IN THE COURT OF APPEAL OF TANZANIA

AT ARUSHA

(CORAM: MUGASHA, J.A., FIKIRINI, J.A. And MASHAKA, J.A.)

CIVIL APPLICATION NO. 380/02 OF 2023

SPLENDORS (T) LIMITED.....APPLICANT

VERSUS

DAVID RAYMOND D'SOUZA
(Under Irrevocable Special Power of Attorney of
Mary Mushi and Jerry John as Administrators of
Christina S. Mugamba - Deceased).....1st RESPONDENT

JANE PHILOMENA BABSA..... 2nd RESPONDENT

(Application for Review of the Judgment of the Court of Appeal of Tanzania, at Arusha)

(Ndika, Levira, Makungu, JJ. A.)

dated the 17th day of February, 2023

in

Civil Appeal No. 7 of 2020

.....

RULING OF THE COURT

1st & 8th November, 2023.

FIKIRINI, J.A.:

Through a notice of motion predicated under rule 66 (1) (a) of Tanzania Court of Appeal Rules, 2009 (the Rules), the applicant moved the Court to review its decision in Land Appeal No. 7 of 2020, delivered on 17th February, 2023. An affidavit deponed by Mr. Meinrad Menino D'Souza, Director of the applicant's company, supported the application.

The first respondent did not lodge any affidavit to contest the application, whereas Mr. Salim Mushi, learned advocate representing the second respondent, filed an affidavit in reply resisting the application. On behalf of the applicant and the second respondent, written submissions were filed in compliance with rules 106 (1) and (7) of the Rules. None was filed by or on behalf of the first respondent. However, at the application hearing on 1st November, 2023, Mr. D'Souza abandoned his.

During the hearing, we invited parties to address us first, on the competence and later on the merits of the application. Responding to our question on the competence of the application, Mr. D'Souza outright declared that the application was competent since the Court is vested with inherent jurisdiction to review its own decision and should not be tied to the administrative requirement and whether the Court had the record related to the matter or not. In support of his contention, he cited the case of **Felix Bwogi t/a Eximpo Promotion & Services v. Register of Buildings**, Civil Application No. 26 of 1989 (unreported). In that case, the Court had to grumble with the issue of a document marked as exhibit "D" but not part of the record, yet it was relied on by the Court in arriving at its decision. In its decision, the Court considered that to be

improper and consequently rejected the document and substituted the finding by declaring that the respondent wrongfully terminated the applicant's tenancy in June, 1980.

Besides **Felix Bwogi's** case (supra), the learned advocate cited to us the case of **Edger Kahwili v. Ameir Mbarak & Another**, Civil Application No. 21/13/2017 (unreported), in which we sanctioned that the Court has powers to review its decision by examining and correcting an erroneous decision, which includes failure by the Court to deal with an issue. In that regard, after it has reviewed its decision, the Court can replace it, as was done in **Felix Bwogi's** case, where the Court substituted an offending part which ultimately altered the decision in favour of the applicant.

Based on the decision, the learned advocate bolstered his position that this Court has inherent power to review its own decision.

Coming to the current application, it was his submission that there was manifest error on the face of the record resulting in miscarriage of justice, which he implored us to look at. His ground had two limbs: on the first limb, the learned advocate invited us to reassess the evidence on the rights of the *bonafide* purchaser for value against that of the title holder

or the parties' primary rights over secondary rights. His second limb was on reliance by the Court of a document not admitted in evidence.

His contention, on the first limb, was that the appellant was a *bonafide* purchaser, contrary to the second respondent's claim that she had a certificate of title over the disputed land. According to the learned advocate, a fair trial entails reasons for the decision, which was lacking in the present Court's decision. Instead of sufficiently dealing with primary issues, particularly the appellant's rights as a *bonafide* purchaser, the Court was fixated on the secondary issue over the certificate of title. In so doing, the Court ignored that before the trial court the appellant prayed to be declared a *bonafide* purchaser. Fortifying his contention, he cited the cases of **Suzana S. Waryoba v. Shija Dawala**, Civil Appeal No. 44 of 2017 and **Tom Morio v. Athumani & 2 Others**, Civil Appeal No. 179 of 2019 (both unreported), in which issue of a *bonafide* purchaser for value was elaborately discussed.

On the second limb, the issue was the Court's reliance on a document not part of the record. It was his submission, even though a certificate of title was not part of the record, yet the Court relied on it. This was contrary to the position stated in the cases of **Jica v. Khaki**

Complex Limited [2006] T. L. R. 343 and **Chantal Tito Mziray & Another v. Ritha John Makalaand & Another**, Civil Appeal No. 59 of 2018 (unreported), in which the Court emphasized that the document which was not admitted in evidence cannot form part of the record even though found included on record.

Mr. D'Souza wound up his submission convincing the Court that the application for review before it was competent and beseeched us to grant it.

On the second respondent's part, Mr. Mushi unreservedly retorted that the application was incompetent as one side, it did not meet the threshold under rule 66 (1) (a) of the Rules and the other was meritless. He declared so, contending that the issue of the *bonafide* purchaser was new since, at the trial court the Judge was invited to determine who was the lawful owner of the suit land and not otherwise. Similarly, on appeal, there was no issue for the Court's determination on *bonafide* purchaser for value rights. Thus, it was impossible for the Court to proceed to evaluate and assess the point not raised.

He further contended that the issue was raised in the written submissions filed, but the reality was no offensive parts were highlighted

from the decision complained about. On the contrary, the Court in its findings, concluded that the trial court decision on who was the lawful owner was not based on the certificate of title as portrayed by the applicant, but on the evidence availed to trial court. The learned advocate referred us to the case of **Kitinda Kimaro v. Anthony Ngoo & Another**, Civil Application No. 79 of 2015 (unreported), in which what constitutes a manifest error on the face of record was illustrated, particularly on page 10 of the judgment, the Court listed those issues which do not fall within the ambit of a manifest error on the face of the record resulting in miscarriage of justice. The list is not exhaustive, but amongst them erroneous decisions, mere errors or wrong views should not be a reason for a review.

Similarly, in the case of **Acer Petroleum (T) Limited v BP (Tanzania) Limited,** Civil Application No. 60/17 of 2020 (unreported), the Court found the invitation to determine who has a right between a *bonafide* purchaser and holder of a certificate of title was superfluous. Mr. Mushi was wondering whether the exercise the Court was invited to be part of would entail bringing fresh evidence or relying on what was already on record. If the expectation is to rely on the evidence previously

availed to the trial court, then this would be reassessment and reevaluation of evidence, which is not what review is all about. The learned advocate referred us to pages 20 - 22 of the Court's decision, contending that nothing was left behind warranting a review. He thus implored us to decline the application for being incompetent and lacking in merit.

Briefly rejoining, Mr. D'Souza reiterated his earlier position that the application was competently before the Court, as it had powers to review its own decision. And in the present application, the burning issue calling for review is that the Court did not address the issue of *bonafide* purchaser for value, which was a primary and jumped to determine if Christina Mugamba had a title to pass over. In that regard, he found it pertinent, and because this was not an administrative matter, the Court should be able to have the record of appeal before it so that it can exercise its powers and extensive jurisdiction conferred on it. He further contended that, given that there is no hard and fixed rule of what can be reviewed, he urged the Court to review its decision.

We are invited to determine the merits of the application before us, but before we do that, we wish to point out outright that we agree with

Mr. D'Souza that this Court is vested with powers to review its decisions. As clarified in **Edgar Kahwili's** case (supra) cited by Mr. D'Souza, one of the criteria, amongst others listed, is where the judgment did not effectively deal with or determine an important issue. That can cause the Court to review its decision and substitute the findings. The case of **Felix Bwogi** (supra), cited to us by Mr. D'Souza, is also relevant, but we shall come back to it later in our ruling.

While we endorse that the Court can review its own decision, based on the powers provided under section 4 (4) of the Appellate Jurisdiction Act, Cap 141, R. E. 2019 (the AJA), it should, however, be noted that those powers are not without a framework or structure within which they can be exercised. The parameters within which those powers can be exercised have been stipulated under rule 66 (1) (a) to (e) of the Rules. Through case laws, we have prominently illustrated in which circumstances an application for review can be entertained. For instance, in **Chandrankat Joshubhai Patel v. R,** [2004] T. L. R. 218 at 225, which was referred to in **Edgar Kahwili's** case (supra), the Court expressed that:-

"An error 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****:* State of Gujarat v. Consumer Education and Research Centre (1981) AIR GU, 223]…***Where the judgment did not effectively deal with or determine an important issue in the case, it can be reviewed on the ground of error apparent on the face of the record*** [Basselios v. Athanasius (1995) 1 SCR 520]…*But it is no ground for review that the judgment proceeds on an incorrect exposition of the law* [Chhajju Ram v. Neki (1922) 3 Lah. 127]. *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 Utsaba v. Kandhuni (1973) AIR Ori.94. It must further be an error apparent on the face of the record. The line of demarcation between an error simpliciter, and an error on the face of the record may sometimes be thin.* ***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*** [Thungabhadra Industries Ltd v. State of Andhra Pradesh (1964) SC 1372]." [Emphasis added]

See also: **Marcky Mhango & 684 Others v. Tanzania Shoe Company Limited & Another**, Civil Application No. 90 of 1999, **Karim Kiara v. R**, Criminal Application No. 4 of 2007, **Tanganyika Land Agency Limited & 7 Others v. Manohar Lal Aggrawal**, Civil Application No. 17 of 2008, **Patrick Sanga v. R,** Criminal Appeal No. 80 of 2011, **Abdon Rwegasira v. The Judge Advocate General**, Criminal Appeal No. 5 of 2011, **Ghati Mwita v. R,** Criminal Application No. 3 of 2013 and **Omary Makunja v. R,** Criminal Application No. 22 of 2014 (all unreported).

Guided by the principles established in **Chandrakant Joshubhai Patel** (supra), and followed in our numerous decisions that came later, we shall now look at the merits of the application before us.

After going through the rival submissions by the counsel for the parties, we explicitly find the present application is without merit. We shall explain. *First and foremost*, what is before us is Civil Application No.

380/02 of 2023 and not an appeal, which would have given us access to the record of appeal. Despite Mr. D'Souza's nudge that with the powers of review bestowed upon us, we can easily access the record of appeal to reassess the evidence, review and then substitute our previous decision. Whilst we acknowledge that this is the highest Court in the land, we still find the suggestion impracticable. This is because there are parameters set for each category, be it an appeal or application, to be determined by the Court. For review, the Court, besides the notice of motion and affidavit in support of the application, the Court is only seized with a copy of the Court's decision subject to review and nothing else.

Secondly, the applicant's complaint is the Court, instead of concentrating on the primary issue, which was the rights of the *bonafide* purchaser for value, which was vital and primary, focused on the secondary issue, which was the right of the certificate of title holder. We could not find the basis for such a complaint in our scrutiny. As submitted by Mr. Mushi, the position we concur with, the issue of the *bonafide* purchaser was not pleaded nor was the trial court invited to determine it. Before the trial court, the issue for determination was who was the lawful owner of the suit land. The Court could, therefore, not determine the

rights of the *bonafide* purchaser for value, the issue which was not before it and essentially, it was new.

Further to the above and backed by the decision in **Acer Petroleum (T) Limited** (supra), in which the Court emphatically stressed that the solicitation that the Court should decide which, between the certificate of occupancy and the letters, superseded the other, was considered to be challenging the merits of the decision, and outside the application for review purview. We, equally, find the invitation by the applicant that we should have determined the rights of the *bonafide* purchaser for value against those of the certificate of title holder misplaced.

The case of **Felix Bwogi** (supra) referred to us by Mr. D'Souza, while relevant in confirming that the Court can revisit its own decision, but the scenario in that case, which called for rectification, was different from those in the current application. In **Felix Bwogi**, an exhibit was admitted and marked "D", while the same did not form part of the record. And heavily relying on exhibit "D," the Court made a finding in favour of the respondent. In his application that the Court had termed unusual, the applicant called upon the Court to rectify the error. Needless to say, after

hearing the parties, the Court substituted the findings by declaring the previous decision vitiated, particularly on the part where the exhibit was relied on, resulting in the offending parts of the decision complained about.

This is different from the situation in the present application, for two reasons: one, the certificate of title complained about, was never admitted in evidence, as it was for exhibit "D" even though it did not form part of the record. Two, the trial court did not solely rely on the said certificate of title to reach its decision, which is the different scenario with what occurred in **Felix Bwogis** case, whereby the Court relied on exhibit "D" to arrive at its decision. That is the reason the Court, in the scrutiny of the impugned decision, was of the view that the certificate of title did not factor in determining ownership of the suit land. At this juncture, we think reproducing part of the Court decision shall speak clearly, marking the difference between the two cases. The Court at page 10 stated that:-

> *"We have thoroughly gone through the entire impugned decision* ***but we are not convinced it was based on the certificate of title as alleged by the appellant****. This we say because even the referred part of that decision is preceded*

by a phrase which defeats the appellant's argument. The learned trial Judge indicated clearly that ***she considered the evidence in its totality to arrive at a conclusion that the second respondent who appeared as the second defendant is the owner of the dispute land contrary to what the appellant and the first respondent would wish us to hold."*** [Emphasis added]

From the excerpts, it is obvious that nothing falls within the scope of review. In the case of **Kitinda Kimaro** (supra) faced with almost the same problem, the Court, in expounding the grounds that should not be listed as falling within the sphere of manifest error on the face of the record, underscored that:-

"*(a) If the error is not self evident and has to be detected by the process of reasoning;*

(b) If there are two possible views regarding the interpretation or application of the law;

(c) Any ground of appeal;

(d) Any erroneous decision;

(e) A mere error or wrong view; and

(f) A different view on a question of law or an erroneous view

on a debatable point or a wrong exposition or wrong application of the law."

Applying the above principle to the present application, we find the complaint brought does not exhibit any manifest error on the face of the record in line with what was illustrated keenly in the **Chandrakant Joshubhai Patel** (supra) and other referred cases.

The first limb of the application that the Court failed to effectively reassess the rights of the *bonafide* purchaser for value over those of the certificate of title holder is a fallacy. This limb fails.

Thirdly, the complaint that a certificate of title which was not part of the record was relied on by the Court in arriving at its decision is unsupported. From what we gathered on pages 10 -11 of the decision. It is evident that after scrutiny, the Court satisfied itself that the trial court relied on the evidence on record, which established and proved the second respondent's ownership of the suit land, hence correctly arrived at its decision. Since there was no proof that the trial court relied on the

certificate of title in reaching at its decision, we find the decisions in **Jica** and **Mziray's** cases (supra) that the document not part of the record should not be relied on, though valid but had no relevancy in the present application.

The contention by Mr. D'Souza that the Court did not effectively deal with the issue of proper rejection of evidence is, in our view misleading, because the Court thoroughly discussed the rejection of the certificate of title in question and came to a conclusion as reflected in its decision, that it was not convinced that the trial court based its decision on the certificate of title as alleged by the appellant, instead it was based on consideration of the evidence in totality.

While it is a desire to have a perfect judgment, the truth of the matter is there is no like judgment. In the case of **Selemani Nassoro Mpeli v. R,** Criminal Appeal No. 68 of 2020 (unreported), the Court referred to a holding of the Supreme Court of India in **Thungadhadra Industries Ltd v. State of Andra Pradesh** [(1964) SC1372], in which it was stated that no judgment could attain perfection or be beyond criticism. Likewise, in the Court's decision dated 17th February, 2023, there could be imperfections, but certainly, they did not warrant a ground

for review under the pretext that there was a manifest error on the face of the record.

On the foregoing discussions and reasoning, we find this application lacking in merit and proceed to dismiss it with costs.

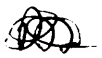
DATED at **ARUSHA** this 7th day of November, 2023.

S. E. A. MUGASHA
JUSTICE OF APPEAL

P. S. FIKIRINI
JUSTICE OF APPEAL

L. L. MASHAKA
JUSTICE OF APPEAL

This Ruling delivered this 8th day of November, 2023 in the presence of Mr. Issa Elijahi Hoseni, legal officer of the Applicant and Mr. Hamudu Mushi, learned counsel for the 2nd Respondent and in the absence of the 1st Respondent though duly notified, is hereby certified as a true copy of the original.



A. L. KALEGEYA
DEPUTY REGISTRAR
COURT OF APPEAL