IN THE COURT OF APPEAL OF TANZANIA

AT DAR ES SALAAM

(CORAM: MWAMBEGELE, J.A., KWARIKO J.A., And MAKUNGU, J.A.)

CIVIL APPLICATION NO. 534/17 OF 2022

SHEKHA NASSER HAMUD..... APPLICANT

VERSUS

MARY AGNES MPELUMBE (In her capacity as the Administratix of the Estate of ISAYA SIMON MPELUMBE) ...RESPONDENT

(Application for Review of the Judgment of the Court of Appeal of Tanzania at Dar es Salaam)

(Ndika, Kente and Makungu, JJA.)

dated the 8th day of July, 2022

in

Civil Appeal No. 136 of 2021

RULING OF THE COURT

5th & 27th December, 2023

KWARIKO, J.A.:

The applicant, Shekha Nasser Hamud, was aggrieved by the decision of this Court in Civil Appeal No. 136 of 2021 hence she has filed this application for review of that decision. The application has been preferred under rule 66 (1) of the Tanzania Court of Appeal Rules, 2009 (henceforth "the Rules").

Before we go any further, we find it necessary to state a brief background of the case which led to this application as follows: At the centre of dispute is Plot No. 224 Tegeta Area within the City of Dar es Salaam (the suit land). The applicant has maintained that she is the

rightful owner of the suit land having been allocated the same by the Kinondoni Municipal Council in 1986 vide a letter of offer, exhibit D1. Her evidence was supported by one Ndemi Festo Ulomi (DW2) who was at the material time an officer in the Land Administration Department at the Ministry responsible for Lands and Human Settlements. DW2's evidence was to the effect that the said department dealt with the dispute between the parties in relation to the suit land. She testified further that, the records revealed that there was double allocation of the suit land arising from forgery in that, the folios in the relevant file were backdated with intention to show that the applicant was allocated the suit land ahead of the respondent.

On the other hand, the respondent claimed to have been allocated the suit land by virtue of a right of occupancy (exhibit P1) granted to him in 1994. At the trial, he had three witnesses including one Susan Mallya (PW3), a Land Officer in the Ministry responsible for Lands and Human Settlements. She testified that, initially, the suit land was allocated to the respondent through a letter of offer and subsequently a right of occupancy (exhibit P1) was issued.

Upon consideration of the evidence from both sides, the High Court of Tanzania, Land Division at Dar es Salaam (the trial Court) adjudged in favour of the applicant. It observed that, although the respondent was in

possession of the right of occupancy, the same was not superior to the applicant's letter of offer which was issued to the applicant before the date in which the respondent was issued with the said right of occupancy.

Aggrieved by that decision, the respondent successfully appealed to this Court. In its decision, the Court relied upon the evidence of Patrick John Chitenje (PW2) who was said to be the only officer responsible for signing letters of offer in the project which was for allocation of plots of land to Government officials, the suit land inclusive. In his evidence, PW2 denied to have signed exhibit D1 which was issued to the applicant. The Court found that this evidence was not controverted and thus it believed that, exhibit D1 was not genuine.

The applicant was dissatisfied by that decision. She has filed this application for review upon the following seven grounds:

1. *The Court erred in law in deciding the appeal based on the Respondent's letter of offer which had not been admitted and tendered in Court as an Exhibit;*

2. *The Court erred in law in deciding the appeal based on the aliegations of fraud the particuiars of which had not been pleaded by the Respondent. In doing so the Court deprived the Applicant of the right to be heard;*

3. *The Court erred in law in deciding the case based on the alleged failure by the Applicant to produce a Declaration of Trust a matter which had not been raised at the High Court or in the Appeal and therefore depriving the Applicant of the right to be heard;*

4. *The Court erred in law in holding that PW2 had not signed the Applicant's letter of offer (Exhibit D1) when it has never been the Applicant case that PW2 had signed her letter of offer (Exhibit D1;*

5. *In declaring the Respondent, a rightful owner of the suit premises the Court erred in failing to make a finding on the status of the exhausted improvements made by the Applicant on the suit premises;*

6. *The decision has occasioned miscarriage of justice on part of the Applicant because as a result of the court findings as per ground 1, 2, 3 and 4 herein above because the Applicant has been condemned unheard; and*
7. *On the basis of grounds, 1, 2, 3 and 4 above the decision was based on manifest error on the face of the record resulting in the miscarriage of justice.*

The notice of motion is supported by an affidavit sworn by Gaspar Nyika, learned advocate for the applicant whereas he essentially reiterated the grounds flanking the application. On the other hand, the application has been opposed by the respondent through an affidavit in reply sworn by Novatus Michael Muhangwa, learned advocate for the respondent.

At the hearing of the application, the applicant was represented by Mr. Gaspar Nyika, learned advocate, while the respondent had the services of Mr. Novatus Muhangwa, also learned advocate.

When he took the stage to argue the application, Mr. Nyika adopted the notice of motion and the supporting affidavit to form part of his oral submissions. Arguing the second and third grounds together, the learned counsel submitted that the Court erred to base its decision on the issue of forgery of the letter of offer (exhibit D1) since forgery was not pleaded, neither was it one of the approved issues at the trial nor did the High Court make a finding on it. He contended that, by deciding as it did, the applicant was denied an opportunity of being heard on that issue which is contrary to Order VI of the Civil Procedure Code [CAP 33 R.E. 2019].

In the same vein, Mr. Nyika submitted that the issue of alleged failure by the applicant to produce a declaration of trust was a matter which had not been dealt with at the trial. In support of his contention,

the learned counsel cited to us the decisions of the Court in the cases of **Bilali Ally Kinguti v. Ahadi Lulela Said & Four Others,** Civil Appeal No. 500 of 2021 and **Twazihira Abraham Mgema v. James Christian Basil *(As Administrator of the Estate of the Late Christian Basil Kiria, Deceased),*** Civil Appeal No. 229 of 2018 (both unreported).

Mr. Nyika also reiterated what he deposed in his affidavit in relation to the first and fourth grounds and further, he decided to abandon the fifth ground. On the basis of the foregoing, he argued that, had the applicant been afforded an opportunity to be heard, she would have proved that her letter of offer was genuine. Thus, by that denial, the applicant suffered miscarriage of justice. To wind up, the learned counsel submitted that, the decision of the Court was reached on the basis of a manifest error on the face of the record and it needs no long-drawn argument to find that, error was committed. He finally implored us to grant the application because it has met the criteria for review.

In response, Mr. Muhangwa adopted the affidavit in reply to be part and parcel of his oral submissions. He argued that the grounds in support of the application are essentially grounds of appeal and not grounds for review. Replying to the second and third grounds, he submitted that the issue of forgery was raised in the written statement of defence and it was proved by evidence as was the case in **Mukhusin Kombo v. Republic,**

Criminal Appeal No. 84 of 2016 (unreported). As regards the issue of declaration of trust, the learned counsel argued that the same was raised by the applicant during the trial and in any case, she did not tender it and there was no evidence to prove that there was change of the alleged ownership from her father.

In relation to the first ground, Mr. Muhangwa argued that the respondent was issued with the certificate of title which was tendered as exhibit P1. According to him, it was an error to refer exhibit P1 as a letter of offer but the same is rectifiable under rule 42 of the Rules. He also supported his argument with the Court's decision in **Amina Maulid Ambali & Two Others v. Ramadhan Juma,** Civil Appeal No. 35 of 2019 (unreported), where we held that simple errors can be rectified under rule 42 (1) of the Rules.

As regards the fourth ground, the respondent's counsel contended that the applicant was sufficiently heard by the Court. He went on to argue that, the impugned decision is free from any manifest error on the face of record and had not occasioned any miscarriage of justice to the applicant. He stressed that, the Court considered the evidence from both sides together with written and oral submissions from the counsel for the parties before it reached its decision. Thus, the applicant was fully heard.

Mr. Muhangwa finally urged us to dismiss the application with costs for lack of merit.

In his rejoinder, Mr. Nyika argued that all this Court had found to be the alleged forgery, was not in the particulars of the pleadings at the trial court. He reiterated that the applicant was not afforded an opportunity to be heard on those issues. In relation to the said respondent's letter of offer, he argued that the same cannot be rectified as a clerical error as it was considered by the Court and its consequences affected the final verdict.

We have considered the grounds for review, the supporting affidavit, the affidavit in reply and the submissions by the learned counsel for the parties. The crucial issue for our determination is whether the applicant's grounds are sufficient to warrant the Court to review its impugned decision. The Court's powers to review its own decisions are provided under section 4 (4) of the Appellate Jurisdiction Act [CAP 141 R.E. 2019] and the procedure thereof is stated at rule 66 (1) of the Rules as follows:

> *"(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) 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."

The provision under this rule echoes the decision by the Court in **Chandrakant Joshubhai Patel v. Republic** [2004] T.L.R. 2004 that:

"The Court of Appeal has inherent jurisdiction to review its decisions and it will do so in any of the following circumstances (which are not necessarily exhaustive):

(a) where the decision was obtained by fraud;

(b) where a party was wrongly deprived of the opportunity to be heard; and

(c) where there is a manifest error on the record, which must be obvious and self-evident, and which resulted in a miscarriage of justice."

In the instant application, the applicant has invoked sub-rule (1) (a) and (b) of Rule 66 of the Rules, such that, the impugned decision was

based on a manifest error on the face of the record which occasioned injustice to her; and that she was denied an opportunity of being heard.

We shall begin with the complaint that the impugned judgment of the Court has manifest error on the face of the record. The applicant's complaints in support of this issue are as follows: that, the Court relied on the respondent's letter of offer which was not admitted in evidence; the allegations of fraud relied upon by the Court were not pleaded by the respondent; the issue relating to declaration of trust by the applicant was not raised at the trial or in appeal; and the fact that the Court erred to decide that PW2 did not sign exhibit D1 was not the applicant's complaint.

It is settled law that, for a decision to be based on a manifest error apparent on the face of the record, the error must be clear to the reader not requiring long-drawn argument or reasoning. There is a plethora of Court's decisions on that issue, they include the following: **Chandrakant Joshubhai Patel** (supra), **African Marble Company Limited v. Tanzania Saruji Corporation**, Civil Application No. 132 of 2005 and **Masudi Said Selemani v. Republic,** Criminal Application No. 92/07 of 2019 (both unreported). For example, in the first case, the Court cited with approval *Mulla, Indian Civil Procedure Code,* 14th Edition at pages 2335-36 and stated that:

"An error apparent on the face of the record must be such that 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 options... 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...But it is no ground for review that the judgment proceeds on an incorrect exposition of the law...A mere error of law is not a ground for review under this rule. That a decision is erroneous in law is not a ground for ordering review. 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 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."

Back to the instant application, starting with the first ground, it is true that the Court referred to exhibit P1 as a letter of offer of the respondent. However, in the court record, exhibit P1 is the certificate of title of the respondent. Hence, by referring exhibit P1 as a letter of offer it did not mean that the Court discussed something which was not

admitted in evidence. It was just a slip of the pen which did not go to the root of the matter and therefore it did not occasion any injustice.

In relation to the second ground, there is nowhere in the impugned judgment where the Court decided the matter basing on the allegations of forgery. The Court referred to the evidence of DW2 where she was recorded as saying thus *"they discovered that there was forgery involved/committed for backdating the documents."* However, to this piece of evidence, the Court observed at page 12 thus:

> *"It was not clear what DW2 was talking about and the trial judge did not inquire into this important piece of evidence. It seems to us that DW2 was talking about the respondent's letter of offer (exhibit D1) which was made to appear older than the appellant's letter of offer (exhibit P1). However, this portion of DW2's testimony was totally ignored. The only portion of DW2 testimony which was given attention by the trial court was that part when DW2 was talking about the principles which normally guide the status of the letter of offer in the process of grant of the right of occupancy. She mentioned the principles that the first offer was given in May 1986 and for Isaya in July 1986, which means that the first person to be issued with the letter of offer is the rightful owner of the property in question."*

What comes out clearly in the foregoing excerpt from our impugned judgment is that, while the Court did not base its decision on the issue of forgery, it only compared the evidence on record and found that PW2's evidence which was not controverted weighed more when he said that he did not sign the applicant's letter of offer since he was the only person responsible with signing documents for ownership of land in that special project. This is what the Court said at page 11 of the judgment:

> *"It follows then that the credible evidence in the matter at hand is the testimony of the writer himself PW2 who said that the handwriting and signature in the Letter of Offer (exhibit D1) to the respondent are not his handwriting and signature. From the available evidence on record there was no dispute to the fact that a genuine letter of offer is exhibit P1 drawn in favour of the appellant."*

Coming to the third ground, although the trial court did not decide the issue of declaration of trust by the applicant, it is herself who had brought it up in her evidence. Be it as it may, the Court did not base its decision on this issue. This matter was mentioned as an *obiter dictum* after the Court had already decided that the evidence by PW2 proved that the respondent was the rightful owner of the suit land. It stated at page 13 as follows:

> *"Just to cap it all, we also considered the following facts, which were established during the trial*

relating to the respondent (DW1), that, ***one,*** *she was 15 years old in May, 1986 when her father allegedly acquired the land in dispute as her trustee.* ***Two,*** *DW1 did not tender Declaration of Trust (Trust Deed) before the trial court nor was there evidence that a registration of the Declaration of Trust (Trust Deed) against the offer or the Title at the Land Registry was done....."*

Additionally, we have not seen the gist of the applicant's complaint in the fourth ground. This is because, even if the applicant did not say that PW2 was the one who signed her letter of offer, the Court considered the evidence as a whole. In so doing, it found that, since PW2 was the one responsible with signing land ownership documents but he did not sign exhibit D1 then it was exhibit P1 which he had signed that proved ownership to the respondent.

From the above analysis, it cannot be gainsaid that, the applicant's complaints do not fall within the ambit of a manifest error on the face of record. To resolve them, it needs a long-drawn reasoning which does not fall under the purview of a manifest error apparent on the face of the record and therefore not amenable to review.

Further, in the second and third grounds, the applicant has complained that she was denied an opportunity to be heard. However, basing on what we have discussed above in relation to those grounds, the

applicant cannot be heard to complain that she was denied an opportunity to be heard.

To wind up, we are in all fours with Mr. Muhangwa that the applicant's grounds for review can only fit to be grounds of appeal, since it shows that the applicant was aggrieved by the decision of the Court on appeal. Nonetheless, the law is clear that, the Court cannot sit as an appellate court on its own decision. On this stance, we wish to state what the erstwhile Eastern Africa Court of Appeal stated in the case of **Lakhamshi Brothers Ltd v. R. Raja & Sons** [1966] 1 EA 313 stated 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."*

Similarly, in the case of **Karim Kiara v. Republic,** Criminal Application No. 4 of 2007 (unreported), cited to us by Mr. Muhangwa, the Court stated as follows:

> *"The law on applications for review is now well settled. A review is by no means an appeal in disguise whereby an erroneous decision is reheard and corrected (see **Thungabhadra Industries***

> ***vs Andhra Pradesh*** *(1964) SC 1372 as cited by MULLA, 14TH Ed. Pp 2335-36). In a properly functioning legal system, litigation must have finality, thus the Latin maxim of* ***"debet esse finis litium."*** *This is a matter of public policy....."*

The Court went on to state the logic behind the stance as stated in **Marcky Mhango & 684 Others v. Tanzania Shoe Company Ltd & Another,** Civil Application No. 90 of 1999 (unreported), to the effect that matters lawfully determined should not be reopened to put in place certainty of judgments. We stated in **Marcky Mhango & 684 Others** (supra) that:

> *"There should be certainty of judgments.... a system of law which cannot guarantee the certainty of its judgments and their enforceability is a system fundamentally flawed. There can be no certainty where decisions can be varied at any time at the pressure of the losing party and the machinery of justice as an institution would be brought into question..."*

-See also **Tanganyika Land Agency Limited and 7 Others v. Manohar Lal Aggrwal,** Civil Application No. 17 of 2008 (unreported).

In the event, we are settled in our mind that, the applicant has neither demonstrated that the impugned decision is tainted with any

manifest error apparent on the face of the record occasioning injustice to her, nor was she denied any opportunity to be heard.

Consequently, since the applicant has failed to prove her grounds for review, we find the application barren of merit and we accordingly dismiss it with costs.

DATED at **DAR ES SALAAM** this 22nd day of December, 2023

J. C. M. MWAMBEGELE
JUSTICE OF APPEAL

M. A. KWARIKO
JUSTICE OF APPEAL

O. O. MAKUNGU
JUSTICE OF APPEAL

The Ruling delivered this 27th day of December, 2023 in the presence of Mr. Idrissa Juma, learned counsel for the Applicant and Mr. Novatus Muhangwa, learned counsel for the Respondent, is hereby certified as a true copy of the original.

J. E. FOVO
DEPUTY REGISTRAR
COURT OF APPEAL