IN THE COURT OF APPEAL OF TANZANIA

AT TABORA

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

CIVIL APPLICATION NO. 573/11 OF 2022

HAJIBHAI KARA IBRAHIM ..... APPLICANT

VERSUS

MRS ZUBEDA AHMED LAKHA ..... 1ST RESPONDENT

THE MINISTER OF LANDS, NATURAL RESOURCES AND TOURISM (now MINISTER OF LANDS, HOUSING AND HUMAN SETTLEMENTS DEVELOPMENT) ..... 2ND RESPONDENT

THE ATTORNEY GENERAL ..... 3RD RESPONDENT

[Application for Review of the Judgment and Order of the Court of Appeal of Tanzania]

(Mwarija, Mwandambo and Mashaka, JJA)

dated the 25th day of May, 2022

in

Civil Appeal No. 238 of 2018

.....

RULING OF THE COURT

18th & 25th September, 2023

KITUSI, J.A.:

This is an application for review of our decision (Mwarija, Mwandambo and Mashaka, JJA) in Civil Appeal No. 238 of 2018 handed down on 25th May, 2022. The proceedings arise from a land dispute whose brief background is as follows:

Prior to 24/5/1985, the first respondent was the registered owner of a piece of land described as Plot No. 153, Block "A" Lumumba Road within Kigoma Municipality under a Certificate of Title No. 6793. However, 24/5/1985 is a turning point because the President of the United Republic of Tanzania revoked that right of occupancy through the Ministry responsible for land, the second respondent. Subsequent to the revocation, the piece of land was sub-divided into three Plots No. 153/1, 153/2 and 153/3 which were reallocated to three people including the applicant. All these were, and remain, undisputed.

The first respondent would not let go, so she sued at the High Court demanding a declaration that the revocation was illegal and that the subsequent subdivisions and reallocation of the three pieces of land was invalid. She impleaded the applicant her own brother whom she had invited to the house and made him the caretaker of the house when she went to the United Kingdom to care for her sick husband. She alleged that in conspiracy with officers of the second respondent, the applicant initiated what caused the revocation without giving the first respondent the requisite notice.

The first respondent was unsuccessful at the High Court which held the revocation, subdivisions and reallocation, valid. However, this victory

was short lived. On 25/5/2020 the Court allowed the first respondent's appeal which she had preferred to challenge the decision of the High Court. The Court held the revocation null and void for having proceeded without prior notice, rendering the sub-divisions as well as the reallocation invalid. It declared the first respondent the rightful owner of the house on Plot No. 153 Block "A" Lumumba Road in Kigoma Municipality.

This application for review is premised on the following grounds according to the notice of motion, the relevant part of which we reproduce.

> "1 *The decision in Civil Appeal No. 238 of 2018 was based on a manifest error on the face of the record resulting in miscarriage of justice for nullifying the order of the President of the United Republic of Tanzania revoking the right of occupancy in respect of Plot No. 153 Block "A" Lumumba Road, Kigoma Municipality comprised in Certificate of Title No. 6793 (hereinafter referred to as the suit property) without regard to the fact that the revocation of the right of occupancy was followed by subdivision and reallocation of the suit property to other people including the applicant who have developed the suit property and have been in possession for many years since 1985.*

2. *The decision in Civil Appeal No. 238 of 2018 was based on a manifest error on the face of record resulting in miscarriage of justice for holding against persons who were not parties to the proceedings at the trial court and the Court of Appeal of Tanzania"*

It is better we state the obvious right from the beginning, that rule 66 of the Rules is so restrictive in that it allows review only in limited stipulated scenarios and we know that it is the applicant who chooses the scenarios for consideration by the Court. In the instant application the applicant wants us to consider rule 66 (1) (a) of the Tanzania Court of Appeal Rules, 2009 (the Rules) and find that there was an error in the Judgment of the Court which is apparent on the face of the record.

We propose to do what we have repeatedly been doing in cases of review. We will set out the governing principles as per case laws and later apply those principles to the set of facts relevant to this case. The first one is in respect of what it means by an error apparent on the face of the record? It is an error so easy to identify that it should be one that can be seen by one who runs and reads. **Chandrakant Joshubhai Patel v. Republic** [2004] T.L.R 218 cited in **Dr. Muzzammil Mussa Kalokola v. The Minister of Justice and Constitutional Affairs & Another,** Civil Application No. 256/01 of 2019 (unreported).

The second principle is that there can never be a flawless judgment. [**Chandrakant Joshubhai Patel** (supra) cited in **Blueline Enterprises Limited v. East African Development Bank** Civil Application No. 21 of 2012]. It is important to emphasise the point that while every error may be taken up on appeal, not every error may constitute a ground for review, because if that were allowed there would be many disguised appeals in applications for review. [**Golden Globe International Services Ltd and Another v. Millicom Tanzania Nv and 4 Others**, Civil Application No. 441/01 of 2018 (unreported).]

The third principle is that there must be an end to litigation. For this we wish to reproduce the following paragraph from **Patrick Sanga v. Republic,** Criminal Appeal No. 8 of 2011 (unreported):

> *"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 re- assess 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 limit 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 in the land is final and its review*

should be an exception. That is what sound public policy demands"

Now back to the substance of the application before us. As indicated earlier, it raises two grounds and we have considered it easier for us to deal first with the second ground alleging denial of the right to be heard.

Messrs Victor Kikwasi and Shepo Magirari, learned advocates, appeared for the applicant and argued in support of the contention that our decision in Civil Appeal No. 238 of 2018 should be reviewed on the ground that it proceeded from proceedings to which some interested persons were not parties. The learned counsel argued that two of the allocatees of the pieces of land following the sub-divisions were condemned unheard because they were not parties to the proceedings at the High Court and subsequently at the Court.

The learned counsel cited the cases of **Fakhria Shamji v. The Registered Trustees of the Khoja Shia Ithnasheri (MZA) Jamaat,** Civil Appeal No. 143 of 2019 and **Mussa Chande Jape v. Moza Mohammed Salim,** Civil Appeal No.141 of 2018 (both unreported), on the right to be heard. They impressed on us that we should take cue and remit the case to the trial court for it to hear those who ought to have been heard.

Mr. Mugaya Kaitila Mtaki learned advocate for the first respondent submitted that since the applicant was heard, he has no justification for arguing this ground. He submitted further that those persons who were allegedly denied a hearing were not impleaded nor did the applicant make attempts to have them joined.

The second and third respondents appeared through Ms. Mariam Matovolwa and Agnes Makubha, learned State Attorneys. They fully associated themselves with the submissions of Mr. Mtaki on the second ground of review.

In our view this ground of review is as surprising as it is novel. Although it was not raised in the notice of motion which cited rule 66(1) (a) only, and that none citation is innocuous as it is cured by rule 48(1) of the Rules, it is surprising that the complaint is being raised not by the ones who were allegedly denied a hearing, but by the one who was heard.

In our firm view, rule 66 (1) (b) of the Rules which relates to denial of a right to be heard as a ground of review did not envisage a compliant being asserted by a person other than the alleged victim of that denial. Conversely, we think the applicant is playing a game of wits calculated at testing the Court's legal ingenuity. It must also be noted that the cases of **Fakhria Shamji** and **Mussa Chande Jape** (supra), were decided by

the Court sitting on appeal, and the denial of the right to be heard was by the High Court. That situation is not the same as where the allegation of violation of the right to be heard is being raised by a person who was heard but has, unsolicited, taken it upon himself to be a representative of others. That cannot be allowed where, as in this case, it has not been established that the litigation is for public interest. After all, is it not a settled principle that the law tends to assist those who are vigilant? See, **Nyanza Road Works Limited v. Giovanni Goidon** Civil Appeal No. 75 of 2020 (unreported). We have in mind what the Court observed in that case, that: -

> *"In this regard, we think it may not be completely out of place to refer to yet another old maxim;* ***Vigilantibus, non dormientibus jura subveniunt*** *which literally means that the law assists the vigilant and not those who sleep"*

For those reasons we find no merit in the complaint raised in ground two, and we proceed to dismiss it.

We turn to ground one which alleges existence of an error manifest on the face of the record. Mr. Kikwasi submitted that in making its decision, the Court did not bear in mind that the three Plots that were created in the course of the subdivision, were allocated to people who

subsequently developed them and have been in their occupation of the premises since 1985. He suggested that the justice of the case needed the court to have maintained the status quo regarding ownership and perhaps consider ordering compensation in favour of the first respondent.

Mr. Mtaki responded by submitting that to appreciate what the applicant has raised and argued, it needs a long-drawn process of argument which is against the settled principles governing review. He cited the cases of **Omar Mussa @ Selemani @ Akwishi & 2 Others, v. Republic**, Consolidated Criminal Applications No. 117, 118 & 119?07 of 2018 and; **Yazidi Kassim t/a Yazidi Auto Electric Repairs v. Attorney General**, Civil Application No. 354 of 2019 (both unreported), to support that argument. In addition, the learned counsel submitted that the issue of compensation was not pursued and placed before the Court on appeal for it to determine it one way or the other. He argued that this issue of compensation is an afterthought, which should not be allowed to affect the Court's decision.

Like in the second ground of review discussed above, the learned State Attorneys representing the second and third respondents aligned themselves with the submissions of the first respondent's counsel in opposing the application based on the first ground. Ms. Matovolwa

submitted, in addition, that it is no justification for a review that one would have held a different opinion on the matter. She cited **Dr. Muzzammil Mussa Kalokola** (supra) in support.

With respect, we agree with Mr. Mtaki and Ms. Matovolwa that what is being submitted by the applicant's counsel as being an error is not patent on the face of the record as required by the settled principles governing review instead it requires a long-drawn argument to see the point. As rightly submitted by Ms. Matovolwa in opposition to this application, a difference of opinion in a matter does not justify a review. Neither is the fact that a party is aggrieved. We must reiterate what we stated in; **Shadrack Balingo v. Fikiri Mohamed @ Hamza & 2 Others,** Civil Application No. 25/8 of 2019, cited to us by Mr. Mtaki, in which the following paragraph from **Efficient International Freight Ltd & Another v. Office DU The DU Burundi,** Civil Application No. 23 of 2005 (both unreported) was reproduced:

> *"...a review is not a stage or step in the appeal process or structure. We say so because, yet again, of late it is apparent that some parties appear to think once aggrieved by the outcome of an appeal there is always an automatic right of review. As already alluded to, a review is only available in the circumstances shown above. A*

review is not available as an automatic remedy to an aggrieved appellant".

We hold the same view in the instant application and find no merit in ground one because, at most, it only demonstrates that the applicant was aggrieved by the decision of the Court not ordering compensation as an alternative to ownership of the disputed property. We dismiss this ground as well.

Mr. Magirari sought to sneak in a completely new complaint regarding citizenship of the first respondent and the inappropriateness of her being a holder of land under the new land law and policy. He suggested that the decision of the Court is therefore a nullity and that in terms of rule 66 (1) (c) of the Rules, we should not let that decision to stand. We do not think the learned counsel was serious on this except just for testing the limits to which this Court's imaginations can be stretched. Even without referring to the substance of the arguments made by Mr. Magirari, we agree with Mr. Mtaki that this point was not put before the trial court nor on first appeal, so it cannot be determined at this stage. If in exercising the power of review we decline invitations to act as an appeal court, it is hard to figure out how we can be equated to a trial

court and determine this point for the first time. We think the point is misconceived and deserves to be dismissed.

Consequently, and for the reasons shown, this application has no merit and it is hereby dismissed with costs.

DATED at **TABORA** this 22nd day of September, 2023.

S. A. LILA
JUSTICE OF APPEAL

I. P. KITUSI
JUSTICE OF APPEAL

A. Z. MGEYEKWA
JUSTICE OF APPEAL

Ruling delivered this 25th day of September, 2023 in the presence of Mr. Respicius Didace, holding brief for Mr. Victor Kikwasi, learned Counsel for the Applicant, Mr. Mugaya Kaitila Mtaki, learned Counsel for the 1st Respondent and Ms. Mariam A. Matovolwa, learned State Attorney for the 2nd and 3rd respondents, is hereby certified as a true copy of the original.

G. H. HERBERT
DEPUTY REGISTRAR
COURT OF APPEAL