

**IN THE COURT OF APPEAL OF TANZANIA
AT DAR ES SALAAM**

(CORAM: MWAMBEGELE, J.A., FIKIRINI, J.A., And MAKUNGU, J.A.)

CIVIL APPLICATION NO. 388/01 OF 2019

EQUADOR LIMITED APPLICANT

VERSUS

NATIONAL DEVELOPMENT CORPORATION RESPONDENT

**(Application for Review from the Judgment of the Court of Appeal of
Tanzania, at Dar es Salaam)**

(Mziray, Mkuye and Korosso, JJ.A.)

dated the 11th day of June, 2019

in

Civil Appeal No. 136 of 2017

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RULING OF THE COURT

19th & 28th July, 2022

MWAMBEGELE, J.A.:

When this application for review was called on for hearing on 19.07.2022, Messrs. Michael Pius Mkenda, Mussa Kiobya, Honestus Kulaya and Aloyce Komba, learned advocates, appeared for the applicants. The respondent Republic had the services of Mr. Mark Mulwambo, learned Principal State Attorney who was assisted by Ms. Irene Lesulie, also learned Principal State Attorney and Mr. Charles Mtae, learned State Attorney.

Before we could embark on the hearing of the application in earnest, Mr. Mulwambo, rose to make an oral application requesting the Court to fix the hearing of the application in accord with rule 66 (5) of the Tanzania Court of Appeal Rules, 2009 (henceforth referred to as the Rules). Mr. Mulwambo made that oral application having in mind the following background to this application for review: the applicant was the plaintiff in Civil Case No. 120 of 2001 before the High Court of Tanzania in which suit the respondent was the defendant. The High Court (Jundu, JK) decided that suit in favour of the applicant. The respondent successfully appealed to the Court. The judgment of the Court (Mmilla, Mkuye and Korosso, JJA) was handed down on 12.07.2019. The applicant was aggrieved. She thus moved the Court by a notice of motion supported by an affidavit seeking a review of its decision. That application was slated for hearing on 11.05.2022 before Korosso, Kitusi and Mashaka, JJA.

That application could not proceed to hearing on that scheduled date. The applicant's counsel, Mr. Mkenda, brought to the attention of the Court the fact that one member of the panel (Kitusi, JA) had participated in the High Court in the adjudication of Miscellaneous Civil Application No., 636 of 2016 which was related to the judgment of the Court sought to be reviewed.

For that reason, the hearing of the application was adjourned to another date to be fixed by the Registrar of the Court before another panel.

The application was, initially, cause-listed for hearing on 19.07.2022 in the ongoing sessions of the Court before Wambali, Korosso and Rumanyika, JJA. However, upon the applicant's letter to the Registrar of the Court authored by her advocate, Michael Mkenda, Esquire, of a law firm going by the name of Thadeson Advocates bearing Ref. No. TA/CF/EQ-1/No. 636/16/2022/02 dated 24.06.2022, the application was fixed for hearing on the same date but now before Mwambegele, Fikirini and Makungu, JJA. In that letter, the applicant's counsel wrote:

"We noted among the members of the panel of Justices, Hon Madam Justice W. B. Korosso, JA, previously, as the High Court Judge issued an adverse order against the applicant in [Miscellaneous] Civil Application No. 636 of 2016 between National Development Corporation vs Equador Limited and another and later participated and adjudicated the matter in Civil Appeal No. 136 of 2017 [and] issued a judgment in favour of the National Development Corporation (Respondent)."

Having stated as above, the applicant's counsel went on to make the following prayer:

"We seek the guidance of the Court on her presence in the conduct of the same in place of Madam Justice W. B. Korosso's participation in the previous [Miscellaneous] Civil Application No. 636 of 2016 to any other necessary steps as may be deemed fit and just to ensure proper administration of justice. Alternatively, our case may be placed before a different members of the panel for adjudication without affecting the scheduled date (19th July, 2022) as the parties have already prepared for the hearing."

Perhaps granting the prayer in the quote above, the Registrar of the Court amended the cause-list and placed the matter for hearing before this panel on the same previously slated date. This course of action, as it turned out, irritated the respondent and that is the reason why Mr. Mulwambo took issue with it when the matter was called on for hearing. He argued that the applicant's counsel was fully aware that Korosso, J. (as she then was) participated in making "an adverse order against the applicant in [Miscellaneous] Civil Application No. 636 of 2016", he should have raised the complaint at the hearing of the appeal whose judgment is the subject of review in this application. He added that he did not do that at that stage and thus he was precluded from belatedly raising it at this stage of review. To buttress this proposition, the learned Principal State Attorney cited to us

Patty Interplan Ltd v. TPB Bank PLC, Civil Application No. 103/01 of 2018 and **Blueline Enterprises Limited v. East African Development Bank**, Civil Application No. 21 of 2012 (both unreported). Proceeding with the hearing of the application before this panel, he argued, would defeat the purpose of rule 66 (5) of the Rules which requires that an application of this nature, as far as practicable, shall be heard by the same Justice or Bench of Justices that delivered the judgment or order sought to be reviewed. He argued that it was practicable for this application to be heard within the dictates of rule 66 (5) of the Rules and that is the reason why it was placed before a panel which included Korosso, JA. The learned Principal State Attorney thus insisted compliance with rule 66 (5) of the Rules.

Responding to the concern raised by Mr. Mulwambo, Mr. Mkenda submitted that the application could not proceed to hearing on 11.05.2022 because it was realised that one member of the panel (Kitusi, JA) had participated at some stage in the proceedings of the matter in the High Court. He submitted further that the same reason exists in respect of Korosso, JA who, like Kitusi, JA, participated at some stage in the High Court and made an adverse order. The learned counsel thus prayed that hearing of the application should proceed before this panel as prayed for in the letter and granted by the Registrar of the Court. He contended that the practice

was not strange to the Court and cited to us the case of **National Bank of Commerce Ltd v. Nurbano Abdallah Mulla**, Civil Application No. 207/12 of 2020 (unreported) as an example. In an attempt to give Mr. Mkenda a hand, Mr. Komba rose to intimate to the Court that the applicant would not like Korosso, JA to be in the panel that would sit to review the judgment because she made adverse orders in the High Court and in the decision sought to be reviewed.

In a short rejoinder, Mr. Mulwambo submitted that a complaint against Korosso, JA should have been raised at the appellate stage. Bringing the complaint belatedly; at the stage of an application for review, was an afterthought and unacceptable, he argued. He reiterated his prayer for the Court to comply with the letter of rule 66 (5) of the Rules.

We have considered the contending arguments by the Principal State Attorney on the one hand and that of the learned advocates for the applicant on the other. Having so done, we think Mr. Mulwambo is right. We shall demonstrate.

Our starting point should be rule 66 (5) of the Rules. It provides:

"An application for review shall as far as practicable be heard by the same Justice or Bench of Justices"

that delivered the judgment or order sought to be reviewed.”

Mr. Mulwambo and Mr. Mkenda do not seem to dispute the tenor and import of the foregoing sub-rule. However, while Mr. Mkenda contends that it is not practicable to include Korosso, JA in the panel because she participated in the proceedings at the High Court level, Mr. Mulwambo submits that it is too late in the day to raise such a complaint as it was only maintainable at the appellate stage. Because the applicant did not raise such a complaint at that stage and the appeal was heard and judgment handed down, the same is not tenable at this stage of review, he argues. We agree with Mr. Mulwambo that the complaint could only be relevant at the appellate stage. The applicant did not complain at that stage, the appeal was heard and a judgment subject of this application for review composed and pronounced. The applicant's counsel thus missed the boat at the appellate stage in these proceedings. He cannot be heard to complain at this stage. As far as we are concerned, we agree with Mr. Mulwambo that holding that Korosso, JA should not be in the panel which will hear the application for review will be going against the letter of rule 66 (5) of the Rules. That sub-rule, as already stated above, requires in mandatory terms that, as far as practicable, an application for review shall be heard by the same Justice or

Bench of Justices that delivered the judgment or order sought to be reviewed. The Bench of Justices which heard and delivered the judgment sought to be reviewed comprised Mmilla, Mkuye and Korosso, JJA. Of the three Justices, Mmilla, JA is no more (RIP) and Mkuye, JA has been assigned to head a panel of justices presiding over cases in the ongoing sessions of the Court at Shinyanga. It is only Korosso, JA who was assigned in the sessions here at Dar es Salaam. So the Registrar of the Court found it practicable to assign the application to the panel which included her.

We have pondered over the complaint and subjected it to a proper scrutiny. Having so done, we respectfully think Mr. Mkenda's complaint is not only an afterthought but also smells forum shopping. We were confronted with an akin situation in **Blueline Enterprises Ltd** (supra), the judgment referred and supplied to us by the learned Principal State Attorney. It was, like in the present, an application for review. In that application, an advocate did not raise a complaint seeking recusal of some justices of appeal at earlier stages of the matter including at the stage of hearing of the appeal whilst he was all along aware of the reason fronted for recusal. He raised it belatedly at the review stage and in refusing his prayer for recusal, we heard at pp 5-6 of the typed judgment:

*"To us, the ingenuity displayed by Prof Fimbo, so far smacks of forum shopping. If he genuinely doubted the impartiality of any or all of the panel members, he would not have fronted his client to test the waters in the first place. Furthermore, he ought to have specifically requested for the recusal of Justices Kimaro and Rutakangwa on the ground raised belatedly, first of all before the **appeal was heard or belatedly**, in the notice of motion or in his letter of 11th April, 2013 and in the worst scenario, **in his oral submission while seeking a reference to a Full Bench**. This is all because going by the record, this fact was within his personal knowledge even before he lodged the appeal. That he never did so, he should not be heard to complain now. We concede that right-minded people demand justice to be rooted in confidence but the same group abhors what appears to be forum shopping in search of justice." [Emphasis supplied].*

The scenario in the **Blueline Enterprises Ltd** case (supra) is in all fours with the scenario in the present application. Mr. Mkenda was aware from the outset that Korosso, J. (as she then was) appeared in the proceedings of the High Court and made an **adverse order** against the applicant. He did not raise an alarm when the appeal was placed for hearing before a panel which included her. The appeal was heard and the judgment

the subject of this application for review, pronounced. He cannot be heard to raise a complaint against her at this stage of review. We respectfully think, the complaint by the applicant's advocate in the letter and before us that Korosso, J. (as she then was) participated in making "an adverse order against the applicant in Miscellaneous Civil Application No. 636 of 2016 between **National Development Corporation vs Equador Limited and another** and later participated and adjudicated the matter in Civil Appeal No. 136 of 2017 [and] issued a judgment in favour of the National Development Corporation (Respondent)", is pregnant with meaning. That meaning, we also respectfully think, is not far to seek. It is that the applicant's advocate has an apprehension of fear that Korosso, JA might issue an **adverse order** like she did in Miscellaneous Civil Application No. 636 of 2016 in the High Court and subsequently in Civil Appeal No. 136 of 2017 when she was at the apex Bench. That, we are afraid, exhibits but forum shopping on the part of the applicant's advocates which cannot be condoned by the Court. The tone in an anecdote by Mr. Komba when giving Mr. Mkenda a hand tells it all. Consequently, we think Mr. Mulwambo's complaint makes a lot of legal sense and we are prepared to swim his current. Agreeing with the applicant's prayer will defeat the purpose for

which the maker of the Rules enacted the provisions of sub-rule (5) of Rule 66 of the Rules.

The above stated, we grant Mr. Mulwambo's prayer and order that this application be fixed for hearing in the next convenient sessions of the Court in compliance with the letter of rule 66 (5) of the Rules. As the trained minds for the parties did not press for costs, we think it is eminently fair that in this ruling, each party shall bear its own costs.

It is so ordered.

DATED at DAR ES SALAAM this 22nd day of July, 2022.

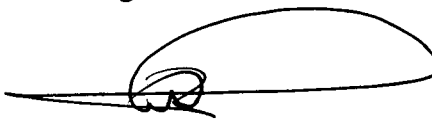
J. C. M. MWAMBEGELE
JUSTICE OF APPEAL

P. S. FIKIRINI
JUSTICE OF APPEAL

O. O. MAKUNGU
JUSTICE OF APPEAL

The Ruling delivered this 28th day of July, 2022 in the presence of Messrs. Michael Mkenda and Mussa Kiobya, both learned counsel for the Applicant and Mr. Charles Mtae, learned State Attorney for the Respondent, is hereby certified as a true copy of the original.




J. E. FOVO
DEPUTY REGISTRAR
COURT OF APPEAL