IN THE COURT OF APPEAL OF TANZANIA

AT DAR ES SALAAM

(CORAM: NDIKA, J.A., KAIRO, J.A. And MURUKE, J.A.)

CIVIL APPLICATION NO. 394/01 OF 2022

PENDO FULGENCE NKWENGE.....APPLICANT

VERSUS

DR. WAHIDA SHANGALI.....RESPONDENT

[Application for review of the decision of the Court of Appeal of Tanzania, at Dar es Salaam]

(Mugasha, Korosso and Kairo, JJ.A.)

dated 25th day of March, 2022

in

Civil Appeal No. 368 of 2020.

RULING OF THE COURT

3rd & 7th December, 2023

KAIRO, J.A.:

By a notice of motion taken under section 4 (4) of the Appellate Jurisdiction Act, Cap. 141 of the Revised Edition, 2019 and Rule 66 (1) (a) and (b) of the Tanzania Court of Appeal Rules, 2009 (the Rules), the applicant is applying for review of the decision of this Court in Civil Appeal No. 368 of 2020 dated 25th March, 2022 wherein, the applicant unsuccessfully appealed against the decision of the High Court of Tanzania in Land Case No. 224 of 2014. Further, the Court declared the respondent a lawful owner of land

situates at Plot No. 1366, Block 'A' Kinyerezi, Ilala Municipality within Dar es salaam Region (the suit land). According to the notice of motion, the application is based on three grounds, **one;** that the decision has serious manifest errors on the face of the record resulting in a miscarriage of justice as paraphrased as follows:-

(i). "That, the Honourable Court wrongly dismissed the appeal with costs and upheld the findings of the trial Judge in respect of the Counter-Claim that, the suit land on Plot No.1366, located at Block 'A' Kinyerezi, Ilala Municipality, Dar es Salaam region belongs to the respondent thus, the record should so reflect. However, the ordered responsible authorities were not identified in the Judgment and were not a party to the proceedings;

(ii). That, since the Applicant has unchallenged Certificate of Title in her name, the decision of re-allocating the suit land to the respondent was based on manifest error on the face of the record which resulted into injustice to her, while the Court has no relocating powers; and

(iii). IN THE ALTERNATIVE, it ought to have consistently found that the Certificate of Title which resulted from a null and void sale agreement was also a nullity and ought to have been cancelled and not

granted to the Respondent. It follows therefore, the Court overlooked in finding that, the Applicant has no good title acquired from Aloysius Mujulizi and not finding that, based on the said finding, there was no authentic Certificate of Title granted from an alleged tinted sale transactions and consequently, there was nothing to rectify in the Register by the ordered Authorities.

(iv). That, the Court ***erred on the face of record*** *as it ought to have come up with the findings that, the respondent or the trial court had a duty to join both Aloysius Mujulizi and Muhidini Jihad to the Counter-Claim proceedings in the trial Court since the respondent is the one who* ***had a cause of action*** *against them and not the applicant.*

(v). That, the Court ought to have found that, the applicant had no claim against both Aloysius Mujulizi and Muhidini Jihad as the applicant was in possession and was a registered owner of the suit land. Thus, she was not duty bound to call them as witnesses or sue or join either of them. Rather, it was the respondent who ought to have joined and implead them in her Counter-Claim since she has been complaining about them for illegal sale.

(vi). That, the Court was in error at page 19 in agreeing with the trial Judge in the High Court and find that,

the applicant did not call as witnesses, both Mr. Aloysius Mujulizi and Mr. Muhidin Jihad to testify in Court as they were important witnesses. Instead, the Court ought to find that, the two persons were necessary parties to the Counter-Claim in which the Respondent was complaining against them and not important witnesses.

two; Aloysius Mujulizi and Muhidin Jihad were wrongly deprived an opportunity to be heard and **three;** that the Court lacked jurisdiction to hear and determine the appeal.

From the outset, we wish to state that the six points above which according to the applicant form the nitty-gritty of the alleged manifest errors on the face of record revolve around two complaints, **one;** that the Court erred to order the Registrar of Titles who was not a party to the suit to rectify the register to replace the name of the applicant with that of the respondent, and **two;** that the Court erred to uphold the trial court's finding that Aloysius Mujulizi and Muhidin Jihad were to be called by the applicant as witnesses or joined as necessary parties in the suit instead of being joined by the respondent in her counter claim.

The application has been supported by an affidavit sworn by Mr. Alex Mashamba Balomi, who teamed up with Mr. Juma Nassoro, learned advocate to represent the applicant. It was resisted by the respondent

through an affidavit in reply sworn by Mr. Francis Alfred Mgare, an advocate engaged by the respondent to represent her.

The brief facts leading to this application as obtained from the record of the application are as follows:

In year 2014, the applicant instituted Land Case No. 224 of 2024 at the High Court of Tanzania, Land Division at Dar es Salaam against the respondent claiming various reliefs as follows: court's declaration that the applicant is the lawful owner of the land in dispute, an injunctive order restraining the respondent from trespassing, interfering, alienating, wasting, developing and/or evicting the respondent from the suit land and general damages amounting to TZS.50,000,000/= with costs.

The respondent, on her part, denied the claims and together with her written statement of defence, she filed a counter claim and sought a declaratory order to the effect that she be declared the lawful owner of the suit land and further that the applicant ordered to vacate the suit land, payment of general damages of TZS. 300,000,000/= by the applicant together with costs of the suit.

After hearing of the parties, the trial court decided in favor of the respondent's counter claim. Discontented, the applicant appealed

unsuccessfully to the Court. Hence, the instant application for review.

Amplifying ground number one, Mr. Balomi submitted that it was an error on the face of record for the Court to order the Registrar of titles to rectify the register to reflect the respondent's ownership of the land in dispute while he was not a party to the proceedings. To back up his argument, he cited the case of **Ngerengere Estate Company Limited vs Edna William Sitta**, Civil Appeal No. 209 of 2016 (unreported). He went on submitting that it was an error as well for the Court to find that the applicant had no good title acquired from Aloysius Mujulizi, yet failed to make a finding that in the circumstances, there was no authentic certificate of title granted and therefore, there was nothing for rectification by the authorities.

As for ground number two on the right to be heard, Mr. Balomi submitted that, the Court's finding that Muhidini Jihad had no good title on the suit land to transfer the same to Aloysius Mujulizi and later to the applicant while they were not parties to the suit, amounted to condemning the duo unheard thereby depriving them the right to be heard. According to him, the Court erred by not faulting the trial court for its failure to make the duo parties to the suit or witnesses.

Expounding what Mr. Balomi stated, Mr. Nassoro added that since the two were found to be the vendors of the land in dispute at different times

before the same was sold to the applicant, then the duo had a constitutional right to be heard but were not accorded with. He contended that the Court would not have reached at the decision subject to review if it would have well considered the deprivation of the right to be heard of the duo. Sequel to that, he also contended that even the order of rectification of the register extended to the Registrar of Titles was also made by the Court without affording him with a right to be heard which he argued to be against Article 13 of the Constitution of the United Republic of Tanzania. In conclusion, Mr. Nassoro submitted that failure to afford the trio with the right to be heard is an error on the face of the record that had occasioned injustice to the applicant. On those bases, he beseeched the Court to grant the application.

Mr. Mgare strongly resisted the application. He argued that the raised grounds do not meet the threshold required under Rule 66 (1) of the Rules. Mr. Mgare contended that the applicant has misconceived the said provision as all the three grounds submitted do not qualify for review rather, they are mere grounds of appeal brought through a back door. As such, the purported review is in fact an appeal in disguise and placed reliance in the case of **The Hon. Attorney General vs Mwahezi Mohamed** (as administrator of estate of the late Dolly Maria Eustace) **and 3 Others**, Civil Application No. 314 of 2020 (unreported) to substantiated his arguments.

Mr. Mgare refuted the argument that the Registrar of Titles was

ordered to rectify the register while he was not a party to the proceedings. He contended that nowhere in the proceedings had the Registrar of Titles been mentioned. He argued that the point is a distinguishing factor to the case of **Ngerengere Estate Company Limited** (supra) cited by the applicant wherein the Registrar was mentioned and blamed without being heard. According to him, the Court gave a fair comment urging the responsible authorities to do the needful so as to reflect the findings of the Court to the effect that the suit land belonged to the respondent. He added that responsible authorities stated in the Court judgment does not necessarily mean the Registrar of titles as submitted by Mr. Balomi.

The respondent's counsel argued further that the allegation that the Registrar of Titles was not a party, yet he was ordered to make rectification of the register, by itself requires a long process of reasoning, and thus cannot qualify to be an apparent error as per the decision in **Chandrakant Joshubhai Patel vs Republic**, [2004] TLR 218. He concluded that in the circumstance therefore, there is no apparent error on the face of the record for review, instead the complaint could be a good ground for review.

Responding to the applicant's argument that Muhidin Jihad and Aloysius Mujulizi were deprived the right to be heard for not been joined as parties to the suit or summoned to testify, Mr. Mgare contended that the duty to join the two or summon them as witnesses was squarely on the

applicant who claimed to have purchased the land in dispute from them. He further stated that the issue was also extensively dealt with by the Court. He referred us to page 19 of the judgment intended to be reviewed for verification, concluding that, making it a ground for review, amounts to reopening up of the matter, which is not within the scope of review.

After going through the notice of motion and the supporting affidavits for and against the application, together with thorough consideration of the oral submissions by the learned counsel for both parties, we are now in a position to determine the merit or otherwise of the application.

Essentially, review is not an automatic right and has a very limited scope. It is allowable in an exceptional situation as provided under rule 66 (1) of the Rules. The said Rule provides that:-

> "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 ofthe record resulting in the miscarriage of justice; or*
>
> *(b) a party was wrongly deprived of an opportunity to beheard;*
>
> *(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."*

Going by the above cited provisions, it is clear that the applicant must satisfy any one of the conditions stipulated under Rule 66 (1) of the Rules. In the instant application, the applicant has premised her prayer under Rule 66 (1) (a), (b), and (d). Starting with the claim of manifest error on the face of record; the case of **Chandrakant Joshubhai Patel** (supra) serves as a guidance on what is manifest error whereby the Court stated as follows: -

> *"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 which there may conceivably two opinions...* ***A mere error of law is not a ground for review*** *under this ruie. That a decision is erroneous in law is no ground for ordering review...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.'*** *[Emphasis added].*

[See also **Edson Simon Mwombeki vs Republic,** Criminal Application No. 06/08 of 2017 and **Twaha Michael Gujwile vs Kagera Farmers Cooperative Bank,** Civil Application No. 156/04 of 2020] (both unreported).

It is clear from the cited cases that the term "manifest error on the face of record" means a plain error which is evident from the record and it does not require scrutiny or arguments or clarification of either facts, evidence or legal exposition. In other words, it must be a patent error on the face of the record not requiring long-drawn arguments to establish it.

As stated, in the instant application, the applicant premised his claims under rule 66 (1) (a), (b) and (d) of the rules.

The applicant's complaint of manifest errors on the face of record hinged on two limbs as earlier alluded. The first limb was to the effect that the Court erred to order the Registrar of titles who was not a party to the suit to rectify the register to replace the name of the applicant with that of the respondent. Deducing from his submission, the sentence resulted to the said complaint is seen at page 27 of the judgment intended to be reviewed. The same reads "...*It is imperative that the records should reflect this and responsible authorities should do the needful."* However, after thorough

scrutiny of the said judgment, we observed that nowhere in the said judgment had the Registrar of Titles been mentioned as rightly submitted by the respondent. This fact was also acknowledged by the applicant in the first point of clarification in the notice of motion wherein he stated that the responsible authorities were not even mentioned in the judgment. It is our take that the sentence was a natural consequence of the finding of the Court as regards the ownership of the land in dispute and was not intended to order the Registrar of Tittles to rectify the land register as argued by the applicant.

That apart, we are of the view that the raised ground does not qualify to be called an apparent error on the face of the record. Its determination in our view, requires a long process of reasoning contrary to the principle enunciated in **Chandrakant Joshubhai Patel** (supra). As such, we find the applicant's complaint is not tenable under rule 66 (1) (a). On those bases, we find the cited case of **Ngerengere** inapplicable in the circumstances of the case at hand.

In the second limb, the applicant contended that that the Court erred to uphold the trial court's finding that Aloysius Mujulizi and Muhidini Jihad were to be called by the applicant as witnesses or joined as necessary parties in the suit instead of being joined by the respondent in her counter claim.

Reading between the lines, the complaint in our view signifies the applicant's dissatisfaction of the decision under impunity over the said issue. The Court has times and again reiterated its stance that review should not be utilized as a backdoor method to unsuccessful litigants to re-argue their case as review is by no means an appeal in disguise. Otherwise, the policy to the effect that litigation must come to an end will be defeated.

Regarding the allegation of denying Muhidini Jihad and Aloysius Mujulizi right to be heard for what the applicant stated to be failure to summon them as witnesses or as parties to the counter claim, we join hands with Mr. Mgare's submission that it was the applicant who had that duty if she thought they were of any assistance in proving her ownership of the land in dispute. But further, on a close look, the complained aspect was thoroughly dealt with by the Court and determined accordingly at page 19 of the judgment. We are of the view that re-arguing it on review is to invite the Court to sit for appeal on its own decision, which is unacceptable. The law is now settled that a review is not an appeal in disguise by a party in the aftermath of the dismissal of his/her appeal [See: **Miraji Seif vs The Republic,** Criminal Application No. 2 of 2009 and **Robert Moringe @ Kadogoo vs The Republic,** Criminal Application No.9 of 2005 (unreported). We therefore, find that grounds number one and two devoid of merit.

As for ground number three, Mr. Balomi contended that, since the counter claim formed the basis of the decision appealed against and finally the judgment of the Court was entered while the subject matter was out of time prescribed by law, then limitation period has direct effect to the root of the matter as regards the jurisdiction of this Court.

Reacting on this ground, Mr. Mgare argued that the issue was neither raised at the trial court nor on appeal, as such, it is an afterthought and prayed the Court to disregard it. As a rejoinder, Mr. Balomi insisted that jurisdiction is a legal issue to be raised at any time.

We agree with Mr. Mgare's argument that the issue was not raised and we take it to be an afterthought. We also do not dispute the settled legal stance that jurisdiction, being a legal issue can be raised even on appeal. However, for review purpose, the same need to be in the impugned judgment and not other record which is not before the Court. In fact, the applicant has failed to point out the alleged error in the judgment intended to be reviewed. We find it instructive to remark here that, during review, the Court is not seized with the record of appeal, but only the impugned judgment, as such the Court cannot determine the time limitation as invited by Mr. Balomi. But that apart, there is no gainsaying that the issue as to whether the subject matter in counter claim was time barred or not needs re-assessing of evidence which also attracts a long-drawn process of

arguments before the same is determined and thus, the complaint is fit to be a ground of appeal, rather than review. For those reasons, we find the ground is devoid of merit as well and accordingly dismiss it.

Times and again the Court has been discouraging litigants from resorting to review as disguised appeals, and underscoring the end to litigation, in **Patrick Sanga vs Republic,** Criminal Application No. 8 of 2011 the Court emphasized as follows: -

> *"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 judgements. In any properly functioning justice system, like ours, litigation must have finality and a judgment of the final court of the land is final and its review should be an exception. That is what sound public policy demands. "*

All in all, we have completely failed to see any error in the three points raised to warrant review in terms of rule 66 (1) (a) of the Rules. Thus, the ground is unmerited and we dismiss it.

That said and done, we find that the application for review is devoid of merit. It is accordingly dismissed in its entirety, with costs.

It is so ordered.

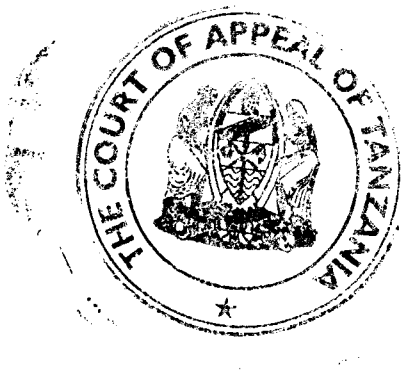
DATED at DAR ES SALAAM this 29th day of November, 2023.

G. A. M. NDIKA
JUSTICE OF APPEAL

L. G. KAIRO
JUSTICE OF APPEAL

Z. G. MURUKE
JUSTICE OF APPEAL

The Ruling delivered this 7th day of December, 2023 in the presence of Mr. Alex Balomi learned counsel for the Applicant and Francis Mgare learned counsel for Respondent is hereby certified as a true copy of the original.



C. M. MAGESA
DEPUTY REGISTRAR
COURT OF APPEAL