IN THE COURT OF APPEAL OF TANZANIA

AT DAR ES SALAAM

(CORAM: LILA, J.A., SEHEL, J.A. And MWAMPASHI, J.A.)

CIVIL APPLICATION NO. 229 OF 2020

THE GRAND ALLIANCE LIMITED ..... APPLICANT

VERSUS

MR. WILFRED LUCAS TARIMO ..... 1ST RESPONDENT

MR. DEDRICK WILFRED TARIMO ..... 2ND RESPONDENT

DOREEN WILFRED TARIMO ..... 3RD RESPONDENT

MRS. IRENE WILFRED TARIMO ..... 4TH RESPONDENT

SNOWCREST & WILDLIFE SAFARIS LTD ..... 5TH RESPONDENT

(Application for Review of the Ruling of the Court of Appeal of Tanzania at Dar es Salaam)

(Mmilla, Mkuye and Sehel, JJ.A.)

Dated the 21st day of April, 2020

in

Civil Application No. 187/16 of 2019

.....

RULING OF THE COURT

15th August, & 7th September, 2022

MWAMPASHI, J.A.:

On 22.08.2014, the applicant obtained a decree against the respondents in Commercial Case No. 09 of 2012 before the High Court of Tanzania (Commercial Division) at Arusha. According to that decree, the Share Acquisition Agreement which the applicant had entered with the 1st, 2nd, 3rd and 4th respondents in respect of the 5th respondent Company on 05.09.2011, was rescinded. The 1st, 2nd ,3rd and 4th respondents were also ordered to pay back to the applicant the sum of US Dollars One Million

Seven Hundred Thirty Thousand (USD 1,730,000.00) which they had received from the applicant as part of the purchase price of shares in the 5th respondent's Company. The attempt by the respondents to challenge the High Court judgment and decree before this Court in Civil Appeal No. 26 of 2016 proved futile as on 27.07.2016, the appeal was dismissed on technical grounds.

After the dismissal of the respondents' appeal, the applicant applied for the execution of the decree by way of arresting and detaining the 1st, 2nd, 3rd and 4th respondents as civil prisoners. Having heard the parties, the High Court (the executing court) found that there was no justification for the decree to be executed in the manner sought by the applicant. The application was therefore refused on 04.10.2017 and in its conclusion, the executing court, remarked that the applicant was at liberty to execute the decree by applying for the attachment of another decree which had been passed in favour of the respondents in Commercial Case No. 03 of 2016 and which the respondents had offered to the applicant for that purpose.

Aggrieved by the refusal, the applicant approached this Court through Civil Application No. 197/16 of 2019 seeking for revision of the said decision by the executing court. Unfortunately to the applicant, the application was dismissed by the Court on 21.04.2020. Still aggrieved, the applicant lodged the instant application under section 4 (4) of the Appellate

Jurisdiction Act [CAP 141 RE 2019] (the AJA) and Rule 66 (1) (a), (b) and (c) of the Tanzania Court of Appeal Rules, 2009 (the Rules) seeking for a review of the said decision. The application is supported by the affidavit sworn by Mr. James Barnabas Ndika, the Managing Director of the applicant and it is opposed by a joint affidavit in reply sworn by the 1st, 2nd, 3rd and 4th respondents.

According to the notice of motion, the application is predicated on the following three grounds:

1. *That the decision dated 21. 04. 2020 was based on manifest errors apparent on the face of the record resulting in miscarriage of justice.*
2. *That through oversight or otherwise, what transpired in the decision dated 21.04.2020 amounted to wrongly depriving the Applicant of an opportunity to be heard.*
3. *That the decision dated 21.04.2020 is a nullity for want of reason in some aspects.*

It is also worth noting at this very stage that, from the notice of motion, the supporting affidavit, written submissions and the oral arguments made in support of the application, it became clear to us that the applicant's grievances and complaints forming the basis of the grounds in support of the application, appear to arise mostly from the fact that in its decision in the application for revision, the Court agreed with the executing

court on the position that a decree can be executed by attachment of another decree and therefore that the applicant was at liberty to apply for the attachment of another decree which the respondent had obtained in Commercial Case No. 03 of 2016. For ease of reference and for the better appreciation of what we consider to be the root cause of the applicant's grievances, we find it apt to reproduce hereunder, the said relevant remark by the executing court as reproduced by the Court in the impugned decision at pages 5 and 6:

> *"Under the provision of Rule 52(1)(a) of Order XXI of the Civil Procedure Act, Cap. 33 RE 2002 (hereinafter referred to as the Code) a decree is among the attachable property in execution of another decree. Under sub rule (2) of Rule 52 of the same Order the court can, on the application of the creditor who has attached the decree, make an order for execution of the attached decree and apply the proceeds in satisfaction of the decree sought to be attached.* ***Thus, the decree holder is at liberty to apply for attachment of a decree in Commercial Case No. 3 of 2016 proposed for satisfying the decree in Commercial Case No. 9 of 2012."***
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> (Emphasis added)

At the hearing of this application, the applicant was represented by Mr. Melchisedeck S. Lutema assisted by Ms. Dora S. Mallaba and Subira Omari, all learned advocates, whereas the respondents had the legal services of Messrs. Boniface Joseph and Ipanga Kimaay, both learned advocates.

In support of the application, Mr. Lutema began by adopting, as part of his oral submissions, the notice of motion, the supporting affidavit, written submissions and the list of authorities, he had earlier filed in Court. He then amplified and clarified the three grounds by arguing, firstly, on the ground in respect of manifest errors, that the impugned decision has manifest errors on its face basing on the following factors; **One**, that the Court agreed with the executing court that it was correct and legally proper for the applicant to be directed to execute the decree by attaching another decree in Civil Case No. 03 of 2016 dated 13.07.2016; **Two**, that the said decree was not dated and had no seal of the court and also that the Court did not observe that the executing court had no power to order for the attachment of the said another decree where there had been no application to that effect; **Three**, that the Court did not ascertain the nature of the decree which the applicant was directed to attach and **Four**, that the Court did not note whether the decree sought to be attached was a decree for payment of money or for sale in enforcement of a mortgage

or charge. It was insisted by Mr. Lutema that the above factors amount to errors which are not only apparent on the face of the record but that the errors occasioned miscarriage of justice because the applicant was left in a position of not being able to execute her decree and realise her USD 1,730,000.00 as the decree directed to be attached by the executing court is a sham and not legally attachable.

Mr. Lutema further argued that the Court's decision has manifest errors on its face because the Court failed to decide on several grounds. He pointed out that the Court did not determine the ground that the purported decree dated 13.07.2016 occasioned a failure of the right to be heard on the part of the applicant and also that the ground that the judicial officer who authored the purported decree is the same judicial officer who conducted the execution proceedings was not determined. It was also argued that the Court did not decide the ground that any sale of properties done by the respondents after the institution of the suit constituted an act of bad faith. To cement his argument that the failure to determine some of the grounds amounted to an error apparent on the face of the record, Mr. Lutema referred us to the decision of the Court in **Chandrakant Joshubhai Patel v. Republic** [2004] T.L.R. 218.

On the second ground, it was argued by Mr. Lutema that the decision of the Court was made without considering the fact that the applicant had

the right to be heard. He contended that the Court did not consider the fact that the decree dated 13.07.2016 was not only procured to alter or negatively impact the applicant's decretal rights but that it was also procured in the absence of the applicant.

As on the last ground that the decision is a nullity, Mr. Lutema submitted that since the Court did not make any finding on the ground that the purported decree dated 13.07.2016 was procured in the absence of the applicant, then the decision is a nullity. He further argued that the Court assigned no reasons for the decision it made. On this, Mr. Lutema placed reliance on the decision of the Court in **Hamis Rajabu Dibagula v. DPP** [2004] T.L.R. 181.

Responding to the submissions made in support of the application Messrs. Joseph and Kimaay adopted the affidavit in reply, reply written submissions and the list of authorities they had earlier filed. They then argued that the application lacks merit as the grounds raised could only be raised in an appeal and not in an application for review. It was contended that most of the complaints and grounds raised in this application were not raised before the Court in revision or even before the executing court. They insisted that in the application for revision the applicant raised only three grounds which were exhaustively dealt with and determined by the Court. It was further contended that the Court could not have determined

grounds which were neither raised or argued by the applicant's advocate in support of the application for revision.

The learned advocates for the respondents further argued that what the executing court remarked regarding the decree in Commercial Case No. 03 of 2016 dated 13.09.2016, was meant to let the applicant know that it was at liberty to apply for attachment of the said decree. They also submitted that the issue that the applicant was not heard or that it was not a party to Commercial Case No. 03 of 2016, is immaterial and could not amount to an error apparent on the face of the record warranting a review of the decision by the Court. It was insisted by them that the applicant has completely failed to single out any error apparent on the face of the record in terms of **Chandrakant Joshubhai Patel** (supra). The learned advocates lastly argued that the Court exhaustively dealt with and decided on all the grounds raised in the application for revision and therefore the application should be dismissed with costs.

In his brief rejoinder Mr. Lutema reiterated his earlier submissions insisting that the impugned decision was based on apparent errors on its face as some of the grounds raised for revision were not determined. He thus urged the Court to grant the application with costs.

After our careful and dispassionate consideration of the submissions made for and against the application and having examined the record before us, particularly the impugned decision dated 21.04.2020, we find that what stands for our determination is whether there are sufficient grounds to warrant a review of the impugned decision.

For a start, the law and principles governing review need to be revisited first. The Court derives the powers to review its own decisions from section 4 (4) of the AJA whereby it is provided that:

> *"The Court of Appeal shall have power to review its own decisions"*

And the scope of the Court's powers in review is provided under rule 66 (1) of the Rules, 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 the miscarriage of justice;*
> *(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;*

(e) the judgment was procured illegally or by fraud or perjury."

In the light of the above provisions of law, it is clear and settled that the scope of the powers of this Court in review is limited not only within the grounds listed under rule 66 (1) of the Rules, but also within the decision sought to be reviewed. In determining whether the decision can be reviewed on a ground that it is based on a manifest error on the face of the record or for any other ground within rule 66 (1), the Court is enjoined to confine itself within the decision sought to be reviewed. For the purpose of review "record" refers to the decision sought to be reviewed and not to any other record. See- **Edger Kahwili v. Amer Mbarak and Azania Bancorp Ltd,** Civil Application No. 21/13 of 2017 (unreported) and **SGS Societe Generale De Serveillance SA and Another v. VIP Engineering and Marketing Limited and Another** [2016] T.L.R. 568.

In exercising its powers in review, the Court is guided by a number of principles including but not limited to the following; **One**, the review jurisdiction is not by way of appeal and its purpose is not to provide a back door method to unsuccessful litigants to re-argue their case or seek a re-appraisal of the entire evidence on record; **Two**, the power of review is limited in scope and is normally used for correction of a mistake but not to substitute a view in law; **Three**, a judgment of a final court is final and

review of such judgment is an exception; **Four**, in review, a mere disagreement with the view of the judgment cannot be a ground for review and where a point has already been dealt with and answered parties cannot challenge the impugned judgment in the guise that an alternative view is possible under the review jurisdiction; **Five,** an erroneous view justifies an appeal and the power of review can therefore not be exercised on the ground that the decision was erroneous on merit; **Six,** it will not be a sufficient ground for review that another judge would have taken a different view, nor can it be a ground for review that the court proceeded on incorrect exposition of the law and **Seven**, a manifest error on the face of the record should be an error that is obvious and patent and not something which can be established by a long drawn process of reasoning on points which may conceivably be two opinions. See- **Elia Kasalile and 17 Others v. Institute of Social Works,** Civil Application No. 187/18 of 2016, **Golden Globe International Services and Another v. Millicom (Tanzania) N.V and Another**, Civil Application No.195/01 of 2017 and **Dismas Bunyerere v. The Republic**, Criminal Application No. 92/08 of 2018 (all unreported).

Guided by the above principles and in the light of the record before us, we are now in position to turn into the determination of the application.

In the first place and as we have already hinted above, it is obvious that the grounds and complaints raised by the applicant in the instant application are based on the fact that the Court in the impugned decision agreed and blessed the remark by the executing court that in executing the decree, the applicant is at liberty to apply for the attachment of another decree, that is, decree dated 13.07.2016 issued in Commercial Case No. 03 of 2016. It is our observation that, as it can be gathered from the supporting affidavit, written submissions and also from the notice of motion, the applicant misapprehended the remark made by the executing court. It is abundantly evident in the supporting affidavit, for instance from what is stated on paragraphs 6, 17.2.1, 17.2.2, 17.2.4 and 17.3 of the supporting affidavit, that the applicant wrongly took the remark to have meant to restrict, compel or direct the applicant to execute its decree by applying for the attachment of the said another decree, which is not the case. The miscomprehension is again exhibited in the written submissions in support of the application where on paragraph 4.1.2, the executing court is wrongly being criticised of allegedly having ordered the attachment of the said another decree while it had no mandate of doing so. The truth is that the executing court never made such an order. No attachment order was made by the executing court.

As correctly argued by the counsel for the respondent, in remarking that the applicant is at liberty to apply for the attachment of the decree dated 13.07.2016 in Commercial Case No. 03 of 2016, the executing court merely gave an option to the applicant to apply for the attachment of the said another decree only if it so wished. The remark was a mere advice not a binding order. It did not restrict, compel or direct the applicant to apply for the attachment of the decree. The executing court did also not order the attachment of the said decree as complained by the applicant.

It is also our observation that, in the application for revision, the nature of the decree dated 13.07.2016 in Commercial Case No. 03 of 2016, its validity or the manner it had been procured was not an issue. In that application, the Court was invited to examine the record of the proceedings, ruling and order in Commercial Case No. 09 of 2012. It was for that reason that even the record of Commercial Case No. 03 of 2016 was not placed before the Court. Any irregularity or omission committed in Commercial Case No. 03 of 2016 or in the procurement of the decree dated 13.07.2016, cannot therefore be the basis for blaming the Court that it failed to do anything regarding Commercial Case No. 03 of 2016 or its decree dated 13.07.2016. The counsel for the respondents are therefore right in their argument that most of the issues being raised in the instant application were not raised neither before the Court in revision nor before

the executing court. It should also be emphasized that the scope of our mandate in the instant application is limited within the impugned decision. In review, the Court have no powers to venture into any other record beyond the impugned decision.

Under these circumstances, where Commercial Case No. 03 of 2016 was not the subject of the application for revision and where the applicant was not restricted or compelled, neither by the executing court nor by the Court, to execute its decree by the attachment of the decree dated 13.07.2016 in Commercial Case No. 03 of 2016, the applicant's complaints and grounds in the instant application which, as we have alluded to above, are essentially not related to the case that was the subject for the revision, become irrelevant and immaterial. Apart from the fact that no apparent error on the face of the record can therefore be said to have been shown or established on the record of the impugned decision, no error relating to Commercial Case No. 03 of 2016 or decree dated 13.07.2016 if any, can therefore have the effect of occasioning any miscarriage of justice to the applicant. This is mainly because the applicant was never restricted, compelled or directed to execute its decree only by the attachment of the decree dated 13.07.2016. Besides that, it should also be borne in mind that in terms of Order XXI rule 52 of the Civil Procedure Code, Cap 33 R.E. 2019

(the Code) a decree is among the properties that can be attached in execution and realisation of another decree.

Ordinarily, the above observations and conclusion would have sufficed to dispose of the application. However, for the sake of completeness we find it apposite to also consider the grounds raised in support of the application, *albeit* in brief.

The first ground is to the effect that the decision sought to be reviewed contains manifest errors on the face of record occasioning a miscarriage of justice to the applicant. It is complained that the Court committed manifest errors when it agreed with the executing court that the applicant can execute its decree by the attachment of another decree which was not dated or sealed and of which its nature was neither ascertained by the Court nor was its attachment made upon an application being made to that effect. As we have amply demonstrated above, these complaints are the result of the misapprehension by the applicant of the remark by the executing court that the applicant is at liberty to execute its decree by applying for the attachment of another decree. Apart from the fact that basing on the record subject of this review, we do not find that these complaints amount to a manifest error on the face of the record, we do not see how, even if they could have so amounted, the same can be said to have occasioned a miscarriage of justice to the applicant where the

applicant had never been restricted, compelled or directed to apply for the attachment of the said another decree.

The ground that the decision has manifest errors on the face of the record is also based on the complaint that some grounds or issues raised in the application for revision were not determined by the Court. Mr. Lutema has singled out some of the said issues to include; **firstly**, the complaints that it was the same judicial officer who issued the decree in Commercial Case No. 03 of 2016 who again conducted and presided over the proceedings of the execution of the decree in Commercial Case No. 09 of 2012; **secondly**, that the Court did not consider and observe that the decree in Commercial Case No. 03 of 2016 adversely varied and altered the applicant's rights in her absence and **thirdly**, that the sale of properties by the respondents which constituted an act of bad faith was also not decided. We again find that these complaints concern extraneous issues which relate to Commercial Case No. 03 of 2016 which was not the subject of the application for revision. It should be noted that the main issue before the Court in Civil Application for Revision No. 187/16 of 2019 was on the refusal by the executing court for the decree to be executed by way of the arrest and detention of the 1st,2nd,3rd and 4th respondents. The record clearly shows that this issue was adequately determined and

answered by the Court. At pages 24 and 25 of its ruling, the Court observed as follows:

> *"On our close reading of the applicant's Counter-Affidavit, we find that the applicant miserably failed to establish that there was deliberate disposition of the properties by the judgment-debtors. Nor were there any evidence to establish that the house at Oleirien in Arusha Municipality and a motor vehicle belong to the judgment-debtors. Mr. Lutema argued that the executing court illegally and improperly blessed fraudulent transfer and conversion occasioned by the judgment-debtors. ... As correctly submitted by Mr. Kimaay, the shares having reverted back to the respondents they were free from any encumbrances as such their sale was not in contravention of Order XXI rule 39 (2) of the Code. In that regard, the subsequent sale of shares to the third party was not an act of bad faith or dishonest disowning of the obligation."*

Again, on page 26, the Court considered whether the sale of properties by the respondents amounted to an act of bad faith and observed that:

> *"Going by the record before us, we are settled that there was no evidence establishing bad faith on*

part of the respondents that would warrant for their arrest and detention as civil prisoners."

From what we have amply demonstrated above, it cannot be complained by the applicant that the Court left any relevant issue or ground undetermined. The issue which was before the Court was determined and decided. The Court might have proceeded on incorrect exposition of the law or it might have even wrongly or erroneously decided the issue but that cannot be the basis for a review. Errors would only justify a review if it is shown that they are obvious and patent. See- **Peter Ng'homango v. Gerson A.K. Mwanga and Another**, Civil Application No. 33 of 2002 and **Maulid Fakihi Mohamed @ Mashauri v. Republic**, Criminal Application No. 120/07 of 2018 (both unreported). In the latter case the Court stated that:

"A review is by no means an appeal in disguise whereby an erroneous decision is reheard and corrected but lies only for patent errors."

Further, in **Angella Amudo v. The Secretary General East African Community,** Civil Application No. 4 of 205 (unreported), the East African Court of Justice (Appellate Division) at Arusha, observed that:

"As long as the point is already dealt with and answered, the parties are not entitled to challenge the impugned judgment in the guise that an

alternative view is possible under the review jurisdiction."

The second ground which is to the effect that the applicant was wrongly deprived of an opportunity to be heard, cannot detain us. On this ground it was argued by Mr. Lutema that the Court failed to observe that the decree dated 13.07.2016 in Commercial Case No. 03 of 2016 was procured in the applicant's absence and that the decree altered and varied the applicant's rights. Apart from the fact that the ground results, as we have alluded to earlier, from the applicant's misapprehension of the remark by the executing court, the complaint does not relate to the matter which was before the Court and which is the subject of the instant application. However, despite of that fact, we note that the issue of the applicant not being heard because she was not a party to Commercial Case No. 03 of 2016, was considered by the Court. At page 26 of its ruling the Court is on record stating that:

"We now turn to the second ground that the executing court incorrectly, illegally and improperly directed the decree-holder to execute another decree in which it was not a party. On this we shall be very brief that the executing court rightly invoked Order XXI rule 52 of the Code... The provision of Order XXI rule 52 of the Code is crystal clear that a decree is among the properties subject to attachment and realization of another decree...

Hence, the decree in Commercial Case No. 3 of 2016 can be attached and realized in accordance with the provision of Order XXI rule 52 of the Code."

The third and last ground predicated upon rule 66 (1) (c) of the Rules which is to the effect that the decision is a nullity, is also misconceived and of no merit. The complaints that the Court assigned no reasons for the decisions it made or that it did not adjudicate on the ground that the decree dated 13.07.2016 was meant to negatively alter or adjust the rights of the applicant are not supported or borne out by the record, the subject of the instant application. Further, as we have alluded to above, this ground is misconceived because what is being complained in support of the ground cannot render the decision a nullity. Factors that can render a decision a nullity were stated by the Court in **M/S Serengeti Road Services v. CRDB Limited,** Civil Application No. 12 "A" of 2011 (unreported) thus:

"In its ordinary sense a decision is said to be a nullity if it is shown that the impugned order was delivered by a court not competent to deliver it or was obtained by fraud or collusion."

It was further stated in the above cited decision of the Court that;

"A decision may be wrong; it may be based on a misapprehension of the law, or a wrong application of the court's discretion, but it does not make that decision a nullity".

Since in the instant application, it is not complained by the applicant that the Court had no jurisdiction in handing down the impugned decision or that the decision was obtained by fraud or collusion, then the ground that the decision is a nullity is baseless and it is accordingly dismissed.

As we conclude, we wish to remark that we have noted with concern that the applicant has unnecessarily wasted time to realise the fruits of its decree since 2017 when the application for the execution of the decree by way of arresting and detaining the decree-debtors, that is, the respondents, was refused by the executing court. As we have amply demonstrated throughout this ruling, the applicant was not restricted, compelled or directed by any court to execute her decree by any particular mode. The applicant was only given an advice or option to apply for the execution of its decree by attachment of the decree in Commercial Case No. 03 of 2016 if it so wished. The applicant was therefore free to apply for the execution of the decree by any mode of execution mentioned under section 42 and Order XXI rule 28 of the Code. In fact, the applicant can even go back to the executing court and apply for the execution of the decree in the same manner of arresting and detaining the decree-debtors

as civil prisoners which was refused by the executing court if the required limitations and conditions to warrant the arrest and detention of the decree-debtors can be satisfied.

All said and done, in view of the aforesaid, we find that the application is without merit and we accordingly dismiss it. Considering the circumstances of this matter, we find it appropriate to make no order as to costs.

DATED at **DAR ES SALAAM** this 1st day of September, 2022.

S. A. LILA
JUSTICE OF APPEAL

B. M. A. SEHEL
JUSTICE OF APPEAL

A. M. MWAMPASHI
JUSTICE OF APPEAL

The Ruling delivered this 7th day of September, 2022 in the presence of Ms. Dora Mallaba, counsel for the Appellant and Mr. Erick Rweyemamu holding brief Mr. Boniface Joseph, counsel for the Respondent is hereby certified as a true copy of the original.

G. H. HERBERT
DEPUTY REGISTRAR
COURT OF APPEAL