IN THE COURT OF APPEAL OF TANZANIA
AT DAR ES SALAAM
(CORAM: MKUYE, J.A., KIHWELO, J.A. And MAKUNGU, J.A.)
CIVIL APPLICATION NO. 388/01 OF 2019

EQUADOR LIMITED .....APPLICANT

VERSUS

NATIONAL DEVELOPMENT CORPORATION.....RESPONDENT

(Application for Review from the Judgment of the Court of Appeal of Tanzania, at Dar es Salaam)
(Mziray, Mkuye and Korosso, JJ.A.)

dated the 12th day of July, 2019
in
Civil Appeal No. 136 of 2017
.....

RULING OF THE COURT

24th October & 27th January, 2023

MKUYE, J.A.:

Before us is an application for review which has been predicated under section 4 (4) of the Appellate Jurisdiction Act [Cap.141 R. E. 2019] (the AJA) and Rule 66 (1) (a) and (b) of the Tanzania Court of Appeal Rules, 2009 (the Rules) in which the applicant seeks to have, this Court's decision in Civil Appeal No.136 of 2017 dated 12th July 2019 by Mziray, JA (as he then was), Mkuye, JA and Korosso, JA, reviewed. The application is supported by an affidavit of Giuseppe Trupia, the Managing Director of the applicant.

On the other hand, the respondent has resisted the application through an affidavit in reply deponed by Bakaru Henry, the Corporation Secretary of the respondent.

At this juncture, we find it apt to narrate albeit briefly, the background of the matter.

As it could be gathered from the record, the applicant had leased from the respondent a premise located at Oysterbay and she conducted her restaurant business christened *"La Dolce Vita Restaurant."* According to the record, prior to the events leading to the eviction of the applicant, the parties had engaged each other before the Regional Housing Tribunal (RHT) in a dispute which the applicant was condemned a trespasser. This led to the respondent to initiate action that eventually led to the eviction of the applicant from the premises.

Upon unceremonious eviction of the applicant from the premises by the respondent's agents, the applicant claimed that during the eviction exercise, some of her properties were damaged or went missing. Hence, convinced that she had a recourse against the respondent, she instituted proceedings before the High Court seeking for a declaration that the eviction was unlawful; and for compensation at the tune of Tshs.600,643,900/=.

Upon hearing both parties, the High Court made a finding in favour of the applicant having found that the eviction exercise had been unlawful which resulted into the damage of the applicant's items. As a result, the High Court awarded the applicant reliefs which were prayed for.

Aggrieved, the respondent successfully appealed to this Court which reversed that decision on grounds among others that a trespasser not being a lawful tenant (the applicant), could not lawfully claim for unlawful eviction.

Dissatisfied with that decision the applicant has now preferred the present application on three grounds which can conveniently be paraphrased as follows:

(a) That, there is an error on the face of the record as the Court, in one hand, agreed that the eviction had led to the damage of the applicant's properties, whilst on the other hand, made a finding that the eviction was lawful and that the issue before the High Court had not been the lawfulness or unlawfulness of the eviction but whether or not the applicant's property was damaged.

(b) That, there was an error apparent on the face of the record in that, upon condemning the acts of the agents acting on behalf of the respondent, it was wrong to state that there were remedies available to the applicant in appropriate forum whilst inadvertently missing out that the applicant's cause of action was one of damage to its property.

(c) That the applicant was denied the right to be heard as the Court had raised and determined the rights or otherwise of trespasser, without having heard the parties.

When the application was called on for hearing on 24th October 2022, the applicant was represented by Messrs Michael Mkenda, Hornest Kulaya and Mussa Kiobya learned advocates; whereas the respondent enjoyed the services of Ms. Jenipher Kaaya, learned Senior State Attorney assisted by Messrs Charles Mtae and Gallus Lupogo, both learned State Attorneys.

On that date, when the matter was called on to be heard in the earnest, Mr. Kulaya, in the first place intimated to the Court on the letter they had written to His Lordship, the Chief Justice (the CJ) seeking his indulgence to constitute a Full Bench of the Court in order to resolve the Courts conflicting decisions. He explained that, the Court had issued diverse decisions on the issue of the Justices who could constitute a

panel to deal with review as per Rule 66 (5) of the Rules. He contended that in the matter at hand (Civil Application No.388/01 of 2019) a panel composed by Mwambegele, Fikirini and Makungu JJA ruled in favour of Rule 66 (5) of the Rules which requires the application for review to be as far as practicable heard by the same Justice or Bench of Justices that delivered the judgment sought to be reviewed.

However, it was argued by Mr. Kulaya that few days later the same panel in the case of **Dr. Muzzamil Mussa Kalokola v. The Minister of Justice and Constitutional Affairs and Others**, Civil Application No. 255/01 of 2019 (unreported) which was initially dealt with by Mugasha JA, Ndika JA and Kwariko JA, assumed jurisdiction and heard and determined an application for review in contravention of Rule 66 (5) of the Rules. In other words, the learned counsel was perturbed as to why the same panel constituted by Mwambegele JA, Fikirini JA and Makungu JA took two different positions on the same issue whereby in the first instance they held that dealing with an application for review while none had participated in the decision sought to be reviewed would be defeating the purpose of Rule 66 (5) of the Rules requiring the application for review as far as practicable, to be dealt with by same panel, in the latter case they assumed jurisdiction and determined the

application in contravention of Rule 66 (5) of the Rules or without considering defeating the purpose of the said subrule.

In this regard, the learned counsel contended that, this move was in compliance with the response from the CJ to make such prayer for the constitution of the Full Bench to the Court at the appropriate time. He, therefore, implored the Court to constitute a Full Bench in order to resolve the conflicting decisions. He made reliance on the case of **Kibo Corridor Limited v. Ravji Investment Company Limited**, Civil Application No.322/05 of 2022 (unreported) in which the Court recommended to the CJ to constitute a Full Bench of the Court to deliberate on some pertinent issues in Civil Appeal No. 307 of 2019 although the said issues were not mentioned and it would appear those issues were discovered by the Court itself.

In response, Ms. Kaaya resisted the prayer for the reasons that **one,** that the applicant has not shown the exact issue required to be addressed by a Full Bench of the Court since he makes reference to a letter written to the CJ. **Two**, it has been the practice which is well settled where there are conflicting decisions for the most recent decision to be followed.

In a very brief rejoinder Mr. Kulaya reiterated his submission in chief.

The other issue which cropped up on the 24th October 2022 hearing, was a prayer that was made by Mr. Kulaya for adjournment following a letter from the Attorney General that the parties were engaged in negotiations over the matter. Although the prayer was objected by the adversary party, we are of the considered view, that such issue cannot detain us much now due to the events that have taken place. We do not see justification of dealing with it now since it is overtaken by event, regard being the fact that the Court had, on 26th October 2022, recalled the parties to address it on the merit of the application which was done.

In dealing with the issue regarding constitution of a Full Bench of the Court, we wish to start with reciting the provisions of Rule 66 (5) of the Rules which stipulate as follows:

> *"An application for review* ***shall as far as practicable be heard by the same Justice or Bench of Justices that delivered the judgment or order sought to be reviewed."***
>
> [Emphasis added]

To our understanding, this provision of the law makes a requirement for an application for review as far as practicable to be dealt with by the same Justice or members of the panel which handed down the decision sought to be reviewed. We have underscored the words *"as*

far as practicable" with a purpose. That, the maker of the Rules envisaged a situation where procuring the same Justice or Justices who constituted the former panel may not be practicable due to reasons beyond control. In other words, it gives a room for other Justices who did not previously participate in the matter, to sit and deal with such matters at the review stage. To put it the other way round, it is ideal for the Justice or bench of Justices who made a decision impugned, to sit on its review.

There are situations where two new Justices together with one who sat at the matter being reviewed may be involved in review. This happened in such cases including **Abbas Kondo Gede v. Republic**, Criminal Application No.75 of 2020 and **Hassan Marua v. Tanzania Cigarette Company Limited,** Civil Application no. 338/ 01 of 2019 (both unreported).

Nevertheless, there are situations where different justices may sit in review while they were not involved in the decision reviewed. This is reflected in such cases including **Charles Bode v. Republic**, Criminal Application No.25 of 2019, **Bahari Oilfield Services EPZ Ltd v. Peter Wilson,** Civil Application No. 10/ 07 of 2022, **Isaya Linus Chengula (as Administrator of the Estate of Linus Chengula) v. Frank Nyika (as Administrator of the Estate of Asheri Nyika),** Civil

Application no. 487/ 13 of 2020 (all unreported) and **Dr. Muzzamil Mussa Kalokola** (supra). As it is, it appears to us that both ways have been applied interchangeably without any problem.

Likewise, there are cases where compliance of Rule 66 (5) of the Rules was questioned. One of those cases is that of **Elia Kisalile and 17 Others v. Institute of Social Works,** Civil Application No.187/18 of 2018 (unreported). In that case, one of the parties questioned why one of the Justices who sat on appeal being impugned was not included in the panel assigned to deal with an application for review thereof. The Court was satisfied with the presence of at least one of the Justice who was initially involved and, on the issue relating to constitution of panels, it remarked among others that:

> *"...the assignment of cases to justices and constitution of panel of justices is* ***purely an administrative function vested with Hon. Chief Justice".*** [Emphasis added]

In the matter at hand, we agree with the applicant's counsel that, indeed, the panel of Justices decided in favour of Rule 66 (5) of the Rules regarding who should constitute the panel in this review while in **Dr. Muzzamil Mussa Kalokola's** case (supra), it decided against Rule 66 (5) of the Rules. We think that, in view of what we have endeavoured

to discuss hereinabove, both ways are applicable depending on the prevailing circumstances. And on this, the said panel cannot be blamed.

We also note that in building up the case for constituting a Full Bench of the Court, the learned counsel for the applicant invited us to follow the case of **Kibo Corridor** (supra) where the Court stated that:

> *"Before we take leave, we recommend to the Honourable Chief Justice that he be pleased to constitute a Full Bench of the Court to deliberate on some pertinent issues in Civil Appeal No.307 of 2019".*

We have gone through the entire case. However, we think that it is distinguishable to the case at hand because **one,** the matter involved an application for leave to amend a memorandum of appeal so as to add new grounds and was granted. **Two,** the issues sought to be deliberated by a Full Bench of the Court were not stated. In this regard, we don't think the case of **Kibo Corridor's** case (supra) is of assistance in the matter at hand.

Given the circumstances of the case, we are yet to be convinced to the invitation to constitute a Full Bench of the Court. We say so in view of what we have digressed above, more so, when taking into account that each case is to be decided on its prevailing circumstances. Also, this Court has no mandate to constitute a Full Bench of the Court, because

that is purely an administrative function vested with the Chief Justice. We, therefore, think that even in the matter at hand, the proposition of constituting a Full Bench of the Court can still be considered at an opportune time. After all, in the matter at hand, one of the Justices who dealt with the judgment sought to be reviewed is among the Justices constituting the panel. (See **Elia Kisalile and 17 Others** (supra). We are, therefore, inclined to decline the prayer made by the applicant's counsel.

As already hinted earlier on, parties were recalled on 26th October 2022 to address us on the merit of the application.

When availed an opportunity to elaborate the grounds of review, on the said date, Mr. Mkenda prayed and leave was granted to add yet another ground of review to the effect that:

> *"There is a manifest error on the face of the record as Korosso JA participated in hearing and determination in Civil Appeal No.136 of 2017 while she had previously presided over in Civil Application No. 636 of 2016 in the High Court and made an adverse order against the applicant who had a judgment in her favour in the High Court".*

Thereafter, Mr. Kulaya took over and after having adopted the notice of motion and affidavit in support of the application opted to

begin with ground (c) in which the applicant's complaint is that the parties were not heard on the issue of trespass. Mr. Kulaya argued that the parties had in 1993 entered into five years lease agreement as shown in the Lease Agreement (page 4) and Certificate of Approval No.03016 that was issued by Tanzania Investment Center (TIC) giving her allowance of ten years. He, therefore, contended that in 2001, when this matter arose, the applicant was not a trespasser as she was treated by the Court. While relying on the case of **Philip Tilya v. Vedastina Bwogi,** Civil Application No. 546/01 of 2017 page 4 (unreported), he invited the Court to take judicial notice under section 59 (1) (g) of the Evidence Act, [Cap 6 R.E. 2022] of the Certificate of Approval which to him was a relevant evidence not considered by the Court.

Then, Mr. Kiobya took over and argued the new ground regarding participation of Korosso JA in the decision sought to be impugned while she had previously dealt with Misc. Civil Application No. 636 of 2016 in the High Court and made an adverse order against the applicant. The learned advocate submitted that initially, before this Court there was Civil Application No. 249 B of 2016 between **National Development Corporation** and **Equardor Limited** (unreported) concerning stay of execution but was struck out for being incompetent (Mbarouk, Mjasiri and Kaijage, JJA). Then, four months later, on 23rd September 2016, a

similar application for stay of execution was lodged by the respondent in the High Court and upon hearing both parties, Korosso J. (as she then was) issued an adverse order against the applicant. It was, therefore, Mr Kiobya's argument that, under those circumstances Korosso JA had no jurisdiction to deal with the appeal before this Court as she did. However, on being prompted by the Court whether the decision of Korosso J (as she then was) had any bearing to the appeal before the Court, he conceded that it was not.

Although the counsel for applicant did not amplify on grounds (a) and (b) of the notice of motion, the applicant, in the affidavit has basically, reiterated what is stated in the said grounds of the notice of motion.

In para 9.1 of the affidavit, the deponent has assailed the Court because, after having found that the eviction carried out by the respondent's agents led to the destruction of some applicant's properties, on the other hand, it found that the eviction was not unlawful. She maintained that, that was an inadvertence since at the High Court the issue was not on lawfulness or unlawfulness of the eviction but rather whether in the process the applicant's properties were damaged or not.

The applicant in paragraph 9.2 of the affidavit complains that after the Court had found that *"some of those executing the eviction of the respondent did unlawful acts that led to the destruction and damaging of some of the respondent's properties and further that any unlawfully acts done by the staff and agents of the appellant leading to damage of the respondent's properties should be condemned,"* it erred to state on the other hand that *"there are remedies available for the respondent to seek in the appropriate forum to deal with the issue."* This is so, because, the applicant's cause of action in the suit was the complaint that its properties were damaged during the eviction process.

In response, Mr. Mtae in the first place adopted their affidavit in reply to form part of their submission. Having done so, he reiterated that the Court has power under section 4 (4) of the AJA and Rule 66 (1) Rules to review its decision and that such power is to be invoked under exceptional grounds as prescribed under Rule 66 (1) (a) to (e) of the Rules.

He submitted that, in this application, the notice of motion is based under Rule 66 (1) (a) and (b) meaning that there is a manifest error on the face of the record; and denial of the right to be heard. In relation to manifest error, he contended that it must be obvious as was stated in the case of **Attorney General v. Mwahezi Mohamed (as**

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Administrator of the Estate of the Late Dolly Maria Eustace) and 3 Others, Civil Application 314/12 of 2020 page 13 to14 (unreported). He added that a review is not an appeal in disguise (page 16) as the Court does not sit on appeal of its own decision (page 25-26).

Mr. Mtae went on arguing that, looking at the grounds raised by the applicant, they all do not fit to move the Court to review its decision instead they seek the Court to review evidence while it has no such jurisdiction. He dimissed the issue relating to certificate of approval and lease agreement contending that, it is a new evidence. While placing reliance on the case of **Justus Tihairwa v. Chief Executive Officer, TTCL,** Civil Application No.131/01 of 2019 page 9 (unreported), Mr. Mtae contended that there was no error on the face of the Court's decision sought to be reviewed.

As regards the issue that the parties were denied the right to be heard on the issue of trespass, it was Mr. Mtae's submission that the said issue was not raised by the Court *suo mottu* but it was a second ground of appeal as reflected at page six (6) of the decision. In any case, Mr. Mtae contented, the parties were heard as shown at pages 10-11 where Mr. Ngalo, learned advocate for appellant made his submission and at pages 17-18 where the advocate for the respondent made his submission and the Court made its deliberations at page 25 of the

judgment. He stressed therefore, that it was not true that the parties were denied the right to be heard but they were availed such opportunity.

With regard to the new ground of appeal relating to Korosso JA's participation in the case at the High Court, it was Ms. Kaaya who responded. She prefaced her submission by reiterating that essentially the Court has jurisdiction to review its decision, judgment or order but does not have jurisdiction to review something outside its decision. To bolster her argument, she placed reliance on the case of **Mwahezi Mohamed (as Administrator of the Estate of the Late Dolly Maria Eustace) and 3 Others** (supra) page 6.

In relation to the issue that Korosso JA had dealt with the matter at the High Court, she countered it contending that such objection ought to have been raised in appeal and not at this stage. Otherwise, failure to do so at the appropriate time is translated that the applicant waived her right to complain against biasness. Reliance was made on the case of **Ramadhani Mlindwa v. Republic**, Criminal Appeal No.158 of 2015 page 8 (unreported), where the Court discussed the essence of biasness and observed that it has two exceptions, one, being necessity and, the other one, waiver. In relation to the waiver the Court stated that:

> *"Secondly, an objection should* ***be taken as soon as the prejudiced party has knowledge of the bias. If no such objection is raised, and the proceedings are allowed to continue without disapproval it will be held that the party has waived his right to complain about bias."***
> [Emphasis added]

The learned Senior State Attorney went on to submit that the decision to which Korosso, JA sat on appeal was not the subject in Civil Application No.636 of 2016 which she dealt with. Hence the issue of prejudice to the applicant could not arise.

She insisted that in the application for review under Rule 66 (1), the conditions set out in that Rule must be complied with and that a review is under such exceptional circumstances as was stated in the case of **Wambura Evarist and 6 Others v. Sadock Dotto Magai and Another,** Civil Application No.127 of 2011 (unreported) and that in this case there are no exception circumstances.

In the end, she implored the Court to find that the application is not merited and dismiss it with costs.

In rejoinder, Mr. Kulaya was fairly brief. He contended that although valuation report and lease agreement were discussed, the Court did not make determination on them. He argued that the valuation

was done by UCLAS and confirmed by Government Valuer. It was, therefore, his argument that there was an error on the face of the record because when the Court dealt with an appeal it did not deliberate on the issue that the eviction was unlawful but it based its decision on that issue that the applicant was a trespasser while she was not.

In addition, Mr. Kiobya contended that the case of **Ramadhani Mlindwa** (supra) is distinguishable as it deals with two exceptions which are necessity and waiver unlike in this case. He further argued that, should the Court grant the application it should do so with no order as to costs.

We have considered the rival submissions and, we think the issue for consideration by this Court is whether the applicant has managed to make up her case to warrant this Court to review its judgment. It is without question that the application is brought under section 4 (4) of the AJA and Rule 66 (1) (a) and (b) of the Rules. While section 4 (4) of the AJA empowers the Court to review its own judgment, Rule 66 (1) (a)-(e) of the Rules provides for the confines of such power or rather provides for the grounds in paragraphs (a) to (e) under which the application for review can be brought. It is couched in mandatory terms 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) 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." [Emphasis added]

According to the grounds of review set out in the notice of motion it is clear that the Court is invited to review its decision based on a manifest error on the face of the record which has resulted in the miscarriage of justice and that the party was not afforded an opportunity to be heard.

Regarding the error on the face of the record, it was elaborated in the case of **African Marble Company (AMC) v. Tanzania Saruji Corporation,** Civil Application No.132 of 2005 (unreported) while quoting Mulla, **Indian Civil Procedure Code**, 14th Edition as hereunder:

"an error apparent on the face of 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".

Generally speaking, review is limited in scope. It is not open ended in the sense that, **one**, in review, the Court would not look at the fact that it would not have acted as it had, if all the circumstances were known – See **Atilio v. Mbowe** [1970] HCD No.3. **Two**, a review of the judgment of the Court being final would be exceptional - See **Blue line Enterprises Ltd v. The East African Development Bank**, (EABD) Civil Application No.21 of 2012 (unreported). **Three,** mere disagreement with a judgment cannot be the ground for review – See **Kamlesh Varma v. Mayawati and Others**, Civil Application No. 453 of 2012 (EAC); **Four**, a review is not a backdoor method for unsuccessful litigants to re-argue their lost case or rather seeking a reappraisal of the entire evidence on record. This is because it would be tantamount to allow the Court to exercise its appellate jurisdiction – See **Mirumbe Elias @ Mwita v. Republic**, Criminal Application No.4 of 2015 (unreported) while citing an Indian case of **Meera Bhanja v. Nirmala Kumari Choudury** (1955) ISCC India). **Five,** power of review is used

for correction of a mistake but not to substitute a view in law – **Peter Ng'omango v. Gerson A.K. Mwanga and Another**, Civil Application No.33 of 2002 (unreported). **Six**, the fact that one of the parties is aggrieved with the outcome is not a ground for review as doing so would be to abuse the court process and also would result in endless litigation, since, like life, litigation must come to an end – See **Tanganyika Land Agency Limited and Others v. Manohar Lal Aggrwal,** Civil Application No.17 of 2008 (unreported).

It is also important to note that in review, the Court does not sit to re-evaluate the evidence as was rightly argued by Mr. Mtae and Ms Kaaya learned counsel – See also **Karim Ramadhani v. Republic** Criminal Application No.25 of 2012 pages 4 to 5 (unreported).

The applicant's first complaint is that there is an error apparent on the face of the judgment based on three grounds that is, **one**, after having found that there was evidence of destruction of the applicant's properties and that the eviction carried by the respondent's agents led to the destruction of such properties, it was wrong for the Court to find that the eviction was not unlawful (page 26 of the judgment). According to the applicant, this was a contradiction as before the High Court the issue was not on lawfulness or unlawfulness of the eviction but whether or not the applicant's properties were damaged in the process of the

eviction. **Two**, after having found and held (page 27 of the judgment) that some respondent's agents who executed the eviction did unlawful acts which led to destruction and damaging of the applicant's properties and condemned such acts, it was an error for the Court to state that there were remedies available for the applicant to seek in the appropriate forum to deal with the issue. The applicant was of the view that, the cause of action on the matter at hand was that her properties were damaged during the eviction process. **Three,** Korosso JA ought not to be involved in Civil Appeal No. 136 of 2017 since she had previously dealt with Misc. Civil Application No. 636 of 2016 in the High Court concerning the same parties.

With regard to the first two grounds, it is true that, those were among the findings of the Court. That, the eviction carried out by the respondent's agents caused damage to the applicant's properties; and that the eviction was lawful since the applicant was a trespasser. We do not see any contradiction as the applicant seems to suggest. This is so because the basis of the Court's decision was that the applicant was a trespasser, and that, she being not a lawful tenant, she could not claim for unlawful eviction. It also implies that, even if her properties were damaged in the process of eviction, there could be no redress against the respondent. See **Lawrence Magesa t/a Jopen Pharmacy v.**

Fatuma Omary and Another, Civil Appeal No. 333 of 2019; and **Princess Nadia (1998) Ltd v. Remency Shikusiry Tarimo,** Civil Appeal No. 242 of 2018 (both unreported). Thus, we are of a considered view that, the Court's further holding that the applicant could invoke other remedies available to seek redress cannot be faulted.

In any case, looking at the said claim, having so determined by the Court, it is our considered view, as was rightly argued by Mr. Mtae, that this is a situation where the applicant is attempting to challenge the finding of the Court in an appeal through the back door, which is not within the mandate of this Court in review – See **Mirumbe Elias @ Mwita's** case (supra).

With regard to the new ground, concerning the involvement of Korosso JA on the matter she previously determined, we note from the letter by the applicant addressed to the CJ that she dealt with Misc. Civil Application No. 636 of 2016 involving the same parties in the High Court and issued an adverse order against the applicant. The said application was on stay of execution of the decree of the High Court which was filed after a similar application that was filed in Court (Civil Application 145 B of 2016 (Mbarouk, Mjasiri and Kaijage JJA) had been struck out for being incompetent. We do not wish to make any comment on whether or not the application before the High Court was proper for a simple

reason that it is overtaken by events and that is not a matter before us. It is our considered view that even if we deal with it, it may amount to a mere academic exercise.

Be it as it may, it is notable in the record that Korosso JA, had dealt with Civil Appeal No. 136 of 2017, the subject of this application. Of course, we are mindful of the provisions of Article 119 of the Constitution of the United Republic of Tanzania which prohibits a Justice of Appeal to sit in a judgment for which he/she had adjudicated. The said Article stipulates as follows:

> *"119. No Justice of Appeal shall have jurisdiction to hear any matter in the High Court or in any magistrates' court of any grade:*
>
> *Provided that where a Judge of the High Court is appointed Justice of Appeal he may, notwithstanding such appointment, discharge his functions in the High Court until he completes the preparation and delivery of the decision or until he completes any other business in connection with matters which he had started hearing before his appointment as a Justice of Appeal, and for that purpose it shall be lawful for him to deliver judgment or any other decision concerned in the exercise of the jurisdiction he had before he was appointed Justice of Appeal;* ***provided that***

where ultimately that judgment or decision is challenged by way of appeal to the Court of Appeal, then in such circumstances that Justice of Appeal shall not have jurisdiction to hear that appeal." [Emphasis added]

According to the issue raised, at the High Court Korosso JA dealt with Misc. Civil Application No. 636 of 2016 involving the same parties. That application was for stay of execution and was decided adversely against the applicant herein. To our recollection, that decision was not appealed against nor was it the one which Korosso JA sat to determine in the Court. In our considered view, much as it would have been more prudent for her not to sit or participate in Civil Appeal No. 136 of 2017, we are settled in our mind that her participation did not occasion any miscarriage of justice since it did not directly emanate from Misc. Civil Application No. 636 of 2016 determined by Korosso J. Strictly speaking, the judge had jurisdiction to deal with it.

At any rate, we think, as was submitted by the learned Senior State Attorney, had the applicant sensed any biasness on the part of the judge, she ought to have raised it before the appeal was heard by the Court instead of raising it at this stage of the proceedings. Having failed to do so at that particular time, she is treated as having waived that

opportunity - See **Ramadhani Mlindwa's** case (supra). In this regard, we find this ground for review unmerited and we dismiss it.

The other complaint by the applicant is on the parties' denial of the right to be heard on the issue of trespass alleging that there was evidence that the applicant had entered in a five-year Lease Agreement and was issued with a Certificate of Approval from the Tanzania Investment Centre (TIC) which the Court was invited to take judicial notice under section 59 (1) (g) of the Evidence Act. On the adversary, apart from viewing it as a new evidence, they submitted that the parties were heard on the issue of trespass before the Court determined on it.

In the first place, we have scanned the record of this application, in particular, the judgment sought to be impugned but we have been unable to glean where the said Lease Agreement or Certificate of Approval were referred in it. In the said decision, the Court found as among undisputed fact that the applicant at first entered into the suit premises innocently or with consent from the respondent as was conceded by the parties. Nevertheless, although the said documents were not part of the material before us, we ventured to look at those documents from the original file however, to our dismay, they do not reflect what the learned counsel tried to convince the Court that the Certificate of Approval issued by TIC gave the applicant an allowance of

ten years so as to connote that at the time of eviction, the applicant was a lawful tenant. At most, what is gathered from the said Certificate is that it granted the applicant the period of Duty and Sales tax exemption from November 1993 to 30th June 1995 and the period of tax holiday from 1st July 1995 to 23rd June 2000. It seems to us this was intended to mislead the Court.

In this regard, even the learned counsel invitation to the Court to take judicial notice of the documents on the basis of **Philip Tilya** (supra) where the Court considered the import of section 59 (1) (g) of the Evidence Act cannot stand under the circumstances.

The other complaint is that the Court made determination basing on the fact that the applicant was a trespasser without being accorded an opportunity to be heard. However, we agree with Mr. Mtae that that is not true. We say so because, before the Court, the issue of trespass was raised in ground no. 2 which read as follows:

> *"2. That the Honourable trial judge misdirected himself for entering judgment in favour of the respondent (the applicant herein) who was found to be a trespasser into the appellant's premises."*

The arguments by the appellant (now respondent) are reflected at pages 10 - 12 of the typed judgment where her submission was to the

effect that the law did not allow a trespasser to be evicted unlawfully but there was a process provided by the law and that the consequences to such unlawful actions in eviction were to be compensated by damages; and it was further argued that after looking at the evidence and the circumstances of the case, an order for compensation that was granted by the lower court to the respondent (the applicant herein) was erroneous.

It was also argued that the applicant was found by the Regional Housing Tribunal to be a trespasser the fact which was acknowledged by the High Court that the applicant was found to be a trespasser. They argued further that, the fact that she was found to be a trespasser, it meant that she had no right to claim for compensation from the respondent on being evicted. That, the fact that the respondent was ordered to pay her mesne profit of USD 3,000.00 per month meant that the respondent was condemned to pay compensation to a trespasser from 1st January 1999 which meant further she was to be paid for illegally staying in the suit premises.

The respondent (the applicant) at page 17 through Mr. Ngalo, learned advocate argued among others that the law did not allow the trespasser to be evicted unlawfully and that there is a process of the

law. And that the consequences for unlawful actions in eviction has to be compensated by damages.

Then from pages 25 to 27 the Court reached to a finding that the applicant was a trespasser having been declared so and that her eviction was lawful there being an order for her eviction from the suit premises. And that, if there were unlawful acts done by the staff or agents of the respondent leading to damage of the applicant's property then she could invoke other remedies available in the appropriate forum to deal with the issue.

It is, therefore our view that, with this revelation, it is not and cannot be true that the parties were not availed with an opportunity to be heard on the issue of trespass as it is glaringly clear that both parties submitted on it. At most, what can be revealed is that the applicant is making an attempt to challenge the finding of the Court by way of appeal through the back door because the Court made its finding, after having heard the parties, that the applicant being a trespasser could not lawfully claim for unlawful eviction. This implies that even if the applicant's properties were damaged in the eviction process, there could be no redress. On this we are guided by the case of **Lawrence Magesa t/a Jopen Pharmacy v. Fatuma Omary and Another**, Civil Appeal No. 333 of 2019 and **Princess Nadia (1998) Ltd v. Remency**

Shikusiry Tarimo, Civil Appeal No. 242 of 2018 (both unreported). For instance, in the latter case it was specifically stated as follows:

> *"We once again agree with the learned advocate for the respondent that* ***since it was proved that the appellant was a trespasser, she had no right to benefit from her wrongful act. At worst, the appellant assumed the risk arising from her unlawful occupation in the premises. Just as she was not entitled to any notice before eviction, she had no right to claim any compensation from the forceful eviction."***
>
> [Emphasis added]

In this regard, we find that the applicant claim that they were denied opportunity to be heard unmerited and we dismiss it.

With the foregoing, we neither see any manifest error in the impugned decision nor denial of the right to be heard to the parties. What is clear is that the applicant is bringing an appeal in disguise because she is dissatisfied with the decision of the Court which reversed the High Court decision in her favour. This is not proper. We took this stance in the case of **Tanganyika Land Agency Limited** (supra) where we stated:

"For matters ***which were fully dealt with and decided upon 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."*

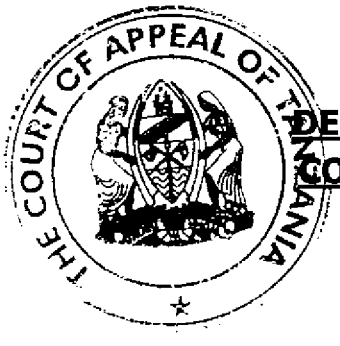
In the light of what we have discussed above, we are settled in our mind that the applicant has failed to make up her case to warrant the grant of review. Hence, the application has no merit and we, therefore, dismiss it with costs.

It is so ordered.

DATED at **DAR ES SALAAM** this 9th day of January, 2023.

R. K. MKUYE
JUSTICE OF APPEAL
P. F. KIHWELO
JUSTICE OF APPEAL
O. O. MAKUNGU
JUSTICE OF APPEAL

The ruling delivered this 27th day of January, 2023 in the presence of Mr. Mussa Kiobya learned advocate for the Applicant and Mr. Gallus Lupogo learned State Attorney for the Respondent, is hereby certified as a true copy of the original.



A. L. KALEGEYA
DEPUTY REGISTRAR
COURT OF APPPEAL