premises; and

5. General damages to the petitioners as the court may assess.

In reply, the present applicants raised, among others, three points of preliminary objection the paraphrase of which is as follows:

1. That the petition was misconceived and untenable for lack of supporting affidavit to verify the petition.

2. The petition was sub-judice to Civil Case No. 187 of 2017; and

3. The petition was incompetent for failure to comply with the mandatory requirements of rule 19 (1) of the High Court (Commercial Division) Rules, 2013.

After hearing the parties on the preliminary objection and, upon appraisal of their respective arguments, the learned trial judge (Nangela, J.) was convinced with the plausibility of the arguments advanced by present respondents' counsel. He accordingly went on dismissing the preliminary objection for want of merit. We find it eminently proper and indeed obligatory to state for purposes of putting this dispute into a proper perspective that, hitherto the said petition is still pending before the High Court.

Undaunted however, the applicants moved this Court purportedly under rule 65(1) (2) (3) and (4) of the Rules, to revise the said decision of the High Court mainly on the grounds that the learned trial judge had strayed into error when he stated in the course of his ruling that the respondents were shareholders and directors of the 2nd applicant while the parties were yet to be heard and further that the learned trial judge erred when he ruled that, the petition before him was not sub-judice to

Civil Case No. 187 of 2018 which was still pending before the same court.

In reply, the respondents found it worthwhile to raise a preliminary point of objection, the long and short of which was that, the applicants had no right of revision against an interlocutory decision of the High Court.

Having heard the parties and carefully considered their rival arguments, the Court was satisfied that indeed its revisionary powers under section 4(3) of the AJA were subject to section 5(2) (d) of the same Act which prohibits appeals or applications for revision against any inter- locutory decision or order of the High Court if such a decision or order has no effect of finally determining the suit. Accordingly, the Court went on sustaining the preliminary objection and striking out the application with costs for being barred by the above-cited provisions of the law. With regard to the applicants' complaint that the trial judge had not only gone on a frolic but he had also been judgmental when he made a statement that the respondents were shareholders and directors of the second applicant without waiting until he knew more about their

status, the Court held that, that was a mere introduction to the parties in the ruling in compliance with section 233(1) of the Companies Act which allows only a member of a company to petition the court on the grounds that the company's affairs are being, or have been mismanaged or conducted in a manner which is unfairly prejudicial to the interests of the members or to some of its members.

It is against the above-said decision of the Court which was handed down on 24th December, 2020 that the applicants were aggrieved hence the present application.

In the notice of motion, the applicants have cited five grounds upon which the application is predicated. We will, at the maximum, and for the sake of clarity, reproduce verbatim the applicants' grievances before going forward to determine their marrow and legal tenability or otherwise. The applicants are complaining that:

i) In its impugned ruling, the Court erred when it failed to take into account the fact that the statement made by the trial court "the three petitioners are also shareholders and directors of the 2nd respondent" was not a mere introductory

remark but it went to the root of the entire dispute before the trial court because membership and directorship of the petitioners is one among the contested issues in the matter that is pending determination before the trial court.

ii) The court erred when it failed to consider that, in the event it made a finding that the impugned statement in the trial court's ruling was just a mere introductory remark, then the same could be a confusion that called for the Court's intervention because the trial court would have made a statement on the status of the respondents prematurely without hearing parties on merit;

iii) The Court erred when it failed to take a liberal approach when interpreting the restrictions under section 5(2) of the Appellate Jurisdiction Act, Cap 141 and limited its application only to the decisions which terminate the whole matter instead of even taking into account findings which though do not terminate the whole matter, they affect the rights of parties;

iv) The Court erred when it failed to harmoniously interpret the provisions of sections 4(3) and 5(2) of the AJA thereby reaching at an erroneous decision as regards the revisionary/interventional powers vested in the Court under section 4(3) of the AJA; and,

v) The Court erred when it made a finding that revisionary powers of the Court under section 4(3) of the AJA, are subject to the limitations under section 5(2) of the same Act.

Both parties to this application were presented by advocates before this Court. Whereas Mr. Jeremia Mtobesya learned advocate represented the applicants, Mr. Richard Rweyongeza also learned advocate appeared for the respondents.

After having abandoned the third ground of complaint, Mr. Mtobesya submitted in respect of the first and second grounds that, the statement made by the trial judge that the respondents were directors and shareholders of the second respondent was not a mere introductory remark as the question of shareholders and directors of the second applicant was and is still one of the most fiercely contested issues before

the trial court. In his endeavours to impress upon us to find that the said statement amounted to an error on the face of the ruling of the Court as to warrant the need for review, the learned counsel maintained that, he was afraid that during the trial the said observation by the trial judge could lead to a confusion if left unattended. Among other authorities, he referred us to our earlier decision in the case of **Augustine Lyatonga Mrema v. R.** [2003] TLR 6 where we then held *inter alia*, that:

> *"The power of revision under section 4 (3) of the Appellate Jurisdiction Act 1979 was not dependant upon the existence of any appeal and make no distinction between civil and criminal proceedings or between interlocutory and concluded proceedings; it applies to "any proceedings before the High Court".*

With regard to the fourth and fifth grounds, likewise Mr. Mtobesya was very brief. He submitted, in essence that, the Court strayed into error as to fail to make a judicial pronouncement which would have put in tune the provisions of section 4 (3) with those of section 5(2) both of the AJA which deal with the interventional and supervisory powers vested in this Court over the High Court. The learned counsel urged us

to intervene, set aside the impugned ruling and make such orders and directions after satisfying ourselves with the correctness, regularity and legality or propriety of the High Court's ruling on the preliminary objection.

Submitting in rebuttal, and being mindful of the mandatory requirements of Rule 66 (1) (a) of the Rules, Mr. Rweyongeza argued in a forthright manner without prolixity that, the application for review was nothing but an appeal in a camouflage. Expounding on his stance, the learned counsel submitted that, all the grounds of complaint raised by Mr. Mtobesya did not disclose any error on the face of the impugned record.

According to Mr. Rweyongeza, this explains why Mr. Mtobesya could not point out any particular error apparent on the face of the ruling of the Court which is sought to be reviewed.

On the seemingly premature remark made by the trial High Court judge that the respondents were shareholders and directors of the second applicant, Mr. Rweyongeza's brief submission was that so far as parties have not been heard, the stage of determining the respondents'

status in the second respondent company had not been reached and therefore by insisting on this Court's intervention Mr. Mtobesya was equally following the same wrong route especially when he invited us to arrogate to ourselves the powers which in fact we did not have. It is needless to say at this stage that, the issue of the respondents being or not being directors and shareholders of the second respondent requires resolution through the conventional judicial process of hearing both parties to the suit.

As for the case of **Augustine Lyatonga Mrema** (supra) to which we were referred by Mr. Mtobesya, Mr. Rweyongeza submitted briefly and correctly so in our view that, the said case was no longer good law as it was decided prior to the amendment of section 5 of the AJA.

Just to refresh our minds, section 5 (2) (d) of the AJA prohibits appeals or applications for revision against any preliminary or interlocutory decision or order of the High Court if such a decision or order has no effect of finally determining the suit.

We must point out here and it is elementary to state that the right of an aggrieved party to apply for review of the Court's decision as was the case in the instant matter, is a creature of a statute.

In the present case, there is no denying the fact that, in view of the applicant's complaint and the submissions made by Mr. Mtobesya, the present application falls within the ambit of rule 66(1) (a) of the Rules which specifies the situations in which a party may apply for review of the decision of the Court on account of an apparent error on the face of the record which may have occasioned injustice.

Since the application of the said provision is central in the determination of this matter, it is appropriate to reproduce it in extenso and, it reads thus:

> *"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 a miscarriage of justice."*

The above-quoted statutory provision being the position of the law, following on heels therefore, is the question as to whether the matters complained of in this application or any one of them, falls in within the scope of Rule 66(1) (a) of the Rules. In these circumstances, we find it appropriate to start by considering the pertinent question as to what in law, constitutes an apparent error on the face of the record.

To a great extent, we are not reinventing a new wheel in this case. As luck would have it, we are boasting case law jurisprudence galore on this point. For instance, in **African Marble Company Limited (AMC) v. Tanzania Saruji Corporation (TSC),** Civil Application No. 132 of 2005 (unreported), borrowing the words used by the authors in **Mulla, Indian Code of Civil Procedure**, 14th Ed. page 2335-2336, the Court held thus:

> *"An error on the face of the record must be such as can be seen by one who runs and reads."*

Five years thereafter, the Court expressed the same view in **Nguza Viking @ Babu Seya & Another v. Republic,** Criminal Application No. 5 of 2010 (unreported) and further stated that:

"it (an apparent error on the face of the record) has to be such an error 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 opinions...."

(See also **Chadrakant Joshibhai Patel v. R,** [2004] TLR 218).

Now, as can be gleaned from the complaints raised by the applicant in grounds (i) and (ii) of the sought review, it is apparent that they are essentially inviting the Court to reconstitute itself and reconsider the application for revision which we had exhaustively dealt with and finally rejected for being violative of section 5 (2) (d) of the AJA. In our respectful view, what should not be in doubt here is the untold fact that, either the applicants were aggrieved by the impugned decision of the Court and, now, once again they are determined to have it overturned despite this being the final Court of the land or else, if we may be pardoned to say so, they are bent on delaying the hearing and final determination of the petition which is still pending before the High Court as alleged by the second respondent in his affidavit in reply. Whichever may be taken to be the intention of the applicants, we find with respect

that, the first and second grounds are very far from being the grounds for review. They are par excellence the same grounds which were advanced in support of the ill-fated application for revision.

Moreover, much as we entirely subscribe to the views expressed by both Mr. Mtobesya and Mr. Rweyongeza that indeed it was an overreach for the trial judge to declare the respondents to be the shareholders and directors of the second applicant as time was not yet ripe to determine their status, we find that by any stretch of imagination, these grounds cannot per se form the basis of a review. We accordingly dismiss them.

The fourth and fifth grounds are relatively easy to dispose of. To recapitulate, we were invited to review the Court's decision because according to the applicants, the Court failed to harmoniously interpret the provisions of sections 4 (3) and 5 (2) of the AJA thereby reaching to an erroneous decision as regards its revisionary or interventional powers provided for under section 4 (3) of the same Act and, the Court erred when it made a finding that its revisionary powers under section 4 (3) were subject to the limitations stipulated under section 5 (2) the same Act.

With great respect to Mr. Mtobesya, we do not subscribe to his views on what constitutes the grounds of review particularly his conceptual understanding of the phrase *"error apparent on the face of the record"* within the meaning of rule 66 (1) of the Rules. We think that, upon a plain reading of the law, such an error must be so glaring and conspicuous as to require no interpolations nor a long debate and process of reasoning or fierce arguments so as to be detected. (see **Mirumbe Elias Mwita v. Republic,** Criminal Application No. 4 of 2015 (unreported). The clear message from this is that, to warrant review, an error on the face of the record must, among other things, not leave any room for reasoning, debate or difference of opinion as it seems to be the case in the instant application.

Going forward, we also wish to point out that, in fact, in an ironic manner, the applicants are essentially asking the Court to put a foot wrong where it had got it right. For, in its impugned decision, the Court made it clear that it could not entertain and determine the application for revision on merit as it was of the view that its revisionary powers under section 4 (3) of the AJA were subject to section 5 (2) (d) of the

same Act which restricts the exercise of such powers to only such decisions or orders of the High Court which have the effect of finally determining of the suit .

With due respect, we cannot find any rationale as to why we should turn around today and make a judicial pronouncement contrary to the above stated correct position of the law on which we have already pronounced ourselves.

Over and above that, we wish to observe by way of emphasis that, as it has been consistently posited, the principle underlying the review remedy is that the court would not have acted as it did if all the circumstances had been known. (see **Atilio v. Mbowe** [1970] HCD No. 3). We are also anxious and we want to reiterate that it should be understood that, a mere disagreement with the view of the court's decision as it seems to be the case in the present matter cannot form the grounds for review and the parties cannot challenge such a decision in the guise that an alternative view is possible under the review jurisdiction. (See **Blueline Enterprises Ltd v. The East African Development, (EADB),** Civil Appeal No. 21 of 2012 (unreported).

All that we have endeavoured to say is that, the grounds advanced by the applicants have not met the minimum requirements which would move the Court to review its earlier decision. Instead, we find their move rather abhorrent to the timely administration of justice. In the ultimate event, we find the application to have no merit and we accordingly dismiss it with costs.

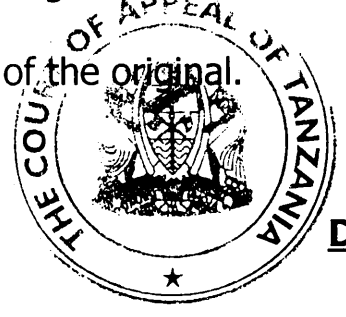
DATED at **DAR ES SALAAM** this 17th day of May, 2022.

G. A. M. NDIKA
JUSTICE OF APPEAL

P. M. KENTE
JUSTICE OF APPEAL

O. O. MAKUNGU
JUSTICE OF APPEAL

The Ruling delivered this 18th day of May, 2022 in the presence of Mr. Elly Musyangi, learned counsel for the applicants and Ms. Jacqueline Rweyongeza, learned counsel for respondent is hereby certified as a true copy of the original.



F.A. MTARANIA
DEPUTY REGISTRAR
COURT OF APPEAL