IN THE COURT OF APPEAL OF TANZANIA

AT DAR ES SALAAM

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

CIVIL APPLICATION NO. 604/01 OF 2021

JOWHARA CASTOR KIIZA ..... APPELLANT

VERSUS

YASIN HERSI WARSAME ..... RESPONDENT

(An application for review from the Judgment of the Court of Appeal of Tanzania at Dar es Salaam)

(Ndika, Galeba and Mwampashi JJA)

Dated the 18th day of September, 2021

in

Civil Application No. 332/01 of 2018

.....

RULING OF THE COURT

13th June & 24th November, 2023

KOROSSO, J.A.:

In this application, the applicant, Jowhara Castor Kiiza, by way of notice of motion made under rule 66(1)(a) of the Tanzania Court of Appeal Rules, 2009 (the Rules) is moving the Court to review and set aside its own decision in Civil Application No. 332/01 of 2018 dated 10/9/2021. The notice of motion is supported by an affidavit deponed by the applicant. The reasons founding the application as expounded in the notice of motion and its supporting affidavit are that the impugned decision is based on a manifest error on the face of the record. Furthermore, the applicant avers

that by sustaining misconceived points of objection from the respondent, the High Court in Civil Application No. 280 of 2017 and the Court, in Civil Application No. 604/01 of 2021, denied him the right to be heard, resulting in a miscarriage of justice.

In paragraphs 3 and 4 of the affidavit supporting the application, the applicant outlined what he considered to be manifest errors on record that are sufficient to prompt the Court to consider and determine the instant application for review. These include; One, the Court's failure to take cognizance of the High Court's non-consideration of the fact that Civil Application No. 280 of 2017 which was before it for hearing and determination was filed pursuant to section 30(1)(a)(ii) of the Magistrates' Courts Act (MCA). According to the applicant, that being the case, it follows that the said application was not affected by any limitation period. He further contended that the purpose of citing the said provision was to move the High Court to exercise its supervisory powers over Temeke Primary Court against its decision in the execution of the decree in Matrimonial Cause No. 12 of 2007, where allegedly the motor vehicle was wrongly attached and later purchased by the respondent. He thus argued that when the matter came before the Court, it wrongly concluded that Civil Application No. 280 of 2017 was an application for revision of the decision of the Temeke Primary Court in the matrimonial cause. The applicant is

aggrieved by the holding of the Court when considering the points of objection on the competence of the application before it, when it stated: *"The applicant's application for Revision is incompetent in Court for being preferred and invoked in a case where there is a Right of Appeal."*

Additionally, he cited where the Court observed: "*The record shows that the applicant faced some difficulties and hurdles in her quest to execute the decree and on the 26th May 2017, she decided to file an application in the High Court seeking revision of the proceedings and decision of the Primary Court of Temeke in Matrimonial Cause No. 12 of 2007.*"

The applicant argued that the Court erred in the above observations because Misc. Civil Application No. 280 of 2017 in the High Court, was not an application for revision arising from the decision and proceedings of Temeke Primary Court in Matrimonial Cause No. 12 of 2007 but from the fact that the High Court failed to exercise its jurisdiction under section 30(1)(a)(ii) of the MCA. Two, in view of the above, the applicant contended that he was denied the right to be heard in Civil Application No. 332/01 of 2018 and Civil Application No. 280 of 2017 which were his sole remedy for justice against the decision of the Temeke Primary Court in the objection

proceedings filed by the respondent in Matrimonial Cause No. 12 of 2007 which resulted in the attachment of the motor vehicle.

The respondent resisted the application through an affidavit in reply filed on 18/2/2022.

The application originates from a petition for divorce against one Muzamil Shehe Hassan filed by the applicant in Matrimonial Cause No. 12 of 2007 at Temeke Primary Court. The marriage was annulled on 27/4/2007 with an order for the division of matrimonial properties, including a motor vehicle with Registration No. T389 AMC (motor vehicle). At a later date, in the process of execution of the trial court decree, an order for attachment of the motor vehicle under the hands of M/S Super Auction Mart was given. Following the order for attachment of the said motor vehicle, the respondent filed objection proceedings at the same Primary Court in quest of the release of the motor vehicle claiming that the same belonged to him having purchased it way back before the annulment of the applicant's marriage.

Moreover, whilst the objection proceedings before the Primary Court were in progress, the respondent filed an application in the District Court of Temeke that sought revision of the decision of the Primary Court in Matrimonial Cause No. 12 of 2007 that listed the motor vehicle as one of

the matrimonial properties. The District Court hearing proceeded *exparte* and found in favour of the respondent and ordered the release of the motor vehicle. The applicant was dissatisfied and the preferred appeal to the High Court in Civil Appeal No. 96 of 2007 was successful. Aggrieved, the respondent initiated the process to appeal to this Court but never filed a memorandum of appeal, thus, the requisite court records on the matter were transmitted to the Primary Court for execution proceedings.

It is on record that the applicant as a decree holder faced some hurdles in finalizing the proceedings for execution of the decree and thus filed an application for revision in Civil Application No. 280 of 2017 in the High Court. The application encountered preliminary objection points and the High Court (Munisi, J.) on 20/4/2018 upheld the objection that the application was time barred and dismissed it. Disgruntled, the applicant instituted Civil Application No. 332/01 of 2018 before this Court seeking revision however, it was struck out, the Court holding that it was incompetent and misconceived. It is the said decision of the Court which instigated the present application for review.

On the day of hearing of the application, the applicant appeared in person unrepresented, while the respondent had the service of Mr. Odhiambo Kobas, learned counsel.

When called upon to amplify the substance of the application, the applicant sought and was granted leave to adopt the affidavit and the written submissions in support of the application. In the written submission filed by the applicant on 9/8/2018, it implores the Court to consider whether the decision by the High Court in Misc. Civil Application No. 280 of 2017 is sound in law and the rules of natural justice. She argued that the High Court's finding that section 30(1)(a)(ii) of the MCA cited in the chamber summons does not exist and ultimately dismissing the application was improper since the said provision exists and confers powers for the courts below to entertain applications at any time without limitation.

The applicant's other complaint was the High Court's decision essentially confirming the decision of the Primary Court of 30/1/2015 instead of addressing the challenged findings in the objection proceedings. For him, the avenue taken by the High Court contravened the Magistrates Court (Civil Procedure in Primary Court) Rules and in essence obstructed the execution of the primary court's decision since the executable order for the division of matrimonial property was set aside. It was the applicant's further contention that the High Court's decision in Civil Application No. 280 of 2017 was contrary to natural justice since; One, the reasons for the order for dismissal of the application contradict and hence are invalid. Second, the decision was not founded on equity as it was based on bias

and was not given in a judicial spirit since the applicant's right to be heard was denied. Third, the order made on the preliminary objection is not based on the determination of the arguments by both parties that the High Court judge's interpretation of the laws relied on submissions by the respondent's counsel, particularly on the interpretation of section 3(1) of the Law of Limitation Act (Limitation Act) and not on established rules guiding interpretation of legal provisions.

In response, Mr. Kobas commenced by adopting the affidavit in reply filed so that it forms part of his oral submission. He implored us to dismiss the application arguing that it is a disguised appeal and does not fall within the ambit of an application for review envisaged under rule 66(1) of the Rules. He argued that under the said rule, an application for review requires the applicant to show there was a manifest error on the record of the challenged decision however, neither the notice of motion nor the supporting affidavit has shown the alleged manifest error apparent in the decision of the Court in revision.

According to the learned counsel for the respondent, his stance is supported by various decisions of the Court including **John Kashekya v. Attorney General**, Civil Application No. 480/03 of 2018 (unreported) where the Court cited the holding in **Lakhamshi Brothers Ltd vs R. Raja**

and Sons [1966] EA 313. Another decision cited was the case of **African Marble v. Tanzania Saruji (TSC),** Civil Application No. 132 of 2005 (unreported) which also emphasizes the importance of showing the manifest error on the record where the review of the decision of the Court is sought.

Mr. Kobas contended that what the applicant has put forward as grounds for review require the Court to go through the decisions from the Primary Court and evaluate evidence therein, matters that do not fall within what is required or envisaged in an application for review before the Court. According to him, in the case of **African Barrick Gold Plc v. Commissioner General, Tanzania Revenue Authority**, Civil Application No. 350/01 of 2019 (unreported), the Court addressed what the term an error apparent on the face of the record in an application for review refers to, guidance which the applicant has failed to comply with, he contended. He thus prayed for the application to be dismissed being unmerited.

The applicant's rejoinder was brief, arguing that the instant application is meritorious since the purpose of a review is for the Court to review errors on record of its decision. He thus implored the Court to grant his prayers as found in the application.

Delving into the substance of the application while taking account of the pleadings and the submissions from the contending parties, the cited authorities and the record of the application, certainly, under section 4(4) of the Appellate Jurisdiction Act (the AJA), the Court has powers to review its own decision under the conditions specified therein. The fact that the Court may review its decision to correct a manifest injustice as stipulated in the above provision has been restated in various decisions of the Court including **Chandrakant Joshubai Patel v. Republic** [2004] TLR 218; **African Marble Company Limited (AMC) v. Tanzania Saruji Corporation (TSC)** (supra), **Karim Ramadhani v. Republic**, Criminal Application No. 23 of 2012 and **Nguza Vikings @ Babu Seya and Another v. Republic**, Criminal Appeal No. 5 of 2010 (both unreported).

Furthermore, rule 66(1) (a)-(e) of the Rules specifies the circumstances that may warrant such a review, thus:

> *"66 (1) 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."

To further amplify on conditions for a review, the defunct Court of Appeal for Eastern Africa in the case of **Lakhamshi Brothers Ltd** (supra), held that:

> *"In a review, the court should not sit on appeal against its own judgment in the same proceedings. In a review, the court has inherent jurisdiction to recall its judgment in order to give effect to its manifest intention on to what clearly would have been the intention of the court had some matter not been inadvertently omitted."*

Taking into account the above, at this juncture, we are constrained to first determine whether the present application qualifies to move the Court to proceed to review its own decision as prayed by scrutinizing the record before us. As alluded to above, the instant applicant is grounded on the assertion of there being a manifest error in the impugned decision of the Court for which review is sought. Fortunately, this Court had occasions to discuss what a manifest error on the face of the record refers to in such

cases as **Nguza Vikings @Babu Seya and Another** (supra) where it held:

> *"There is no dispute as to what constitutes a manifest error apparent on the face of the record. It has to be such an error that is obvious and patent mistake and not something which can be established by a long-drawn process of reasoning on points which there may conceivably be two opinions."*

[See also, **African Barrick Gold PLC v. Commissioner General TRA**, (supra) and **African Marble Company Limited (AMC) v. Tanzania Saruji Corporation** (TSC) (supra)].

In the latter case, the Court revisited a book by Mulla, Indian Civil Code, 14th Edition pages 2335-36, where the term error apparent on the face of the record has been defined to 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."*

Considering the settled legal position shown above, indeed, the term manifest error or error apparent on the face of the record implies an error that can be discerned from the record of the impugned judgment of the

Court and proceedings thereof. There is no requirement for a detailed examination, scrutiny or delving into the facts or the legal arguments as observed in **Chandrakant Joshubhai Patel** (supra) and **African Barrick Gold PLC** (supra).

In our scrutiny of the four grounds advanced by the applicant founding the application in the notice of motion and supporting affidavit, we have failed to find any issue that can be clothed as a manifest error or error apparent on the face of the record. According to the notice of motion and supporting affidavit together with the applicant's submission, we have gathered that the points of disgruntle manifested as patent error include allegations of the Court's failure to discern the fact that the High Court in Civil Application No. 280 of 2017 failed to consider that the said application was pursuant to section 30(1)(a)(ii) of the MCA which called for it to exercise its supervisory powers against the decision of the Primary Court in its decision in the objection proceedings filed by the respondent against the execution of a decree arising from a Matrimonial Cause No. 12 of 2007.

In the decision of the Court related to Civil Application No. 332//01 of 2018, an application for revision under section 4(3) of AJA and rules 65(1)(2)(3)(4) and 51(1) of the Rules, the grounds for revision were that the High Court decision contravened two Acts of Parliament, was contrary to natural justice and there was failure by the High Court to exercise two

distinct jurisdictions vested by the law. However, initially, the Court had to consider and determine a preliminary point of objection raised that the application for revision was incompetent having been lodged notwithstanding the fact that the applicant had the right of appeal. The Court sustained the objection and held that:

> *"...neither the grounds raised on the notice of motion which have not been substantiated at all nor the reason alluded on by the respondent in her submission, constitute or amount to any exceptional circumstances calling for the invocation of the Court's revisional jurisdiction."*

Plainly, the Court did not determine the merits of the application for revision and thus what is averred in paragraphs 3, 4, 5 and 6 is misconceived. The Court found that the applicant had a right to appeal from the impugned decision of the High Court and thus the application for revision was not viable in the absence of exceptional circumstances to move the Court to hear and determine the application. Essentially, in the complaints by the applicant, no manifest error in the decision of the Court can be drawn since the grievances are on the merits of the case.

What we can discern is that most of the complaints related to what transpired in the High Court in Misc. Application No. 280 of 2017, which prompted the application for revision to this Court in Civil Application No.

332/01 of 2018. As alluded to herein, the application for revision was struck out upon the Court's finding that the application was incompetent since the applicant had circumvented to pursue his right to appeal. In the circumstances, the issue of the competence of the application was thus determined, and as correctly argued by the learned counsel for the respondent, the applicant's dissatisfaction with the outcome in the said application is no ground for review [see, **Tanganyika Land Agency Limited and 7 Others v. Manohar Lai Aggrwal**, Civil Application No. 17 of 2008 (unreported)]. Therefore, this ground fails.

On the complaint that the applicant's right to be heard was denied, we find this to be misconceived, since our careful scrutiny of what is averred in the supporting affidavit and written submissions, clearly shows that the complaints stem from what transpired in the High Court and not the Court during the hearing of the application for revision. In paragraph 4 of the affidavit, she avers that she was denied the right to be heard in Civil Application 332/01 of 2018 by;

> *"...namely, my being denied the right of being heard in Civil Application No. 280 of 2017, where the said application (Civil Application No 280 of 2017) was my sole remedy for miscarriage of justice resulting from the decision of Temeke Primary Court on fictitious objection proceedings*

filed by the respondent in Matrimonial Cause No. 12 of 2007..."

The applicant proceeds to lament with regard to the proceedings in the High Court and Primary Court, however, there is nothing specific on the error of the Court. Further scrutiny of the record of the application shows that at the hearing of the Civil Application No. 332/01 of 2018, the applicant was present in person, unrepresented. Upon an order by the Court that the preliminary objection be dealt with first, the applicant was called upon to reply to the submission of the respondent's counsel, and on page 5 of the Ruling of the Court, it is recorded thus:

> *"In her brief submission in reply, the applicant asked the Court to overrule the objection on the ground that the same is misconceived and misplaced. She argued that in refusing the application the High Court failed to exercise its jurisdiction and further that there are exceptional circumstances making the High Court decision revisable..."*

Furthermore, the record shows that thereafter, the applicant proceeded to give three circumstances under which she implored the Court to find exceptional and overrule the objection raised. Evidently, she was given an opportunity to respond to the point of objection raised and to expound on her position.

For the foregoing, we find the application misconceived for the reasons stated above and on the fact that the application seeks to move us to re-examine the proceedings and decision of the High Court, an invite, we are not ready to accept under the circumstances, embracing the spirit of the provision of rule 66(1) of the Rules.

All in all, the application has no merits and we dismiss it. In the circumstances, each party is to bear its own costs.

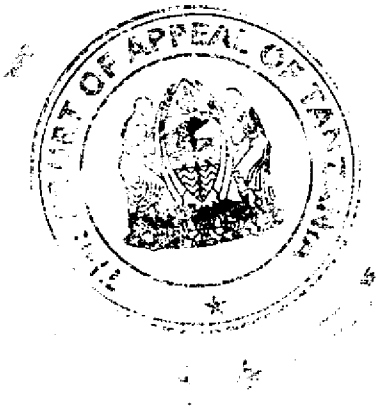
DATED at **DAR ES SALAAM** this 21st day of November, 2023.

W. B. KOROSSO
JUSTICE OF APPEAL

I. P. KITUSI
JUSTICE OF APPEAL

P. S. FIKIRINI
JUSTICE OF APPEAL

The Ruling delivered this 24th day of November, 2023 in the presence of Ms. Lulu Mbinga, learned counsel for the respondent and Mr. Primus Kiiza, a relative of the applicant who reported him to be sick is hereby certified as a true copy of the original.



J. E. FOVO
DEPUTY REGISTRAR
COURT OF APPEAL