IN THE COURT OF APPEAL OF TANZANIA

AT MWANZA

(CORAM: NDIKA, J.A., RUMANYIKA J.A., And MDEMU, J.A.)

CIVIL APPLICATION NO. 414/08 OF 2021

THE REGISTERED TRUSTEES OF

ISLAMIC PROPAGATION CENTRE (IPC) ..... APPLICANT

VERSUS

THE REGISTERED TRUSTEES OF

THAAQIB ISLAMIC CENTRE (TIC) ..... RESPONDENT

(Application for Review of the decision of the Court of Appeal of Tanzania at Mwanza)

(Ndika, Fikirini, And Kihwelo, JJ.A.)

Dated 27th day of July, 2021

in

Civil Appeal No. 20 of 2020

.....

RULING OF THE COURT

4th & 14TH December, 2023

RUMANYIKA, J.A.:

Before the High Court of Tanzania at Mwanza (Bukuku, J.), the Registered Trustees of Thaaqib Islamic Centre (TIC), the respondent, successfully sued The Registered Trustees of Islamic Propagation Centre (IPC), the applicant, vide Land Case No. 23 of 2015. The action was for recovery of Plot No. 502, Block A, Nyasaka area, bearing Nyasaka Islamic Secondary School, Plot No. 549, Block LL, Kiloleni area, where Thaaqib

Islamic Primary School is located and Farm No. 1, Block LL also at Kiloleli area (the disputed property), both situated in Ilemela municipality, Mwanza region. The respondent alleged that, a congregation of muslims known as Darasa Duara, that worked under them, had established the academic institutions stated above. It is an agreed fact that, by that time, the respondent was not yet incorporated hence it could not legally contract or acquire property in its own name. For that reason, it allegedly orally commissioned the incorporated and qualifying applicant to have the disputed property registered in its name and run the management of the schools. That was done. Acting on these arrangements, according to PW4, the respondent kept the respective certificates of title. However, at a later stage, the relationship between them turned sour, and they parted company. The respondent demanded to take control of the property, whereas the applicant cross-claimed the title. The applicant lost the battle in the High Court. In that decision, the respondent was ordered to have the respective certificates of titles registered in its name and to take control and management of the disputed property.

Aggrieved by that decision, the applicant appealed to this Court (Ndika, J.A, Fikirini, J.A and Kihwelo, J.A). It lost the battle on 27th July,

2021. Still not satisfied, it is now before us, assailing the said decision, by way of review.

This application is predicated on section 4(4) of the Appellate Jurisdiction Act, Cap. 141 of R.E. 2019 ("the AJA"), rules 4(2) (b), 66(1) (a) and (b), also 48(1) of the Tanzania Court of Appeal Rules, 2019 ("the Rules". It is supported by an affidavit sworn by Advocate Deya Paul Outa for the applicant. The respondent has opposed it by filing an affidavit in reply, sworn by Advocate Twaha Issa Taslima.

At the hearing of the application, Mr. Deya Paul Outa being assisted by Mr. Mussa Kiobya both learned counsel appeared for the applicant, whereas the respondent was represented by Mr. Twaha Issa Taslima, learned counsel.

Mr. Outa began, in terms of section 3A(1) and 3B(1) (c) of the AJA and rule 111 of the Rules, urging us to rectify the typographical error so the civil appeal, which this application emanates from, to read as No. 02 of 2020, and not No. 20 of 2020 which was cited in advertently. We granted his unopposed prayer.

In the notice of motion, the applicant has fronted three grounds of review which we paraphrase as follows: **one,** that the Court was wrongly constituted because, on that appeal Kihwelo, JA ("the objected member") sat as a member of the panel while he had been a managing partner working with ESCO Law Chambers, and the latter drew the applicant's Written Statement of Defence ("the WSD"), which appears at page 67 of the record of appeal. **Two**, that the Court having found that the respondent was a non-incorporated institution thus, legally incapable to contract or own property, yet it decided the appeal in favour of the respondent, basing on the alleged "other factors", which is an apparent error on the record, and **three,** that, the Court decided the appeal on the purported other factors, without affording the applicant a right to be heard.

The applicant therefore, has proposed three issues for our determination: **First**, whether the Court was properly constituted, **secondly,** whether the applicant was denied a right to be heard and **thirdly,** whether there is an error apparent on the record which occasioned miscarriage of justice.

Regarding the 1st ground of review, Mr. Outa contended that, the objected member had worked with the said ESCO Law Chambers ("the Chambers") and still yet, he sat in the appeal, thereby violating the rule against bias. He therefore urged the Court to consider the resultant judgment a nullity, with no legal effect. He cited our decision in **CRDB (1996) Ltd. v. Minister for Labour and Youth Development** (2000) T.L.R. 66 to cement his point. He also cited **R.v. Gough** (1993) AC 646 at 670 for the same purpose.

About the 2nd ground, having referred to the Court's finding at page 21 of the record of appeal, Mr. Outa asserted that, despite this finding that, the respondent could have not owned the disputed property, the Court proceeded to decide the appeal in favour of the respondent, basing on the alleged other facts stated at paragraph 9 of the WSD, without affording the applicant a right to be heard. That omission, he argued, rendered the respective proceedings, the resultant judgment and orders vitiated. He cited our unreported decision in **Ausdrill Tanzania Ltd v. Mussa Joseph Kumili and Another**, Civil Appeal No. 78 of 2014 to reinforce his point.

The 3rd ground concerns existence of an apparent error on the record. Mr. Outa contended that, as it was the Court's firm finding that, the respondent was unregistered organization thus, incapable to own the registered disputed property, to hold otherwise, it was an apparent error which clearly contravened the provisions of section 64(1) of the Land Act, Cap 113 R.E. 2019. He prayed for the granting of the application with costs.

On his part, Mr. Taslima began by adopting the respondent's written submission filed on 26/10/2021. As regards the 1st ground in the notice of motion, he contended that, the objected member did not draw the WSD or sign it, so as to suggest the alleged bias. He prayed this ground to be dismissed.

For the 2nd ground, he asserted that, indeed, at page 21 of the record of appeal, the Court heard the parties and find that, the respondent could not legally own the disputed property. However, having heard the parties and acknowledged Members of Darasa Duara to be owner of the disputed property, in association with the respondent, the Court was done. He further argued that, Mr. Outa is back simply trying to urge the Court revert back to the scrutiny of the issue that had

been conclusively determined on appeal, which is not acceptable as it does not form a ground of review. He prayed for an order dismissing this ground for being unmerited.

Concerning the 3rd ground, about an error apparent on the record, Mr. Taslima contended that, the applicant may have been aggrieved by the said Court's finding and decision allegedly for being erroneous, but this does not constitute a ground of review. In conclusion, he urged the Court to dismiss this ground and therefore, the entire application with costs.

Indeed, this Court has powers to review its own decisions, in terms of section 4(4) of the AJA. However, for the Court to grant an order of review, a party seeking it must exhibit, at least one of the grounds set out under Rule 66(1) of the Rules. It reads as follows:

> *"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;***

(c) ... (not applicable).
(d)... (not applicable).
(e) ... (not applicable)."

(Emphasis added)

From the rule cited above, it is clear to us that, in our jurisdiction, as far as the rights of appeal of the litigants are concerned, any decisive judgment or ruling of the Court, *ejusidem generis,* is final and conclusive and that, the Court that has rendered the decision becomes *functus officio.* An application for review therefore, is not re-litigation of a matter but an exception.

The contention in the first ground of review that the Court was improperly constituted is, with respect, baffling and plainly hollow. None of the parties drew the Court's attention, at the hearing of the appeal to the alleged involvement of the objected member in the drawing up of the written statement of defence, in 2015, a fact which should have been in the knowledge of the applicant at that stage. Raising that complaint at this stage is clearly belated and injudicious.

Apart from finding merit in Mr. Taslima's submission that there is no proof that the objected member had any personal and meaningful role as a member of the Chambers at the material time in 2015 when the Chambers acted for the applicant, we do not think that a case could be made that the objected member could have been biased against the applicant taking into account that the hearing of the appeal was done before this Court on 13/07/2021, that is about six years after the written statement of defence was drawn and lodged by the Chambers. It would not be irrelevant to say that, logically one would have expected the respondent to have taken issue with the involvement of the objected member in the appeal, but not the applicant. We think that we must treat the complaint at hand as it is. It is nothing but an afterthought. Without hesitation, we dismiss it.

As regards the alleged denial of the applicant of the right to be heard, with respect to the facts stated in paragraph 9 of the written statement of defence, on the alleged liability of the applicant, we wish to stress that, the said pleading formed part of the Court's record. Therefore, nothing precluded the Court from considering whatever the aligned facts, in arriving at its decision. As such, as far as this fact is

concerned, the Court had heard the parties, and it is *functus officio*. Luckily, this is not the first time for the Court to deal with a similar issue. For instance, in **Abel Mwamwezi v. R,** Criminal Appeal No. 1 of 2013 (unreported), it stated that:

> *"A ground of review inviting the court to consider any evidence afresh, amounts to inviting the Court to determine an appeal against its own judgment. This shall not be allowed".*

We hasten to say that, the applicant's complaint is respectfully unfounded. Without running the risk of repeating ourselves, at page 21 of the record of appeal, the Court pointed out what are the "other facts", considered in arriving at our decision, upon hearing the parties. For ease of reference, we have found it necessary to reproduce the relevant passage as follows:

> *"...On that basis, we would agree with Mr. Outa that TIC could not have owned the properties prio to its incorporation. But, this is not the only fact to be considered in this matter...* ***It is in evidence that members of Darasa Duara, who acquired and developed the disputed properties, acted and associated under the umbrella Thaaqib Islamic Centre.*** *As an*

outfit, ***Thaaqib Islamic Centre was an unincorporated association of persons whose relationship might or might not have been governed by any written contract or constitution...".***
(Emphasis added)

We think that, the applicant might have not been contented with the just quoted above finding of the Court. However, in arriving at that decision, the Court relied on the evidence on record, adduced by both parties, as demonstrated. The ground sounds more of a ground of appeal, through a back door, than being a ground of review. With respect, the issue of denial of a right to be heard is neither here nor there. That ground also fails.

The 3rd ground concerns the alleged manifest error on the record. That, the Court having found that the respondent could have not owned the disputed property, in the circumstances, it should not have ruled otherwise, as it did, in the same breath. Again, on this one, we note that, the applicant is simply expressing its dissatisfaction for losing an appeal, which does not constitute a ground for the Court to invoke its powers of review. It is tantamount to an appeal in disguise which cannot

be accepted. We wish to stress on the long-time established and accepted principle that, in an application for review, an alleged error on the face of the record, resulting to a miscarriage of justice is such an error which is self-evident. It does not require any detailed examination, reasoning, scrutiny or clarification either of facts or legal exposition. It must be such as can be seen by one who runs and reads: See: Mulla, Commentary on the Indian Code of Civil Procedure, 1908, 14th edition at pp 2335-6 and **Chandrakant Joshubhai Patel v. R** [2004] TLR 218.

As such, the applicant's complaint is not a manifest error on the record resulting to a miscarriage of justice. Similarly, we dismiss that ground.

Moreover, as hinted earlier, for a reason or two, the applicant may have been discontented by the Court's evaluation of evidence and reasoning, arriving at the now impugned decision. However, that alone does not constitute a manifest error, which is stipulated under rule 66(1) of the Rules.

Put in other words, the law and logic require that, as far as a review jurisdiction is concerned, a mere aggrieving point does not constitute a ground for review. See our decisions in **Blue Line**

Enterprise Ltd. v. The East African Development Bank (EADB), Civil Application No. 21 of 2012 and **Kamlesh Varma v. Mayawati And Others,** Review Application No. 453 of 2012 (both unreported).

By way of emphasis, in **Tanganyika Land Agency Limited And Others v. Manohar Lal Aggarwal,** Civil Application No. 17 of 2008 (unreported), we stated that:

> *"For matters which were fully dealt with and decided upon an appeal, the fact that one of the parties is dissatisfied with the outcome is no ground at all for review. To do that, would, not only be an abuse of the court process, but would result to endless litigation. Like life, litigation must come to an end".*

With respect, it is very clear to us that, the applicant has embarked on a mission to re-open the appeal, through the back door which is unacceptable. We have reviewed the record of review and found that, there can be no way through to vacate our judgment and orders. We remind the Court users that, our duty to discourage unpleasant backward and forward litigations in the courts of law is also our number-one priority.

In view of the foregoing, we are satisfied that, the applicant has not made out a case for the Court to review its decision. The application is unmerited and stands dismissed with costs.

DATED at **MWANZA** this 13th day of December, 2023.

G. A. M. NDIKA
JUSTICE OF APPEAL

S. M. RUMANYIKA
JUSTICE OF APPEAL

G. J. MDEMU
JUSTICE OF APPEAL

The Ruling delivered on this 14th day of December, 2023 in the presence of Mr. Deya Paul Outa, learned counsel for the applicant, also holding brief for Mr. Twaha Issa Taslima for the respondent, is hereby certified as a true copy of the original.

THE COURT OF APPEAL OF TANZANIA

F. A. MTARANIA
DEPUTY REGISTRAR
COURT OF APPEAL