IN THE COURT OF APPEAL OF TANZANIA

AT TANGA

(CORAM: LILA, J.A., KITUSI, J.A. And FIKIRINI, J.A.)

CIVIL APPLICATION NO. 318/12 OF 2021

HASSAN KAPERA MTUMBA administrator of the estate of the late KAPERA MTUMBA) .....APPLICANT

VERSUS

SALIM SULEIMAN HAMDU.....RESPONDENT

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

(Mziray, Mwambegele, and Kerefu JJA.)

dated 08th day of April, 2020
in
Civil Application No. 505/12 of 2017
.....

RULING OF THE COURT

3rd April & 28th June, 2023

KITUSI, J.A.:

This is an application for review of the decision of this Court in Civil Application No. 505/12 of 2017 (Mziray, Mwambegele and Kerefu, JJA) dated 8th April 2020, on the ground that:-

> *"(i) The decision dismissing the application was based on a manifest error on the face of the record resulting in the miscarriage of justice".*

The application is made under, among other provisions, rule 66 (1) of the Tanzania Court of Appeal Rules, 2009 (the Rules), which stipulates:-

> *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 fact 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.*

The application is predicated on paragraph (a) of sub rule (1) of rule 66 of the Rules. From the above provision, it is obvious that where the decision of the Court is based on a manifest error on the face of the record, we are enjoined to review it, if we get satisfied that such error has resulted in a miscarriage of justice.

The application arises from the following simple background. There is a decree of the District Land and Housing Tribunal (DLHT) of Tanga in Land Application No.53 of 2010 in favour of the respondent. The applicant's attempts to challenge that decision failed because Land Appeal No.21 of 2013 by him was dismissed for want of prosecution and Misc. Land Application No.80 of 2016 seeking extension of time to restore Land Appeal No.21 of 2013 was also dismissed for want of merit.

Thereafter the applicant lodged a notice of appeal intending to challenge the decision of the High Court. Subsequent to that he filed Civil Application No. 505/12 of 2017 seeking stay of execution. This application was dismissed by the Court on the ground that since the decree of the DLHT of Tanga in Land Application No. 53 of 2010 declares the respondent the rightful owner of the suit house, the applicant could not offer the same house as security for the due performance of the decree in the application for stay of execution. It dismissed the application. This is the decision subject of this application for review.

The applicant's affidavit which was taken in support of the application narrates the foregoing background story and proceeds to identify what the applicant considers to constitute a manifest error on the

face of the record. In our considered view, paragraphs 9 and 10 of that affidavit are of essence. They aver:-

> 9. *That, in paragraph 27 of the affidavit in support of application in Civil Application No. 505/12 of 2017 the applicant therein undertook to give security for the due performance of the decree of the District Land and Housing Tribunal as may ultimately be binding upon her which the Court did not consider and as a resuit did [not] exercise its wide discretion to order any security for the due performance of decree and thereafter grant an order for stay of execution.*
>
> 10. *That, the Court only considered paragraph 28 of the affidavit in support of the application in Civil Application No.505/12 of 2017 and made a finding to the effect that the disputed property cannot be offered by the applicant as a security for the due performance of the decree sought to be stayed and that the applicant had not fulfilled the condition of undertaking a security for due performance of the decree sought to be stayed".*

It is Mr. Daimu Halfan learned advocate appearing along with Mr. Mashaka Ngole, also learned advocate, who argued the application on behalf of the applicant. In substance he argued that the dismissal of the

application on the ground that the house could not be offered for security was wrong because the applicant, under paragraph 27 of the affidavit, was undertaking to furnish any other security as would be ordered by the Court. He raised issue with the Court not pronouncing itself on the said undertaking under paragraph 27 of the affidavit. Mr. Daimu argued that the omission to address the averment in paragraph 27 of the affidavit constitutes an apparent error on the face of the record making the decision liable to review.

Mr. Obediodum Chanjarika, learned advocate who acted for the respondent, had nothing to submit on the application. The respondent had not even filed an affidavit in reply.

Inspite of the respondent not putting up a fight, we shall still test the application in terms of principles governing review. Rule 66 which we reproduced earlier justifies a review if there is an established manifest error on the face of the record. However, this rule has been qualified by decisions of the Court. For instance, in the case of **The Hon. Attorney General Mwehezi Mohamed (as administrator of Estate of the late Dolly Maria Eustace) and Three Others**, Civil Application No.314/12 of

2020 cited in **Isaya Linus Chengula v. Frank Nyika,** Civil Application No. 487 of 2020 (Both unreported), the Court stated the following:

> *"Rule 66(1) of the Rules is very clear that the Court may review its "judgment" or "order" which means for the Court to determine (an) application for review, all it needs to have before it is the impugned decision and not the evidence adduced during trial or decision of subordinate court(s) as submitted by Mr. Malata. We need to emphasize here that, the record referred in review is either the "judgment" or "order" subject of review."*

In the oft cited case of **Chandrakant Joshibhai Patel v. Republic** [2004] TLR 218 the Court qualified the term "error apparent on the face of the record" by stating:

> *"Error apparent on the face of the 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 reasonlng on points which there may conceivably be two options. A mere error of law is not a ground for review under this rule. That the decision is erroneous in law is no ground for ordering review. 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."

Applying those principles to the present application, the question is whether the Court did not address the contents of paragraph 27 of the affidavit and if so whether the omission is manifest such as can be spotted by one who runs and reads. For a start, there is this paragraph at page 4 of the judgment.

> *"As for the security for the due performance of the decree, the* ***applicant has indicated under paragraph 27 and 28 of the supporting affidavit*** *that the house which is the subject matter of the dispute is sufficient security."* (Underlining ours).

The above paragraph clearly disproves the applicant's contention that paragraph 27 of the affidavit was totally not considered by the Court. As per the above except it is vivid that in paragraphs 27 and 28 the applicant undertook to offer the house as security. In the circumstances considering our limited powers of review the applicant's contention that paragraph 27 raised something other than what is clear in that decision, cannot arise. The final decision may have been wrong in the applicant's opinion but that does not make the decision reviewable, for no decision can attain

perfection. See **Blueline Enterprises Limited v. East African Development Bank**, Civil Application No.21 of 2012 (unreported) reproducing the following paragraph from **Chandrakant Joshubhai Patel** (supra)

> *"It is, we think, apparent that there is a conflict of opinion as to what amounts to an error manifest on the face of the record and it is important to be clear of this, lest disguised appeals pass off for applications for review. We say so for the well-known reason that* ***no judgment can attain perfection but the most that courts aspire to is substantial justice. There will be errors 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".***

See also the case of **Peter Ng'omango v. Gerson A.K. Mwanga & Another,** Civil Application No. 33 of 2002, cited in the case of **Hassan Marua v. Tanzania Cigarette Company Limited,** Civil Application No. 338/01 of 2019 (both unreported).

Considering all those factors, it is our conclusion that the applicant has not made a case for a review of the decision in Civil Application No. 505/12 of 2017. This application has no merit and we dismiss it. We make no order for costs because the respondent did not resist the application.

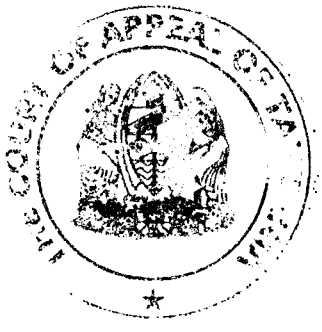
DATED at **DAR ES SALAAM** this 23rd day of June, 2023.

S. A. LILA
JUSTICE OF APPEAL

I. P. KITUSI
JUSTICE OF APPEAL

P. S. FIKIRINI
JUSTICE OF APPEAL

The Ruling delivered this 28th day of June, 2023 in the presence of Mr. Mashaka Ngole, learned counsel for the Applicant and Ms. Ezerida Mganga holding brief for Mr. Obediodum Chanjarika, learned counsel for the Respondent, is hereby certified as a true copy of the original.



G. H. HERBERT
DEPUTY REGISTRAR
COURT OF APPEAL