IN THE COURT OF APPEAL OF TANZANIA

AT ARUSHA

(CORAM: MWAMBEGELE, J.A., KEREFU, J.A. And KIHWELO, J.A.)

CIVIL APPLICATION NO. 132/02 OF 2022

RAPHAEL SAIBOKU.....APPLICANT

VERSUS

SHENYA JOHN IMORI (Suing as Administrator of the Estate of the Late Long'asani Ladung'ani).....**RESPONDENT**

(Application for Review from the Decision of the Court of Appeal of Tanzania, at Arusha)

(Ndika, Levira And Mwampashi, JJ. A)

dated the 3rd day of December 2021

in

Civil Appeal No. 69 OF 2021

.....

RULING OF THE COURT

28th November & 5th December, 2022

KIHWELO, J.A.:

In this application, the Court is being asked to review its decision in Civil Appeal No. 69 of 2021 dated 3rd December 2021 whereby the applicant's appeal against the decision of the High Court of Tanzania in Land Case No. 35 of 2015 (Masara, J.) was upheld save for orders on award of special damages in relation to the demolition of the deceased's house situated at Siwandeti village within the District of Arumeru.

The application has been preferred through a notice of motion predicated on rules 66(1)(a), 48 (1) and (2) and 49 of the Tanzania Court of Appeal Rules, 2009 ("the Rules"), on the ground that the decision was based on a manifest error on the face of the record resulting in miscarriage of justice.

The application has been supported by an affidavit of the applicant, Raphael Saiboku. Paragraphs 8, 9, 10 and 11 of the supporting affidavit deal with the alleged errors. To be more precise, in paragraph 11 the applicant faults the judgment of the Court alleging, that the Court took over the powers of the High Court the decision that manifests an error on the face of the record resulting in the miscarriage of justice.

On the other hand, the respondent, Shenya John Imori filed an affidavit in reply. In essence, the respondent is opposing the application and argues that the ground relied upon by the applicant does not warrant the Court to exercise its powers of review. In particular, the respondent averred that the power of the Court to review its own decision is limited to an error on the face of the record which resulted to miscarriage of justice and not on an erroneous decision which is the prerogative of the superior Court.

At the hearing before this Court, the applicant was represented by Mr. Michael Lugaiya, learned counsel who teamed up with Mr. Sabato Ngogo also learned counsel, whereas the respondent had the services of Mr. Meinrad Menino D'Souza learned counsel.

Mr. Lugaiya prefaced his submission by praying to adopt the written submissions which were earlier on lodged in terms of rule 106 of the Rules. He further prayed to adopt the list of authorities they earlier on filed in terms of rule 34 of the Rules. On his part, Mr. D'Souza did not file written submissions in opposition and addressed the Court in terms of Rule 106 (10) (b) of the Rules.

In support of the application Mr. Lugaiya contended that, upon this Court finding that the requirements of the law were not complied with by the trial court, it was expected to remit the case file to the trial court with a direction that the trial court should proceed to make the necessary orders and/or directions and that, as it stands now, the Court has taken over the powers of the trial court and therefore, the decision of this Court manifests an error on the face of the record resulting in the miscarriage of justice. Elaborating further, the learned counsel argued that, the Court properly considered the consequences of failure to file the written statement of

defence within time and cited Order VIII, rule 14 (1) and (2) of the Civil Procedure Code, [Cap 33 R.E. 2019] as well as the decision of this Court in **John Lessa v. ZAMCARGO Ltd and Jonas Mmari**, Civil Appeal No. 61 of 1996 (unreported) in which, faced with analogous situation, the Court remitted the matter to the High Court with a direction that the court proceed to make the necessary order and/or direction.

Mr. Lugaiya further submitted that, the decision of the Court to infer that the trial judge made an order for the respondent to proceed *ex parte* took away the applicant's opportunity and right to apply for extension of time to file his written statement of defence in accordance with the CPC. He paid homage to the previous decisions of this Court in **Prof. T.L. Maliyamkono v. Wilhelm Sirivester Erio**, Civil Appeal No. 93 of 2021, **Dangote Industries Tanzania Ltd v. Warnercom (T) Limited**, Civil Appeal No. 13 of 2021 (both unreported) and **Nimrod Elireheman Mkono v. State Travel Services Ltd & Masoo Saktay** [1992] TLR 24. The learned counsel, therefore prayed that, the application be allowed and the case file be remitted to the High Court for necessary orders.

Mr. D'Souza, in response argued that, although the applicant has predicated his application upon rule 66 of the Rules in essence the averments

in the affidavit do not fall within the purview of an application for review, for they are aimed at calling upon the Court to revisit an erroneous decision which is the prerogative of the superior court which is not what a review is all about. He went on to argue that a mere error of law is not a ground for review and that the ground raised by the applicant do not qualify for a review but rather they are mere grounds of appeal which have been brought through a back door. Reliance was placed in the case of **Amina Maulid Ambali and 2 Others v. Ramadhani Juma**, Civil Application No. 173/03 of 2010 (unreported) which cited the case of **Tlatla Saqware v. The Republic**, Criminal Application No.2 of 2011 (unreported) which quoted the case of **Mirumbe Elias @ Mwita v The Republic**, Criminal Application No. 4 of 2015 (unreported).

Responding further Mr. D'Souza, argued that, the applicant has not sufficiently demonstrated how will he suffer injustice if the application is not granted, in the contrary, the respondent stands to suffer injustice if the matter is remitted to the High Court. He distinguished all cases that were cited by the applicant as inapplicable in the circumstances of the case before the Court and finally urged us to dismiss the application with costs.

Having carefully considered the submissions, and after going through the notice of motion and the supporting affidavit as well as the affidavit in reply, it is instructive to interject a remark at the outset that, review is not an automatic right. It is available only in exceptional situations which are listed under rule 66 (1) of the Rules.

Before we dwell onto the determination of this application, it seems desirable that we, first, discuss the principles governing the Court's power to review its decision. This Court in the case of **Hassan Ng'anzi Khalfan v. Njama Juma Mbega and Another**, Civil Application No. 336/12 of 2020 discussed the powers of the Court to review its decision thus: -

> *"We wish, in the first place, to point out that powers of the Court to review its decision constitutes an exception to the general rule that once a decision is composed, signed and pronounced by the Court, the Court becomes functus officio in that it ceases to have control over the matter and has no jurisdiction to alter or change it. Needless to overemphasize that a review is called for only where there is a glaring and patent mistake or grave error which has crept in the earlier decision by judicial fallibility. Simply stated, the finality of the decision should not be reopened or reconsidered so as to let the aggrieved*

party fight over again the same battle which has been fought and lost. It is obvious therefore that the court's power of review is limited."

It is therefore, we think, appropriate to recapitulate briefly the provision of rule of 66 of the Rules and more in particular rule 66 (1)(a) which the applicant has, in this application confined his grievance reads: -

"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."

The question is; what amounts to a manifest error on the face of the record? The answer to this question was discussed at considerable length by the Court in the most celebrated case of **Tanganyika Land Agency Limited and 7 Others v. Manohar Lal Aggrwal**, Civil Application No. 17 of 2008 (unreported) in which the Court drew inspiration from the Indian decision in **M/S Thunga Bhadra Industries Ltd v. The Government of Andra Pradesh**, AIR 1964 SC 1372 where it was 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 error...it would

suffice for us to say that where without any elaborated argument one could point to the error and say here is a substantial point of law which stares one in the face, and there could reasonably be no two options entertained about it, a clear case of error apparent on the face of the record would be made."

Similarly, in the landmark case of **Chandrakant Joshubhai Patel v. Republic** [2004] TLR 218, what amounts to a manifest error on the face of the record was fully addressed by the full Court at page 225. Having examined several authorities on the matter, the Court adopted from Mulla on the Code of Civil Procedure (14th Ed), pages 2335-2336 the following passage:

"An error apparent on the face of 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.*** *State of Gujarat v. Consumer Education and Research Centre (1981) AIR GU [223]...* ***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*** *[Basselios v.*

Athanasius (1955) 1 SCR 520] .....But it is no ground for review that the judgment proceeds on an incorrect exposition of the law [Chhajju Ram v. Neki (1922) 3 Lah. 127]. A mere error on law is not a ground for review under this rule. That a decision is erroneous in law is no ground for ordering review: Utsaba v. Kandhuni (1973) AIR Ori.94. 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 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 [Thungabhadra Industries Ltd v. State of Andhra Pradesh (1964) SC 1372]"[Emphasis added]

It was also stated in part at page 224 that:

".....no judgment can attain perfection but the most that Courts aspire to is substantial justice. There will be errors of sorts here and there, inadequacies of this or that kind, and generally no judgment can be beyond criticism. Yet while an appeal may be attempted on the pretext of any error, not every error will justify a review."

We are alive to the fact that, the above decision was decided prior to the enactment of rule 66 of the Rules, but the case has remained one of the landmark cases in the interpretation of the issue of error manifest on the face of the record resulting in a miscarriage of justice within the scope of rule 66(1)(a) of the Rules. The Court in this case stressed that to constitute a reviewable error, such error must be patent on the record and not one which can be established by a long-drawn process of argument with the potential of two different opinions.

Upon a thorough scrutiny of the impugned judgment, we must confess that, we have completely failed to see any error that qualifies for review in terms of rule 66 (1) (a) of the Rules.

The judgment of the Court is impugned on the grounds that upon finding that the requirements of the law relating to filing a written statement of defence timely were not complied with by the High Court, it was incumbent upon the Court to remit the file to the High Court with a direction that the High Court proceed to make the necessary orders and/or direction instead of taking over the powers of the High Court as it did. Furthermore, the judgment of the Court is impugned on the grounds that it was improper

for the Court to infer that the trial judge made an order for the respondent to proceed *ex parte.*

With respect, we think, that in any case these complaints by the applicant do not fall squarely within the scope of reviewable errors but rather a ground of appeal in disguise which is not acceptable in review.

Fortunately, we have held similar position consistently in various decisions of this Court. For instance, in the case of **Rizali Rajabu v. Republic**, Criminal Application No.4 of 2011 (unreported), the Court stated 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 it is not reconsidered will result into a miscarriage of justice. We are alive to a well-known principle that a review is by no means an appeal in disguise. To put it differently, in a review the Court should not sit on appeal against its own judgment in the same proceedings. We are also mindful of the fact that as a matter of public policy litigation must come to an end hence the Latin Maxim-**Interestei reipublicae ut finis litium**. (See **Chandrakant Joshubhai***

Patel v R *[2004] TLR 218;* ***Karim Karia v. R,***
Criminal Appeal No.4 of 2007 CAT (unreported)."

In view of the foregoing position, it cannot be doubted that the ground of the notice of motion by the applicant has no merit and it fails.

That said and done, we find that the application for review is devoid of merit. It is accordingly dismissed with costs.

DATED at **ARUSHA** this 5th day of December, 2022.

J. C. M. MWAMBEGELE
JUSTICE OF APPEAL

R. J. KEREFU
JUSTICE OF APPEAL

P. F. KIHWELO
JUSTICE OF APPEAL

The ruling delivered this 5th day of December, 2022 in the presence of Mr. Michael Lugaiya, learned counsel for the applicant who also holds brief for Mr. Meinrad D'Souza, learned counsel for the respondent is hereby certified as a true copy of the original.

THE COURT OF APPEAL OF TANZANIA

F. A. MTARANIA
DEPUTY REGISTRAR
COURT OF APPEAL