IN THE COURT OF APPEAL OF TANZANIA

AT ARUSHA

(CORAM: MWAMBEGELE, J.A., KOROSSO, J.A. And KITUSI, J.A.)

CIVIL APPLICATION NO. 40/02 OF 2023

ATHUMANI AMIRI .... APPLICANT

VERSUS

HAMZA AMIRI ....1ST RESPONDENT

ADIA AMIRI .... 2ND RESPONDENT

(Application for review against the decision of the Court of Appeal of Tanzania sitting at Arusha)

(Mwambegele, Kerefu, and Kihwelo, JJ.A)

dated 06th day of December 2022

in

Civil Appeal No. 8 of 2020

....

RULING OF THE COURT

9th & 15th November, 2023

KOROSSO, J.A.:

Athumani Amiri, the applicant, has for the second time come before the Court following the dismissal of his appeal in Civil Appeal No. 8 of 2020, dated 6/12/2022. The present application moving the Court to review its decision is by way of notice of motion supported by an affidavit affirmed by Athumani Amiri, the applicant. The applicant avows that the judgment of the Court is essentially engrained with manifest errors on the face of the record occasioning injustice; the court's

decision is a nullity for lack of jurisdiction; and that the judgment was procured illegally.

The respondents contested the application through an affidavit in reply deponed by Hamisi Amiri, the 1st respondent purporting to do so also on behalf of Adia Amiri.

At this juncture, we believe a brief background is essential for a better appreciation of the context giving rise to the application. The applicant sued the respondents in the High Court of Tanzania (Land Division) at Arusha in Land Case No. 28 of 2010, over a dispute related to a plot of land, registered as Plot No. 18 Block W Area F, situated at Levolosi Ward in Arusha Municipality with Certificate of Title No. 5295 L.O No. 104895 (the suit property). The applicant claimed that he is the co-owner of the suit property with 41.6% shares of it as against the lesser shares owned between the 1st and 2nd respondents respectively. He prayed for payment of Tshs. 124,800,000/= being the value of his shares in the suit property and in the alternative, prayed for the suit property to be sold and the proceeds thereof to be distributed to the co-owners and costs of the suit. In a joint written statement of defence (WSD), the respondents disputed the applicant's claims and raised a

counterclaim of them being the lawful co-owners of the suit property to the exclusion of the applicant, who was not entitled to any share therein. Additionally, the respondents prayed for perpetual or permanent injunction restraining the applicant and his agents or servants from interfering with the peaceful occupation and ownership of the suit property.

The judgment of the trial court, which was delivered on 21/12/2015 (Massengi, J. (as she then was) held that the applicant and the two respondents were co-owners of the suit property with equal shares. It decreed that each party was entitled to occupation and use of three rooms of the suit property. It further ordered that in the alternative, the respondents had the option to buy out the applicant by paying him an amount equal in value to his shares upon evaluation by a government valuer. Dissatisfied by the decision, the applicant preferred an appeal to the Court in Civil Appeal No. 8 of 2020, which ended in dismissal. The dismissal of his appeal prompted the applicant to file the present application to move the Court to review its decision in terms of section 4(4) of the Appellate Jurisdiction Act, Cap 141 R.E. 2019 (the AJA) and rule 66(1) (a), (c), (d) and (e) of the Tanzania Court

of Appeal Rules, 2009 (the Rules). The application is predicated on the grounds that:

1. The judgment contains a manifest error on its face resulting in miscarriage of justice, accepting the original owner transferred his ownership over the suit premises by executing P1 (transfer deed) and stating that P1 was not registered.
2. The Court held parties are owners in common in equal shares and divided three rooms to the applicant.
3. The Court lacks jurisdiction to receive fresh evidence from the advocate of the respondents on the non-registration of exhibit P1, change the contents and page number of the record of appeal and not go through the record of appeal and see that rent was pleaded under paragraph 6 of the plaint and the specific issue was framed.
4. That the judgment of the Court was procured illegally, the Court received new evidence on the non-registration of P1 and changed the contents and page number of the appeal record.
5. That there is a nullity in the judgment of the Court by impliedly forfeiting the applicant's shares over the suit premises.

At the hearing of the application on 9/11/2023, Ms. Fatuma Amiri, learned Advocate represented the applicant whereas both the respondents were represented by Mr. Ezra J. Mwaluko, learned Advocate. Both counsel, prayed to adopt the affidavits in support of and countering the application on 13/3/2023 and 25/4/2023 respectively, together with their respective written submissions.

Before the hearing of the application began in earnest, Ms. Amiri sought leave of the Court to add a new ground for review alleging that the impugned judgment subject of the instant application was procured through fraud, a prayer which upon further reflection she decided to abandon. We granted the prayer and marked it withdrawn. The learned counsel for the applicant then proceeded to raise a preliminary point of objection that essentially questioned the competence of the affidavit in reply. Upon hearing the counsel for the parties from both sides on the issue, we overruled it and reserved reasons for our decision.

Suffice it to say, the concern of the learned counsel for the applicant related to the competence of the affidavit in reply which is affirmed by Hamza Amiri, the 1st respondent, on his own and his sister, ADIA AMIRI, the 2nd respondent's behalf. Ms. Amiri queried whether in

the absence of any power of attorney or otherwise giving Hamza Amiri power to do so, the said averments by the deponent of the affidavit in reply, were justified. It was her contention that, the said affirmation was an incurable defect which rendered the affidavit in reply to be defective and thus incompetent, praying that we expunge it from the record of the application, leaving the respondents without an affidavit in reply to resist the application.

On his part, the learned counsel for the respondents, while conceding to the said averments, prayed the Court to find such infraction to be minor which does not go to the root or the essence of the said affidavit or in any way occasion injustice to the applicant. He implored the Court to overrule the objection for being misconceived and unmerited. In the alternative, he prayed that were the Court decides to sustain the objection, then in the interest of justice it should invoke the overriding principle and order to do away with the offending averments, however, leave the affidavit in reply to stand without the alleged offending averments.

Having perused the contents of the said affidavit in reply and considered the submissions by the counsel for the parties, evidently,

rule 56 (1) of the Rules, gives a person served with a notice of motion, the discretion to lodge one or more affidavits in reply to the applicant as soon as practicable. In the instant application, the respondents filed an affidavit contending to be for both of them, where the 1st respondent averred that, the affidavit is "... *on my own behalf and on behalf of my sister ADIA AMIRI*". In paragraph 2 of the said affidavit, he reiterated this avowal stating that his sister was taking care of her seriously sick husband hence him being the one stating the said facts on their behalf therein. To be noted is the fact that in the verification clause, the 1st respondent verified that what is averred in the paragraphs of the affidavit in reply is what he believes to be true to the best of his own knowledge.

Given the circumstances of this case, and invoking the principle of the overriding objective, we find the said infraction found in the said affidavit in reply did not go to the essence of the said affidavit nor did it in any way prejudice the rights of the applicant. That is why we overruled the objection.

Ms. Amiri then proceeded to amplify the grounds of the application. Regarding the first ground for review, Ms. Amiri contended

that the judgment of the Court in Civil Appeal No. 8 of 2022 of 6/12/2022 has a manifest error apparent on the face of the record resulting in miscarriage of justice and highlighted the following aspects. One, she challenged the finding of the Court on pages 2 and 3 stating that;

"... *the original owner of the suit property was the late Hamis Amiri who is the biological father of the parties. On 21st April 1981 the original owner transferred his ownership over the suit property to the appellant and respondents in the above-stated shares by executing a deed of transfer (exhibit P1)*".

Then, on page 14 it states; "*we find the submission by the appellant on this aspect misconceived because, as eloquently argued by Mr. Mwaluko, the said document was not registered with the Registrar of Titles and at any rate, it cannot be relied upon to prove ownership over the suit property against the certificate of title (exhibit P2).*"

For the learned counsel for the applicant, the manifest error can be discerned from what she called the Court's invalidation of exhibit P1 and legalization of exhibit P2, a product of exhibit P1. To reinforce her

argument, she referred us to the case of **Asia Rashid Mohamed v. Mgeni Seif**, Civil Appeal No. 128 of 2011.

According to Ms. Amiri, the second manifest error apparent on the face of the record relates to the finding of the Court on the issue of the shares owned by the contending parties found at page 2 of the Court's judgment. She was at issue with the fact that while the Court seems to acknowledge the contents of the transfer deed (exhibit P1) as it related to co-ownership of the suit property and the effected transfer from the party's late father (the original owner) to them on 21/4/1981 showing the apportionment of the suit property, that is, 41.6% for the applicant as against 41.6% shares and 16.8% shares by the respondents respectively, the Court then decided not to rely on exhibit P1 to prove ownership of the suit land, finding it unregistered, and relying on the certificate of Title (exhibit P2) to prove the title to the suit property. She argued that this was an anomaly since exhibit P2 was pegged on the contents of exhibit P1.

Ms. Amiri was further concerned about the Court's finding on page 15 of the judgment that the trial court properly applied the law in determining the suit, stating that exhibit P2 is conclusive proof of

ownership and shows the fact that the parties are co-owners of equal shares in the suit property as signed by all of them which was not the case.

The other issue of concern for Ms. Amiri which she identified as another manifest error, was the Court's upholding of the decision of the trial court to divide the three rooms of the suit property amongst the parties to the suit. With regard to exhibit P3 the judgment of the High Court (Sambo, J.) in Civil Appeal No. 14 of 2006, it was Ms. Amiri's further contention that it was wrong for the Court not to take judicial notice of the contents of exhibit P3, as required under sections 58 and 59 (1) of the Evidence Act, Cap 6. She argued that failure to do so is another manifest error on the record that occasioned miscarriage of justice on the part of the applicant.

Another manifest error patent on the face of the record as contended by the learned counsel for the applicant, is the Court's finding that the rent claimed was neither pleaded in the plaint nor shown in the reliefs sought by the applicant and that the applicant failed to produce any documentary evidence to prove his claims. The learned

counsel for the applicant argued that this was not the position since the issue of rent was pleaded in paragraph 6 of the plaint.

The seventh manifest error on the face of the record according to Ms. Amiri is the fact that in the impugned judgment of the Court, the 2nd respondent was also referred to as DW2, whilst she had never testified in the trial court. The eighth manifest error found in the record of appeal according to the learned counsel for the applicant is where the Court wrongly cited the page numbers of the record of appeal, instead of citing the plaint to be found on pages 4 to 6 of the record of appeal it cited it to be at pages 1 to 3 of the said record.

In response to the issues raised in the first and second grounds for review, Mr. Mwaluko contended that what has been expounded in the affidavit supporting the notice of motion, oral and written submissions by the learned counsel for the applicants referred to as grounds for review do not qualify to warrant a review and prayed that we dismiss the application for being unmeritorious. He argued that all the illustrated so-called manifest errors on the face of the record do not qualify to be regarded as such, since they all invited the Court to look beyond the impugned judgment. The learned counsel for the

respondent also urged the Court to find as distinguishable the decisions cited by the learned counsel for the applicant, alleging they were applied under different circumstances to the case at hand.

Having heard the submissions by the counsel for the parties, we intend to consider and determine the first and second grounds for review conjointly finding that they both address manifest errors on the face of the record resulting in miscarriage of justice. We shall address the alleged errors sequentially to determine whether or not they are worth the claim. Before venturing into the determination of the issues raised on this ground, plainly, the main issue for our determination is whether the applicant has managed to show a patent error on the face of the record resulting in a miscarriage of justice. In so doing, we find, it is pertinent to restate the position of the law on applications moving the Court to review its own decision.

It goes without saying, that the jurisdiction of the Court for review is bestowed by the provisions of section 4 (4) of the AJA introduced by the amendments ushered in by the Written Laws (Miscellaneous Amendments) Act, No. 3 of 2016. Previously, the review mandate arose from case law (see, **Felix Bwogi v. Registrar of Buildings**, Civil

Application No. 26 of 1989 (unreported)). It is augmented by Rule 66(1) which goes thus:-

> "*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;*
>
> *(b) a party was wrongly deprived of an opportunity to be heard;*
>
> *(c) the court's decision is a nullity; or*
>
> *(d) the court had no jurisdiction to entertain the case;*
>
> *(e) the judgment was procured illegally, or by fraud or perjury.*"

As is the practice, the Court's power for review is exercised parsimoniously and cautiously, occurring in the rarest situations that meet the benchmarks prescribed under rule 66 (1) of the Rules. The Court is confined to granting the order for review within the five grounds enumerated under rule 66 (1) as stated in the case of

Tanzania Transcontinental Co. Ltd. v. Design Partnership, Civil Application No. 62 of 1996 (unreported).

Furthermore, as observed in the case of **Rizali Rajabu v. Republic**, Criminal Application No. 443 of 2011 (unreported):

> *"First, we wish to point out that the purpose of review is to re-examine the judgment with a view to amending or correcting an error which had been inadvertently committed which if it is not reconsidered will result into a miscarriage of justice."*

(See also, **Chandrakant Joshubhai Patel v. Republic** [2004] T.L.R. 218 and **Peter Kidole v. Republic**, Criminal Application No. 3 of 2011 (unreported)).

Evidently, from the restated position from the decisions cited above, in exercising its powers of review, the Court can correct an identified inadvertent error or omission manifest on the face of the record, which resulted in the miscarriage of justice for the parties. As regards the scope of rule 66(1) of the Rules, the Court in **Twaha Michael Gujwile v. Kagera Farmers Cooperative Bank Ltd**, Civil Application No. 156/04 of 2020 (unreported) observed thus:

"... for an application for review to succeed the applicant must satisfy one of the conditions stipulated under rule 66 (1) of the Rules. It is only within the scope of the Rule that the applicant can seek the judgment of this Court to be reviewed"

Indeed, thus guided by the provision of the law stipulated hereinabove and now venturing into consideration of the incidents illustrated by the applicant's counsel as manifest errors patent on the face of the record resulting in miscarriage of justice, we, ahead of that, think it is apposite to be clear to what amounts to *"a manifest error on the face of the record'* envisaged under rule 66 (1) of the Rules.

The Court has on various occasions deliberated on this matter. In **Chandrakant Joshubhai Patel v. Republic** (supra) it was held:

"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...."

The gist of ground one of the review application as averred in paragraphs 3 (a), (b), (c), (d), (e), (f) and (g) of the supporting affidavit, seems to arise from the Court's deliberation and determination on the legality, admissibility and the value accorded to exhibits P1 and P2 (the transfer deed and title deed). Additionally, there was an issue with the Court's finding that the applicant is a co-owner of the suit property with the 1st and 2nd respondents with equal shares despite exhibit P1 stating otherwise. There was also a concern on the Court's ruling that the issue of rent was not pleaded which the appellant's counsel stated was not the case alleging that the Court had made reference to the plaint upon citing the wrong pages in the record of appeal. She contended that the Court had also wrongly referred to the 2nd respondent as DW2 whilst she did not testify in the trial court.

Taking account of the guiding law, we are of the view that, what we are called upon to do, that is in addressing the above concerns raised as manifest errors on the face of the record, will require us to peruse and revisit the record of proceedings from the trial to the appeal level, the pleadings and admitted exhibits such as exhibit P1, P2 and P3 which are not before us for scrutiny. Neither is the plaint or any other pleadings. In essence, to reanalyze the evidence and draw our own conclusions. As stated hereinabove, the scope of review is not open-ended, it is confined within the parameters of the provisions of rule 66 (1) of the Rules. As stated in **Charles Barnabas v. Republic**, Criminal Application No. 13 of 2009 (unreported), an error on the face of the record resulting in an impugned decision and an erroneous decision are not one and the same, since while the former may prompt a review, however, the latter does not, since, as an erroneous decision it is amenable to appeal and not a review.

On the concerns raised by the applicant as manifest errors on the face of the record resulting in miscarriage of justice, we find them to be similar to appeal grounds and rendering the application to be an appeal in disguise (see, **Tanganyika Land Agency Limited and 7**

Others v. Mahohar Lal Aggrwal, Civil Application No. 17 of 2008 (unreported). As stated above, the presented concerns call upon us to reassess the evidence. To be noted is the fact that there has to be an end to litigation in any properly functioning justice system as held in **Patrick Sanga v. Republic**, Criminal Application No. 8 of 2011 (unreported).

We are minded to follow our decision in **Karim Ramadhani v. Republic**, Criminal Application No. 25 of 2012 (unreported), where in deliberating on the need to comply with rule 66 (1) of the Rules, we observed as follows:-

> *"... It is not sufficient for the purposes of paragraph (a) of Rule 66 (1) of the Rules, for the applicant to merely allege that the final appellate decision of the Court was based on the 'manifest error on the face of the record' if his elaboration of these errors discloses grounds of appeal rather than manifest error on the face of the decision..."*

What is obvious is that in the instant application, the thrust of the applicant's contentions highlighted as manifest errors on the face of the record underscores his dissatisfaction with the findings of the Court and

not manifest errors on the face of the record as envisaged by the provisions of rule 66 (1) of the Rules. It goes without saying that judgments can contain errors, but it is not all the errors that can be acted upon under review. We wish to re-emphasize what the Court stated in the case of **Peter Ng'homango v. Gerson A. K. Mwanga**, Civil Application No. 33 of 2002 (unreported) that:-

> *"It is no gainsaying that no judgment; however elaborate it may be can satisfy each of the parties involved to the full extent. There may be errors or inadequacies here and there in the judgment. These errors would only justify a review of the Court's judgment if it is shown that the errors are obvious and patent."*

For the foregoing, as correctly stated by the learned counsel for the respondents, ground one fails.

With respect to ground number three, it contended that the Court lacks jurisdiction to receive fresh evidence as it received new evidence on appeal from the learned advocate of the respondents on the non-registration of exhibit P1 (transfer deed) and relied upon the new evidence in reaching its decision contrary to the law. The learned counsel for the applicant contended that this infraction can be discerned

from page 14 of the impugned judgment of the Court, where the Court made reference to the submission by Mr. Mwaluko, the learned counsel for the respondents on the fact that exhibit P1 was unregistered and thus cannot be relied upon to prove ownership over the suit property against exhibit P2. It was thus the applicant's argument that since the Court had no jurisdiction to consider fresh evidence and its role was just to re-evaluate the entire evidence and arrive at its own conclusion, this was erroneous and fatal. She also alleged that the Court had no jurisdiction to change the contents of page numbers of the record of appeal as it did by stating that the plaint was found on pages 1 to 3 of the record of appeal while it was on pages 4 to 6.

Another concern raised under the guise of lack of jurisdiction is that the Court changed the contents of the judgment of the trial court on the matter related to the apportionment of the suit property for the parties, who were found to be co-owners of the suit property by the trial court.

The respondent counsel in reply, argued that the submissions by the learned counsel for the applicant do not relate in any way to what

is envisaged as a lack of jurisdiction that may be prayed in a review application. He implored us to find the ground to be without substance.

It is pertinent to understand that the relevant provision addressing issues of lack of jurisdiction is rule 66 (1) (d) of the Rules, and it refers to where the Court lacked jurisdiction to hear and determine a matter before it. Jurisdiction is a creature of the law and founded on clear legal provisions. In the present application, as correctly argued by the learned counsel for the respondents, the applicants failed to front anything squarely falling under this ground that shows lack of jurisdiction on the part of the Court to hear and determine the appeal whose judgment is under scrutiny. Whether or not the Court considered and relied on new evidence, cited pages containing the plaint wrongly or allegedly changed the contents of the decision of a lower court are matters that essentially show a party's dissatisfaction with the deliberations and findings of the Court and not its jurisdiction. The said incidents also call upon us to go beyond the record of the application to verify what is alleged, which is not the purpose of review as stated hereinabove. Therefore, this ground is misconceived and it thus fails.

The fourth and fifth grounds for review address the nullity of the impugned judgment and that it was procured illegally. The learned counsel for the applicant contends that the Court nullified exhibit P2 which it relied upon in holding that the parties are owners in common in equal shares and then ordered the division of the three rooms in the suit property controverting the contents of exhibit P2. The other wing is that since the Court considered and relied on fresh evidence on non-registration of exhibit P1 procured illegally, and held that the issue of rent was not pleaded, the judgment was enshrined in illegality and procured illegally. She thus prayed the Court finds the grounds fronted for review to be fit grounds to lead the Court to allow the application with costs and then correct the errors in the judgment.

The respondent's counsel reiterated his earlier submissions castigating the incidents provided by the applicant to justify his application for review, stating that the applicant failed to show any illegality in the judgment or that it was procured illegally. Arguing that all the narrated incidents went to challenging the impugned decision of the Court and are thus grounds for appeal and not for review. He prayed that the application be dismissed being unmeritorious.

Upon considering the rival arguments on the issue, we have failed to find any illegality in the judgment or instances showing it was procured illegally. What we have gathered, is the applicant's complaint that the Court relied on evidence that is questionable, which in essence is a ground of appeal, since it will require re-evaluation of the evidence to gather whether the said alleged new evidence was actually new. As we observed in the case of **Attorney General v. Mwahezi Mohamed (as administrator of the estate of the late Dolly Maria Eustace) & 3 others**, Civil Application No. 314/12 of 2020 (unreported), a decision is a nullity if it is so defective on its face that it is not the type of decision that its maker would have wished it to be or it cannot be given effect.

From our examination of the notice of motion and the submissions, the applicant appears to be unsatisfied with the decision on its merits which falls outside the scope of our review jurisdiction. This is further amplified by the fact that in the judgment, the Court only refers to the submission by the learned counsel for the applicant having stated that exhibit P1 was unregistered, and there is nothing to show that this was new evidence. We are thus constrained to find so. With

regard to the other issues raised our findings in ground three are relevant and apply here also. These grounds fail, being unmerited.

In the final analysis, the applicant has not triumphed over the hurdle in satisfying us to exercise our power of review on any of the grounds set out in the notice of motion. The application is obviously wanting in merit and we dismiss it. This being a matter involving blood relatives, to maintain peace and amicability in the family, we shall make no order as to costs.

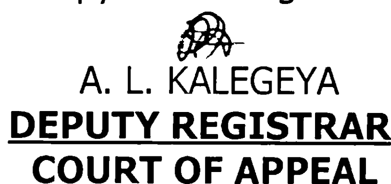
DATED at **ARUSHA** this 15th day of November, 2023.

J. C. M. MWAMBEGELE
JUSTICE OF APPEAL

W. B. KOROSSO
JUSTICE OF APPEAL

I. P. KITUSI
JUSTICE OF APPEAL

The Ruling delivered this 15th day of November, 2023 in the presence of the applicant in person, 1st respondent in person and in the absence of Ms. Fatuma Amiri, Mr. Ezra J. Mwaluko, both counsel for the applicant and respondents respectively and the 2nd respondent, is hereby certified as a true copy of the original.



A. L. KALEGEYA
DEPUTY REGISTRAR
COURT OF APPEAL