IN THE COURT OF APPEAL OF TANZANIA

AT DAR ES SALAAM

(CORAM: MUGASHA, J.A., KITUSI, J.A. And MDEMU, J.A.)

CIVIL APPLICATION NO. 608/01 OF 2021

JACKSON SIFAEL MTARES..... 1ST APPLICANT
DOMINIC KIGENDI.....2ND APPLICANT
TIMOTHEO SAIGURAN OLE LOITG'NYE.....3RD APPLICANT
SAMWEL SIFAEL MTARES.....4TH APPLICANT

VERSUS

THE DIRECTOR OF PUBLIC PROSECUTIONS.....RESPONDENT

(Application from the Judgment of the Court of Appeal of Tanzania at Dar-es-salaam)

(Mugasha, Kwariko & Kente, JJ.A.)

dated the 27th day of October, 2021

in

Civil Appeal No. 180 of 2019

RULING OF THE COURT

16th & 21st August, 2023

MUGASHA, J.A.:

In this application brought by way of notice of motion, the applicants are seeking the indulgence of the Court to review its decision (Mugasha, J.A, Kwariko, J.A and Kente, J.A), dated 28.10.2021, in Civil Appeal No. 180 of 2019. The application is accompanied by the affidavits sworn by Mr. Jackson Sifael Mtares and Timotheo Saiguran Ole Loitgnye the 1st and 3rd applicants and is predicated under section 4 (4) of the Appellate

Jurisdiction Act [Cap. 141 R.E. 2019] (the AJA), Rule 4(1), 4(2) (a), 4(b) and rule 66 (1) (a), (b), (c) and (d), Rule 48(1) and (2) of the Tanzania Court of Appeal Rules, 2009 (the Rules).

The application has its roots in the decision of the Resident Magistrate Court of Dar es Salaam at Kisutu in Criminal Case No. 109 of 2009 wherein, the applicants were jointly charged and convicted of the offences of conducting and managing a pyramid scheme contrary to section 171A (A) (1) and (3) of the Penal Code [CAP 16 R.E.2022] and accepting monetary deposits from the general public without a license c/s 6(1) and (2) of the Banking and Financial Institution Act, No. 5 of 2006. Subsequently, in respect of the first count, they were sentenced to pay a fine of TZS. 3,000,000.00 or in default to serve a custodial sentence of three (3) years. For the second count, they were each sentenced to pay a fine of TZS. 18,000,000.00, in default a custodial sentence of three (3) years. Furthermore, the Bank of Tanzania (BOT) was ordered to make arrangements in order to refund the members of DECI (TANZANIA) LIMITED who deposited their monies and had not collected the same at any single instance.

Aggrieved by the latter order, the applicants unsuccessfully preferred an appeal to the High Court of Tanzania and finally appealed to the Court vide Criminal Appeal No. 2 of 2018. Subsequently, the respondent successfully filed Criminal Application No. 42 of 2019 in the High Court of Tanzania seeking to forfeit to the Government of the United Republic of Tanzania the tainted assets, properties and monies acquired and collected through an illegal pyramid scheme which was conducted by the applicants.

As the High Court found that the convicted applicants were Directors of DECI (Tanzania) with direct interest in tainted properties acquired in its name and sourced from the proceeds of crime, the High Court pierced the incorporation veil of DECI in order to proceed against the applicants personally and forfeited to the Government the respective properties, assets and monies. The applicants were aggrieved by the decision of the High Court and they lodged an appeal before the Court which was dismissed for want of merit hence the present application for Review on the following grounds: -

1. *That, the judgment was based on the manifest error on the face of record resulting in the miscarriage of Justice in that;*

a. *It is against the legal position that the applicants and DECI limited are two and distinct or separate legal personality in that the convictions and sentences of the applicants were not the conviction and sentence of DECI.*

b. *It is against the legal position that DECI as a distinct of separate legal personality from the applicants was not convicted by the Resident Magistrates of the two counts.*

c. *It is against the legal position that it was only the properties of the applicants that was supposed to be tainted and thereby be forfeited to the Government of the United Republic of Tanzania as the applicants were the ones who were convicted and sentenced and they did not appeal against the said sentences and conviction.*

d. *It is against the legal position that DECI being a separate legal entity different from the applicants, owned its own properties that are not capable of being legally taken from the said DECI on account of Criminal Conviction of another person.*

e. *It is against the legal position that DECI being a separate legal entity from the applicants did not legally own the funds that were deposited by the members of the general public but the said funds were entrusted to DECI by the said members of the general public on a fundamental term that the money deposited would be*

paid back with interests or profit by the said DECI to the depositors.

2. *A party or an interested person or persons was wrongly deprived of an opportunity to be heard in that;*
    a. *It is not in dispute that the DECI accepted and took deposits from the members of the general public and such deposits were banked in several bank accounts in several banks.*
    b. *The General members of the public who are the depositors of the funds and DECI were not made parties in the Proceedings before the High Court Criminal Application No. 42 of 2019 and the Court of Appeal thereby were not given the Right to be heard.*

3. *The Court's decision is nullity in that,*
    a. *The Judgement omitted to demarcate the legal liability of the applicants on one hand and the legal interests of the general members of the public and DECI on the other hand.*
    b. *The interests of the general members of the public in the funds deposited by the said members to DECI were determined by the High Court and the Court without affording the members of the Public right to be heard.*

c. *The legal interests of DECI were determined by the High Court and the Court of Appeal of Tanzania without affording the said DECI the Right to be heard.*

4. *The Judgement was procured illegally or by perjury in that.*

a. *It was given in total disregard of the constitutional right to be heard to the members of the general public who were the depositors of the funds.*

b. *There was failure to involve the interested persons in respect of the property the subject of forfeiture to the Government.*

c. *The evidence given on behalf of the Respondent in the High Court in Criminal Application No 42 of 2019 was to the effect that the funds and the properties the subject of forfeiture were under the ownership of the applicants a fact which is legally not true as Motor Vehicle make Rav 4 with Registration No. T 274 ATQ was neither owned by the applicants nor by DECI.*

At the hearing in appearance was Mr. Francis Stolla, learned counsel for the applicants and Mr. Shadrack Martin Kimaro, learned Principal State Attorney and Ms. Anita Sinare, learned Senior State Attorney, for the respondent.

Prior to the hearing, we wanted to satisfy ourselves on the propriety or otherwise of the application and as such, we invited the parties to address the Court. On taking the floor, Mr Stolla submitted that the application predicated under Rule 66 (1) (a), (b), (c) and (d) of the Rules is properly before the Court as it seeks the indulgence of the Court to annul the decision of the High Court because the respondent, the Director of Public Prosecutions (the DPP) was not legally mandated to file an application for assets recovery. With this submission, Mr. Stolla urged us to find the present application competent and proceed to hear and determine its merits.

On the other hand, Mr. Kimaro challenged the competence of the application arguing that, it seeks to re-open the re-hearing of the appeal as none of the advanced grounds has met the threshold warranting the Court to invoke its Review jurisdiction. He added that, the grounds of review in the present motion were earlier on raised by the applicants as grounds of appeal before the Court and were considered and conclusively determined in the impugned decision. That apart, it was also submitted that, the application filed in 2019 before the High Court on assets recovery was properly before that court because the DPP is mandated to do so in terms

of section 9 of the POCA as amended vide Act No. 7 of 2018. Thus, Mr. Kimaro urged us to find the application not competent and proceed to strike it out.

Having considered the rivalling submissions and the record before us, the issue for determination is whether the present application is competent. At the outset, we wish to restate that, the Court derives power to review its own decisions from section 4(4) of the AJA and rule 66(1) of the Rules so as to ensure that a manifest injustice does not go uncorrected. Whereas the AJA, clothes the Court with review jurisdiction, rule 66(1) of the Rules spells out the grounds on which a review can be sought as hereunder stipulated:

> *"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 face of the record resulting in the miscarriage of justice; or*
>
> *(b) a party was wrongly deprived of an opportunity to be heard; or*

(c) the court's decision is a nullity; or (d)the court had no jurisdiction to entertain the case; or

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

[Emphasis supplied]

In the bolded expression, it is clearly stated that the review jurisdiction is limited in scope in order to re-examine the decision of the Court so as to correct an error which has been inadvertently committed which if not considered will result into a failure of justice. In other words, the review jurisdiction is a residual power of the Court which can sparingly be invoked under the grounds stated above. This is also reflected in the principles governing the exercise of review as established by case law in our jurisdiction and from various jurisdictions as follows:

One, the term 'mistake or error on the face of the record' by its very connotation it must be such as can be seen by one who runs and reads: **MULLA,** Commentary on the Indian Code of Civil Procedure, 1908, 14th edition at pp 2335-6, **STATE OF GUJARAT VS CONSUMER EDUCATION AND RESEARCH CENTRE** (1981) a Guj. 233 **STATE OF**

WEST BENGAL AND OTHERS VS KAMAL SENGUPTA AND ANOTHER, (2008) 8SCC 612 and **CHANDRAKAT JOSHUBHAI PATEL VS REPUBLIC** [2004] T.L.R. 218. In the latter case, the Court stated that: -

> *"An 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 reasoning on points on which there may conceivably be two opinions.... A mere error of law is not a ground for review under this rule. That a decision is erroneous in law is no ground for ordering review.... It can be said of an error that it 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...."*

Two, a judgment of the final court is final and review of such judgment is an exception as it would be intolerable and most prejudicial to the public interest if cases once decided by the Court could be re-opened and re-heard. See: **BLUE LINE ENTERPRISES LTD. VS THE EAST AFRICAN DEVELOPMENT BANK, (EADB),** Civil Application No. 21 of

2012 (unreported) and **AUTODESK INC. VS DYASON** (No. 2) (1993) HCA 6 (Australia).

Three, 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 and mere disagreement with the view of the judgment cannot be the ground for invoking the same. See **PETER NG'HOMANGO VS GERSON A.K. MWANGA** and **ANOTHER**, Civil Application No. 33 of 2002 (unreported) and **DEVENDER PAL SINGH VS STATE, N.C.T.** of New Delhi and Another, Review Petitions No. 497, 620, 627 of 2002 (India Supreme Court).

Four, a review should not be utilized as a backdoor method to unsuccessful litigants to re-argue their case because a review is by no means an appeal in disguise because it is a matter of policy that litigation must come to an end. Therefore, seeking the re-appraisal of the entire evidence on record for finding the error, is tantamount to the exercise of appellate jurisdiction which is not permissible because a Court will not sit as a Court of Appeal from its own decisions, nor will it entertain applications for review on the ground that one of the parties in the case

conceived himself to be aggrieved by the decision. See: **RIZALI RAHABU VS REPUBLIC**, Criminal Appeal No. 4 of 2011 (unreported) and **MEERA BHANJA VS NIRMALA KUMARI CHOUDURY** (1955) ISCC India).

Five, as to what constitutes a subject for review or the record thereof, the Court had the occasion of pronouncing itself on the matter in the case of **HON. ATTORNEY GENERAL VS MWAHEZI MOHAMED (AS ADMINISTRATOR OF ESTATE OF THE LATE DOLLY MARIA EUSTACE) AND THREE OTHERS,** Civil Application No. 314/12 of 2020 (unreported), the Court held thus:

> *"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 decisions 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".*

We shall be guided by the firmly stated legal principles to determine the propriety or otherwise of the present application.

In the wake of settled position of the law on the grounds on which a remedy of review can be sought, a careful scrutiny of the present motion and the accompanying affidavit clearly shows that this application is misconceived and we shall demonstrate. The applicants' attacks on the impugned decision are mainly to the effect that, the parties or interested persons were deprived the right to be heard. This is wanting because those parties or interested persons are not privy to the present application let alone a review not being a proper forum for strangers to seek the remedy as that does not fall within the ambit of rule 66(1) of the Rules. That apart, in the impugned decision, the Court categorically stated that, although a notice of hearing was issued to applicants and the general public to enter appearance and be heard in the application before the High Court; besides the applicants, none other appeared so as to be heard if the tainted properties subject to the forfeiture belonged to them.

Moreover, the grounds upon which the review is sought in the present application all revolve around the 1st and 3rd grounds of appeal which were considered and determined by this Court. Thus, the present motion is tantamount to bringing an appeal through the back door which cannot be condoned by the Court as it is an abuse of court process. This

was underscored in the case of **PATRICK SANGA VS REPUBLIC,** Criminal Appeal No. 8 of 2011 (unreported), as the Court stated:

> *" The review process should never be allowed to be used as an appeal in disguise. There must be an end to litigation; be it in civil or criminal proceedings. A call to reassess the evidence, in our respectful opinion, is an appeal through the back door. The applicant and those of his like who want to test the Court's legal ingenuity to the lime it should understand that we have no jurisdiction to sit on appeal over our own judgments. In any properly functioning justice system, like ours, litigation must have finality and a judgment of the final court of the land is final and its review should be an exception. That is what sound public policy demands."*

[See also: **BLUE LINE ENTERPRISES LTD. VS THE EAST AFRICAN DEVELOPMENT BANK,** (EADB) (supra) and **RIZALI RAHABU V. REPUBLIC** (supra).

In the premises, it is glaring that in this motion the applicants are all out re-open the rehearing of the appeal which at any stretch of imagination does not fall within the ambit of the grounds warranting the Court to

review the impugned decision. This is also evident in the ground where the applicants are seeking the remedy of review to have the impugned decision annulled on ground of omission to demarcate the liability of the applicants and legal interests of DECI. This puzzled us as the applicants are all out to substitute a view in law because of mere disagreement with the impugned judgment which at any stretch of imagination does not constitute a ground for the invoking the review jurisdiction of the Court. That apart, challenging the merits of the judgment of the Court which dismissed their appeal, cannot be relied upon as grounds for review: See **PETER NG'HOMANGO VS GERSON A.K. MWANGA** and **ANOTHER** (supra). However, in the impugned decision the matter was dealt with in the determination of the 2nd, 3rd and 6th grounds of appeal and the Court categorically pronounced itself in the following terms:

> *"Without prejudice, we agree with Mr. Magafu that from a juristic point of view, a company is a legal person distinct from its members. However, lifting the incorporation veil entails looking behind the person in control of the company not to take shelter behind legal personality where fraudulent and dishonest use is made of the legal entity. The*

underlying reasons are to ensure that the legal entity should not be used to defeat public convenience, justify wrong or defend crime. Thus, the law will consider the company as an association of persons whereby the courts can draw aside the veil to see what lies behind. This is the spirit embraced under section 23 (2) of the POCA. In this regard, since the appellants being directors who were convicted and sentenced for serious crimes had direct interest in tainted properties purchased on behalf of DECI (TANZANIA) LIMITED utilising the proceeds of crime, the incorporation veil was correctly lifted or pierced to proceed against the appellants personally and forfeit to the Government the tainted properties and assets. We say so because, professional criminals engaged in serious organised crimes should not benefit from their crimes."

In light of the foregoing, the complaint that the impugned decision was procured illegally or by perjury is neither here nor there. Thus, having considered the grounds on which the review is sought, we are satisfied that they do not meet the prescribed threshold envisaged under Rule 66(1) of the Rules to warrant this Court to invoke its review jurisdiction. In the

premises the purported application is not competent and it is hereby struck out. It is so ordered.

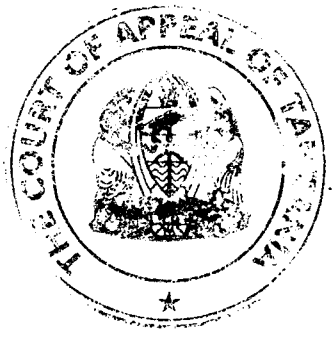
DATED at **DAR ES SALAAM** this 21st day of August, 2023.

S.E.A. MUGASHA
JUSTICE OF APPEAL

I.P. KITUSI
JUSTICE OF APPEAL

G. J. MDEMU
JUSTICE OF APPEAL

The Ruling delivered this 21st day of August, 2023 in the presence of Mr. Peter Nyangi, learned Counsel for the Applicants and Ms. Salome Matunga, learned State Attorney for the Respondent, is hereby certified as a true copy of the original.



R. W. Chaungu
DEPUTY REGISTRAR
COURT OF APPEAL