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. 32/01 OF 2022

PROSPER JOSEPH MSELE.....APPLICANT

VERSUS

AMI TANZANIA LIMITED..... RESPONDENT

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

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

dated the 11th day of November, 2021
in
Civil Appeal No. 159 of 2020

.....

RULING OF THE COURT

18th & 28th August, 2023

MDEMU, J.A.:

This is an application for review. It is by way of notice of motion and the supporting affidavit sworn by one Prosper Joseph Msele. The application is made under the provisions of rule 66 (1) of the Tanzania Court of Appeal Rules, 2009 (the Rules). As grounded in the notice of motion and deposed by the applicant in his affidavit, the applicant wants the Court to review its decision in Civil Appeal No.159 of 2020 dated the 11th day of November, 2021 (Mugasha, Kwariko and Kente, JJ.A.).

According to the depositions of the applicant in the affidavit, on 17th July, 2018, the applicant imported 13,800 yards/230 bales of 100% cotton printed fabric to Dar es Salaam on transit to Zambia. However, only 91 out of 230 bales in the consignment were collected. Thinking of the whereabouts of the remaining 139 bales, the applicant filed Commercial Case No.84 of 2019 against AMI Tanzania Limited, the Respondent herein, who was responsible for shipping and handling the consignment. The High Court (Commercial Division) awarded a total of USD 300,000.00 as special damages being the value of the cargo, and USD 20,000.00 as general damages and interest thereof. The respondent appealed to the Court which allowed the appeal by reducing damages to USD 80,072.85 and USD 5,000.00 for special and general damages respectively. The applicant believes there is manifest error in that decision hence moved the Court for the instant review on the following grounds after abandoning grounds (a) and (d) in the notice of motion:

1. *The Court erred on the face of the record in failing to realize that exhibit D3 used to compute the value has a lot of contradiction as DW2 testified that the unit price*

used is 0.70 while the document itself indicates 0.40-unit price.

2. *The Court erred on the face of the record in failing to realize that, invoices are useful to compute the value of the goods which is the corner stone of the case not necessarily the payment receipts.*
3. *The Court erred on the face of the record in failing to recognize that, the cargo was in transit to Zambia as transporting 91 bales was more unfavourable to the applicant as the applicant cargo was a specific order of 230 bales.*

Before us on 18th August, 2023 appeared Messrs. Bakari Juma and Godlove Godwin both learned Advocates representing the applicant and Mr. Mafuru Mafuru learned counsel for the respondent arguing the application. They both adopted their written submissions filed prior. At the inception of hearing of the application, Mr. Mafuru prayed to withdraw the notice of preliminary objection on time limitation for review, the prayer which was not objected to by the counsel for the applicant. On our part, we acceded to the prayer and accordingly marked the notice of preliminary objection withdrawn.

Submitting in ground **one** of the review, Mr. Juma, while referring us to the impugned judgment, submitted that, there is contradiction between the evidence of DW2 and exhibit D3 on the unit price deployed in computing the value of the consignment. He thus asked us to reevaluate exhibit D3 for that purpose. He added when submitting in ground **two** of the review that, at page 19 through 20 of the impugned judgment, the value of the cargo should have its basis on the invoices rather than in exhibit D3 as observed by the Court. He was not happy also in ground **three** of the review regarding the award of special damages relying on uncollected bales alone instead of the whole consignment of the 230 imported bales. He thus concluded his submission by imploring us to find the impugned judgment to constitute manifest error particularly on reliance of exhibit D3 in arriving at the award of damages of which, to him, is considered unjustifiable.

In resisting the application for review, Mr. Mafuru, in amplifying the adopted affidavit in reply and the written submissions, underscored a general observation that, this application has not met the threshold stipulated under the provisions of rule 66(1) of the Rules. In the words he used, Mr. Mafuru described the applicant as one seeking a second bite to reap what substantively is a grievance in the impugned judgment. Submitting in specific

grounds of review, commencing with ground one, Mr. Mafuru's contention was that the applicant is re-opening what was heard and determined by the Court regarding rights of the parties. He added when responding to ground two that, the impugned judgement reading from page 14 through 20 is clear and concise on what was determined. He concluded in response to ground three that, there is nothing to be reviewed regarding the value of the consignment because the same was arrived at pursuant to requisite procedures regarding declaration of value as required by the Tanzania Revenue Authority. He thus found the application incompetent and urged us to hold so.

Having considered submissions as levelled by the parties and the entire record before us, the issue which we endeavour to determine is whether the instant application is premised on the benchmarks stipulated under the provisions of rule 66 (1) of the Rules which, for the sake of convenience, is reproduced as hereunder:

> *66.-(l) 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 judgment was procured illegally, or by fraud or perjury.

Given the depositions in the affidavit, and both in the oral accounts and the filed written submissions, the main complaint of the applicant focuses on rule 66 (1) (a) of the Rules that the decision of this Court had its bases on a manifest error on the face of the record resulting into miscarriage of justice. Was this the case? As stated in **Jackson Sifael Mtares & Three Others v. The Director of Public Prosecutions**, Civil Application No. 608/01 of 2021 (unreported), review jurisdiction of the Court are residual powers which can sparingly be invoked under the grounds stipulated in rule 66 (1) of the Rules. We will therefore make an assessment of what constitutes the basis of the applicant's complaint regarding invoking these rare residual powers of the Court to review its own decisions. As learned counsel did, we will also determine each ground of complaint seriatim.

Beginning with ground one, in own words, the applicant's counsel invited us to re-evaluate exhibit D3 in the judgment for the same is in contradiction with the evidence of DW2. Is this a manifest error? What constitutes a manifest error was discussed in the case of **Chandrakant Joshubhai Patel v. Republic** [2004] TLR 218 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 points...A mere error of law is not a ground for review under this rule. That a decision is erroneous in law is not 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..."*

Since the learned counsel invited us to re-evaluate exhibit D3, it is obvious that, the invitation is beyond the scope beseeching errors apparent on the face of the record. This, in our view, and as observed in **Chandrakant Joshubhai Patel** (supra), is something which can be

established by a long-drawn process of reasoning thus disrespects what is envisaged in review. We are of that observation because residual powers of the Court on review may not extend to re-evaluation of evidence, exhibit D3 in the present application. Those are powers of the Court on appeal. In our respective view therefore, the applicant appears to have grievances on the way this Court considered the evidence on record, the reason why he implored us to re-appraise the contents of exhibit D3. This may not be entertained, and as said, such powers are exercisable on appellate jurisdiction. In fact, what the applicant invited us in the so-called re-evaluation of exhibit D3 is outside the scope and what is benchmarked under rule 66 (1) of the Rules where our jurisdiction is envisaged. On this, the Court in **OTTU on Behalf of P. L. Asenga &106 Others v. AMI (Tanzania) Limited,** Civil Application No.20 of 2014 (unreported) at page 42 cited to us by Mr. Mafuru observed that:

> *That on account of its nature and upbringing, the court's power on review is a jurisdiction which is exercised very sparingly and with great circumspection. Such is the stance which this Court has all along given heed and no wonder, in the present standing, a review only avails in the rarest situations which*

meet the specific benchmarks prescribed under the referred Rule 66(1). In the premises, it should always be born in mind that, whilst the court has an unfettered discretion to review its own judgment or order but the anchorage of the court's discretion is not on the basis of the sky's the limit. On the contrary, the Court is strictly barred from granting an order for review outside the five grounds enumerated under Rule 66 (1)

In ground two of the review, the learned counsel referred us to page 19 through 20 of the impugned judgment alleging that, the value of the cargo should have its basis on the invoices rather than in exhibit D3. This should not detain us. As we observed in ground one, the applicant's stance is to challenge the evidence. In other words, the applicant is not impressed by the way the court assessed the evidence by banking its decision in exhibit D3 instead of the alleged invoices in computing the value of the cargo. For sure, the Court will not pronounce itself unless and until exhibit D3 is put to scrutiny. As Mr. Mafuru observed, that duty was judiciously exercised by this Court in its appellate jurisdiction when dealing with grounds 4 and 5 of the appeal reproduced at page 6 of the judgment of the Court. A room therefore to re-exercise such powers is not available at all and will be in abuse of court

processes dealing with an appeal through the back door. See **Patrick Sanga v. Republic**, Criminal Appeal No. 8 of 2011(unreported). We also appreciate such indulgence is against the sound policy of ensuring that litigations come to an end.

Last was ground three of the review on special damages awarded basing on uncollected bales alone instead of the totality of the consignment of all the 230 imported bales. Again, as we observed in the foregoing, there is nothing like error on the face of record revealed by the applicant for our attention. In essence, this ground attracts re-evaluation and re-appraisal of the evidence, particularly on how special damages were assessed and ultimately awarded by the trial court. To do this, in our respective view, entails re-evaluation of evidence and the judgment of the trial court. That forum, by all intent and purposes, has passed and both parties and the Court utilized and exhausted it in full. It will never and may not be reopened at this stage of the review.

As observed in the foregoing, the least we can say is that, as the applicant has not established any manifest error in the impugned judgment, he has not made out a case to warrant the Court to invoke its review jurisdiction. We thus decline to grant the orders sought for in the notice of

motion and consequently, this application stands to fail and is thus dismissed accordingly. We do not make an order as to costs.

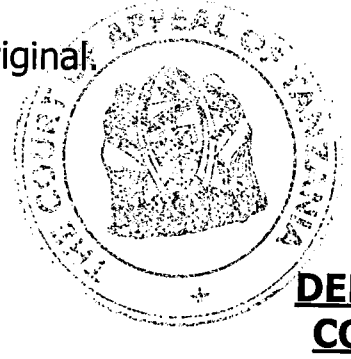
DATED at **DAR ES SALAAM** this 28th day of August, 2023.

S. E. A. MUGASHA
JUSTICE OF APPEAL

I. P. KITUSI
JUSTICE OF APPEAL

G. J. MDEMU
JUSTICE OF APPEAL

The Ruling delivered this 28th day of August, 2023 in the presence of Mr. Godlove Godwin, learned counsel for the Applicant and Ms. Sia Godbless Ngowi, learned counsel for the Respondent, is hereby certified as a true copy of the original.



R. W. CHAUNGU
DEPUTY REGISTRAR
COURT OF APPEAL