

IN THE COURT OF APPEAL OF TANZANIA

AT DAR ES SALAAM

(CORAM: MWAMBEGELE, J.A., GALEBA, J.A. And MWAMPASHI, J.A.)

CIVIL APPLICATION NO. 575/01 OF 2021

YUSUF HAMISI MUSHI 1ST APPLICANT

ZAMZAM YUSUF MUSHI 2ND APPLICANT

VERSUS

ABUBAKARI KHALID HAJJ 1ST RESPONDENT

GEMACO AUCTION MART INTERNATIONAL LTD 2ND RESPONDENT

FRANK LIONEL MARIALLE 3RD RESPONDENT

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

(Mkuye, Wambali, Galeba JJ.A)

dated the 15th day of October, 2021

in

Civil Application No. 55 of 2020

.....

RULING OF THE COURT

18th July & 6th September, 2023

GALEBA, J.A.:

This application has been made under rule 66 (1) (a) and (c) of the Tanzania Court of Appeal Rules 2009, (the Rules). It is for review of the judgment of this Court dated 15th October, 2021. The notice of motion initiating it, is supported by the affidavit of Mr. Salim Juma Mushi, one of the learned advocates representing the applicants in this matter.

The application is predicated on one ground segmented into three sub grounds (i), (ii) and (iii) namely: -

"1. That, the decision of the Court in the ruling and order in Civil Application No. 55 of 2021 was based on a manifest error on the face of the record resulting in the miscarriage of justice, particulars of which are:

- (i) The Court erred apparently on the face of record by assuming the right to appeal as stipulated under Order XLII rule 7 (1) of the Civil Procedure Code, Cap 33 R.E. 2002 is automatically vested to the Court of Appeal without there being in existence an express provision to that effect under the Civil Procedure Code;*
- (ii) The Court erred apparently on the face of the record by ousting the applicability of the Appellate Jurisdiction Act, Cap 141 R.E. 2002 in appeals originating under Order XLII rule 7 (1) (c) of the Civil Procedure Code, Cap 33 R.E. 2002 while the said provision did not mention the Court of Appeal as the Appellate court; and*
- (iii) The Court erred apparently on record by applying its earlier decision in **Tanzania***

Teachers Union v. The Chief Secretary and 3 others, Civil Appeal No. 96 of 2012 on this matter, while the provision of section 57 of the Labour Institution Act, No. 7 of 2004, clearly subjected the appeals in the said matter to the Court of Appeal of Tanzania differently from the provision of Order XLII rule 7(1) (c) of the Civil Procedure Code, Cap 33 R.E. 2002 which is silent on the appellate forum and or court for the aggrieved party.

2. That upon Review, this Court be please to order that its decision dated the 15th October, 2021 be reviewed and corrected to the extent of the grounds stated here and the decision to dismiss the Application be set aside and substitute it with the order striking out the notice of appeal for the respondents' failure to take necessary steps i.e. applying for leave, in instituting the appeal."

Initially, the applicants were plaintiffs in Land Case No. 142 of 2016. The matter was heard but before the defence could be opened, a preliminary objection was raised concerning the time limit. After hearing parties on the objection, the High Court (Kairo, J.) (as she then was),

dismissed the applicants' suit with costs because, it was time barred. As they were aggrieved by the court's dismissal order, the applicants filed Miscellaneous Application No. 472 of 2019 moving the very court to review its decision. Following this latter application, the High Court (Maghimbi, J.) set aside the dismissal order, thus the suit was restored and set down for hearing. This decision aggrieved the first and second respondents, such that they lodged a notice of appeal to this Court in order to challenge the decision setting aside the dismissal order of the original suit.

On 21st February, 2020, the applicants lodged Civil Application No. 55 of 2020, moving the Court to strike out the above notice of appeal under rule 89 (1) of the Rules, based on two grounds, namely; **one**, that no appeal lies because the notice of appeal was challenging an interlocutory order and; **two**, that no leave of the High Court or of the Court had been sought and obtained in order to file the intended appeal.

The application was fully heard by the Court and the following findings were made; **first**, that the ruling of the High Court which was being challenged by the notice of appeal was not an interlocutory or a preliminary decision, as argued by the applicants, rather it was a final

decision of the High Court and; **secondly**, that in order to appeal to the Court against the decision of the High Court, leave of the High Court or of this Court was not a mandatory requirement, in the circumstances of that matter. So, Civil Application No. 55 of 2020 was dismissed with costs. This application is seeking to challenge the ruling in that matter.

At the hearing of this application, the applicants had the services of Mr. Salim Juma Mushi assisted by Ms. Agnes Dominick, both learned advocates. Messrs. George Kato Mushumba and Derick Pascal Kahigi, learned advocates, appeared for the first and second respondents, whereas Ms. Ritha Odunga Chihoma, also learned advocate, appeared for the third respondent. Counsel adopted their respective written submissions and affidavits for their respective positions.

In supporting the first and second segments of the applicants' ground of review, Mr. Mushi, submitted that as long as Order XLII rule 7 (1) (c) of the Civil Procedure Code, (the CPC) does not provide that the Court of Appeal is the forum to which an appeal under that provision may be presented, then the Court erred to assume that it is one of the fora contemplated under that provision of the law. That was so, according to Mr. Mushi, because not all appeals go to the Court of

Appeal, for sometimes the law provides for other venues for redress. In the applicants' written submissions, learned counsel argued that the Court ousted the applicability of the AJA, for holding that in terms of that law, leave to appeal was not required.

As for the third segment of the ground of review, according to the applicants' written submissions, the Court committed an error on the face of the record for relying on the case of **Tanzania Teachers' Union v. The Chief Secretary and 3 others**, Civil Appeal No. 96 of 2012, (unreported) (the Teachers' Union case) because, the law that the Court dealt with in that case, is not the same as the one that the Court applied in Civil Application No. 55 of 2020. To Mr. Mushi, this Court erred because the Teachers' Union case was very distinguishable such that it was erroneous to rely on it in that matter. Based on those submissions, Mr. Mushi implored the Court to set aside its own decision and strike out the notice of appeal.

In reply orally before us, Mr. Kahigi submitted that this application is an appeal in disguise as there is no error on the face of the record that Mr. Mushi was able to point out.

In terms of the written submissions of the first and second respondents in reply to the first and second sub grounds of review, Mr. Mushumba submitted that, it is obvious that appeals from the High Court go to the Court of Appeal. He challenged Mr. Mushi for not pointing out as to which court, an appeal from the High Court under Order XLII rule 7 (1) (c) of the CPC, was supposed to be lodged.

On the third point, he submitted that the decision in the Teachers' Union case was cited to support the Court's reasoning, but the Court did not depend on that case as a basis for its decision.

On her part, Ms. Chihoma in opposing the application, submitted orally that the application is an appeal through the back door because, in order to agree or disagree with the applicants, one has to read the entire ruling of the Court and analyse it in order to fault the reasoning behind it. She argued further that in order, to comprehend the complaint in the third point raised, one needs to study the whole decision in the Teacher's Union case and analyse it so as to see whether the same was properly applied by the Court in Civil Application No. 55 of 2020. She contended that in the circumstances, the criteria set by rule 66 (1) (a)

and (c) of the Rules, were not met, and moved the Court to dismiss this application with costs.

The issues for determination in this application are two; **first**, whether this application meets the criteria for an application for review under the law, and; **second**, if it does, whether, the points raised in the ground of application have merit. As it can be noted, we will only be able to get to the second issue, if we will resolve the first in the affirmative.

In disposing of this matter, the fit decisions to guide us are quite numerous, but one of such authorities is **Angella Amundo v. The Secretary General of the East African Community**, Civil Application No. 4 of 2015 (unreported), where we stated: -

*"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: **Kamlesh Varma v. Mayawati & Others**, Review Application No. 453 of 2012."*

Other decisions on the same point are **Majid Goa Vedastus v. R**, Criminal Application No. 11 of 2014, **Shamim Shaha v. Ibrahim**

Haji Selemani and Two Others, Civil Application No. 163/17 of 2019 and; **Mirumbe Elias Mwita v. R**, Criminal Application No. 4 of 2015 (all unreported). In the latter case we set several qualifications for an applicant to move the Court under rule 66 (1). We observed: -

"... in review jurisdiction, mere disagreement with the view of the judgment cannot be the ground for invoking the same..., 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..., the term 'mistake or error on the face of the record by its very connotation signifies an error which is evident per se from the record of the case and it does not require detailed examination, scrutiny and clarification either of the facts or the legal exposition..."

We have carefully studied the grievances raised in this application, and our understanding of the first and second points is that the applicants are arguing that, because the Court of Appeal is not mentioned as an appellate court for orders made under Order XLII rule 7 (1) (c) of the CPC, then it was wrong for the Court to assume that it was one of the appellate courts, in case one was to appeal from an order arising from that provision.

We have considered the complaint very carefully, and we are not clear on what is it that the applicants might be up to in expressing the grievance. Not only that we do not see any error on the face of the record, but also the applicant does not suggest the appellate fora for parties aggrieved by an order of the High Court exercising powers under that provision of the CPC. In any event, it is clear that what the applicants are aggrieved with, is the holding that an appeal tracing origin from that provision is appealable without necessarily seeking leave, which had an effect of defeating their prayers in Civil Application No. 55 of 2020.

We need to stress one point as to the jurisdiction of this Court. Certainly there are several sources, but the basic statutes providing for the appellate Jurisdiction of this Court, are; **first**, the Constitution of the United Republic of Tanzania, 1977 (the Constitution) and; the **second**, is the AJA. Article 117 (3) of the Constitution provides that: -

*"The functions of the Court of Appeal shall be to hear and determine every appeal brought before it arising from the judgment or other decision **of the High Court or of a magistrate with extended jurisdiction.**"*

[Emphasis added]

In complementing the above provision of the Constitution, the AJA provides in section 4 (1) as follows: -

*"The Court of Appeal shall have jurisdiction to hear and determine **appeals from the High Court and from subordinate courts with extended jurisdiction.**"*

[Emphasis added]

That is why one is lost, when Mr. Mushi whines about the missing written expression that the orders of the High Court in the law under consideration, had to necessarily mention the name of the Court to which an appeal should be presented. We wish to state that a careful scrutiny of the first and second sub grounds of review numbered (i) and (ii); **first**, are mere disagreements with the manner that the High Court disposed of Civil Application No. 55 of 2020; **second**, the points do not seek to correct a mistake but to substitute the Court's view in line with the applicants' advocate's reasoning, and; **third**, the points raised in those sub grounds, are not errors *per se* on the face of the record, for the proper grasp of their substance requires a detailed examination, scrutiny and interpretation of Order XLII rule 7 (1) (c) of the CPC, and what does that law entails.

That said, we hold that the first and the second sub grounds of review to be grievances, which are fit for determination by this Court in an appeal, which remedy is not available before us for want of jurisdiction. We accordingly disregard determination of the said points on merit.

The third sub ground of review numbered (iii) complains against the decision of this Court for relying on a distinguishable authority, the Teacher's Union case. We have carefully studied this point and we are of a settled position that determination of it, is only possible if, the judgment in the Teacher's Union case is strictly examined and analysed as to what and how it was decided and compare the *ratio decidendi* in it with the Court's reasoning in Civil Application No. 55 of 2020 in order to find out whether, it was a right approach for this Court to have relied on that authority. That, in a review application, this Court can never do, because in review the Court, does not have jurisdiction to interrogate or criticize the reasoning behind the decision sought to be reviewed. This, like the first two, is a disguised ground of appeal which we do not have jurisdiction to entertain, as it does not at all point to an error on the face of the record as envisaged under rule 66 (1) of the Rules.

Finally, we find it ideal to make one general comment. It is significant that litigants and their legal counsel keep in mind at all times that under the Constitution, the Court of Appeal of Tanzania is the highest appellate body in the court structure in this jurisdiction, with none above it. There is no subject that can challenge its decision on appeal, covertly or overtly, because it is sound public policy that litigation must come to an end, and does so fairly, expeditiously and as much as possible, affordably. Review, though a remedy under the law, the relief is extremely limited in scope and it is restricted as to range and coverage of the matters to include in it. The power to consider granting the relief, is likewise rarely invoked, and cautiously exercised. It can only be granted if the application meets any of the criteria set out at rule 66 (1) of the Rules. All these efforts to trim down the chances and possibilities of going beyond the Court, is to try as much as it can possibly be, to balance the need to get rid of any possible error of law on the face of the record which might have escaped the Court during an appeal or other grounds under rule 66 (1) of the Rules, on one hand, against a social need, to achieve the above public policy of bringing litigation to finality, on the other.

In the upshot of the matter, and based on the above reasons, this application is hereby struck out with costs.

DATED at **DAR ES SALAAM**, this 5th day of September, 2023.

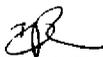
J. C. M. MWAMBEGELE
JUSTICE OF APPEAL

Z. N. GALEBA
JUSTICE OF APPEAL

A. M. MWAMPASHI
JUSTICE OF APPEAL

Ruling delivered this 6th day of September, 2023 in the presence of Ms. Agnes Dominick, Counsel for the Applicants and Mr. Derick Kagigi, counsel for the 1st and 2nd Respondents, Mr. Derick Kigigi holding brief for Ms. Ritha Chioma, learned counsel for the 3rd Respondent is hereby certified as a true copy of the original.




D. R. LYIMO
DEPUTY REGISTRAR
COURT OF APPEAL