IN THE COURT OF APPEAL OF TANZANIA

AT DAR ES SALAAM

(CORAM: MKUYE J.A., MWAMPASHI, J.A. And MURUKE, J.A.)

CIVIL APPLICATION NO. 779/16 OF 2022

AFRISCAN GROUP(T) LTD..... APPELLANT

VERSUS

DAVID JOSEPH MAHENDE..... RESPONDENT

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

(Mkuye, Kihwelo, And Makungu JJA,.)

dated the 15th day of December, 2022

in

Civil Appeal No. 200 of 2016

RULING OF THE COURT

23rd April & 16th May, 2024

MURUKE, J.A:

The applicant, Afriscan Group (T) Ltd, seeks to review the judgment of the Court dated 15th December 2022 in Civil Appeal No. 200 of 2016 which reversed the decision of the High Court in Commercial Case No. 86 of 2013. The applicant is moving the court to review its own decision based on the ground that there is manifest error on the face of the record resulting in miscarriage of justice. The notice of motion is supported by two affidavits sworn by Mr. Ulf Nilsson and Mr. Joseph Ishengoma Rutabingwa, learned counsel for the applicant. Apart from that, the applicant's counsel filed written submissions and list of authorities. On the other side, the respondent, in resisting the application, has filed an affidavit in reply sworn

by Mr. Samson Mbamba, learned counsel, who also filed his submission and a list of authorities.

The grounds upon which the present application is founded are as hereunder reproduced: -

1. *The finding that PW1 Ulf Nilsson was not sworn at the time of giving evidence was raised by the court suo mottu and did not form the grounds of appeal. It was raised upon applicant's counsel closure of oral submission in reply and he was not afforded opportunity to respond to the submission of counsel for the respondent.*
2. *The court did not verify the original record of the High Court Commercial Division and the electronic recording, by pray back to ascertain the authenticity of the proceedings under the record of appeal in particular what transpired on 19th October, 2015 as per the official record of hearing consisting of an electronic recording extracted during the trial and supplied to the applicant's (then plaintiff's) counsel on 24th October, 2015 in terms of rule 59 of the High Court Commercial Division Procedure Rules 2012 as per exchequer receipt number 11693763 covering 19/10/2015, 20/10/2015 and 21/10/2015 copies of which are attached here to as per Rule 56 of the High Court (Commercial Division) Procedure Rules 2012.*
3. *The witness statement of PW1 Ulf Nilsson was properly taken and duly sworn in line with the 3rd schedule to the Commercial Court Rules 2012 forming the witness's evidence in chief and the same ought to have been given the necessary*

consideration in the event of absence of a proper taste on cross-examination. A witness statement is worth of consideration oven without cross-examination.

4. *The hearing of the appeal had proceeded before a different panel whereas there was a clear order of the court arising from the order of the court dated 13th July, 2022 that hearing should proceed before a panel that had originally ordered taking of additional evidence and there was no order why the directions were never adhered to as they were never varied.*
5. *In the alternative to the above, even if it is to be taken that PW1 Ulf Nilsson was not sworn, the mistake and or omission was by the trial court and not occasioned by the parties. The court would have proceeded to decide the appeal on the available evidence excluding the evidence of PW1 Ulf Nilsson and or exclude part of the evidence forming cross-examination or order a retrial of the suit.*
6. *There were essential documents tendered as exhibits by other witnesses to establish the claim in the absence of those allegedly expunged, such as exhibit P3 which was also tendered by PW2 Raymos Zakayo and exhibit P5 tendered by PW3 Farida Nilsson.*

When the application was called on for hearing, the applicant was represented by Mr. Joseph Ishengoma Rutabingwa, whereas the respondent had the services of Mr. Samson Mbamba, both learned counsels.

Upon being availed an opportunity to amplify the grounds of application, Mr. Rutabingwa adopted the notice of motion, the two affidavits

and written submission earlier filed, to form part of his submission. It was submitted for the applicant that, at page 24 of the record of the Review, (judgment of the Court) it was found that the evidence of PW1 Ulf Nilsson was not taken on oath, contrary to the proceedings of 19th October, 2015, which is anexture 'B' to the supporting affidavit, in which at page 30 of record of review reads that;

> "PW1 Ulf Nilsson"
>
> *Ulf Nilsson 72 years old, I reside at Kimweri Road 52 Kinondoni District, Christian. I swear that what I shall state shall be truth the all and nothing but the truth so help me God".*

It was Mr. Rutabingwa's submission that PW1 Ulf Nilsson was sworn at the time of his appearance for cross – examination on 19th October, 2015 as confirmed by him in his affidavit and duly seen in the extracted electronic recording which could not be verified on the date of the hearing of the appeal before the Court as it was not sought and was not available.

Mr. Mbamba for the respondent, submitted to the contrary, insisting on principles guiding review, and that grounds for review should not be equated with an appeal, citing numerous decisions supporting his stand that, review should not be granted generally as there are no special circumstances, to warrant the same.

Before we resolve onto the grounds of the application, we find it necessary, to first lay down the principles governing the Court's power to review its decision. Power of the Court to review its decisions constitutes an exception to the general rule that once a decision is composed, signed and pronounced by the Court, the Court ceases to have control of the case and it lacks jurisdiction to alter or change it. To be specific, a review is called for only where there is a glaring and patent mistake or grave error which crept in the earlier decision, by error. Needless to overemphasize that the finality of the decision should not be reopened or reconsidered so as to let the aggrieved party fight over again the same battle which has been fought and lost. It is obvious therefore that the court's power of review is limited. We are bound by the principles laid down by rule 66(1) (a) to (e) of the Rules that lay down specific grounds upon which an application for review may be based.

Rule 66 of the Rules empowers this Court to review its own decisions. The parameters under which the Court can exercise such power are provided for under the said Rule 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; or

(c) the court's decision is a nullity; or

(d) the court had no jurisdiction to entertain the case; or

(e) the judgment was procured illegally, or by fraud or perjury".

The conditions set out under the above cited provision were emphasized in the case of **Roshan Meghee & Company Limited v. Commissioner General of Tanzania Revenue Authority** [2017] T.L.R. 482 in which the Court stated that:

> *"The Court has time and again held that an application for review will be entertained only if it falls within the grounds stipulated under the provisions of Rule 66 (1) of the Court of Appeal Rules".*

In this case, the applicant has predicated his notice of motion under paragraph (a) of sub rule (1) of Rule 66. It implies, therefore, that as it was argued by Mr. Rutabingwa, there is a manifest or apparent error on the face of the record which resulted in the miscarriage of justice.

As to what entails a manifest error on the face of the record, the law is now settled. It was weil stated in the case of **African Marble Company**

Limited (AMC) v. Tanzaia Saruji Corporation TSC, Civil Application No. 132 of 2005 (unreported) as follows:

> *"An error apparent on the face of the record must be such as can be seen by one who writes 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...".*

(See also **Chandrakant Joshubhai Patel v. Republic**, [2004] T.L.R. 218)

It should be also emphasized here that, an application for review is really meant to address the irregularities in a decision sought to be reviewed which have resulted into injustice to the aggrieved party. Thus, it is not an appeal in disguise to a party who is dissatisfied with the decision of the Court.

The major complaint raised on ground 1, 2, 3, and 5th is on the evidence of PW1, Ulf Nilsson. According to the record, PW1, did indeed give evidence on oath, contrary to the observations by the Court on appeal. The applicant has attached to the application the transcription of the electronic recording of the proceedings of the trial court which indicate that PW1 gave testimony under oath, as seen at page 30 of the records line 14.

This Court in the case of **Zanzibar Telecom Limited v. Petrofuel Tanzania Limited**, Civil Appeal No. 69 of 2014 (unreported), observed that in the Commercial Division of the High Court it is the electronically recorded evidence that matters and not the handwritten notes.

According to the review records before us, at page 30 it appears that PW1 gave evidence under oath. In our opinion, the situation would have been different if the Court was availed with the transcribed proceedings at the hearing of the appeal. It would not have observed as it did. Therefore, the complaint has merit.

The complaint on ground four of motion is regarding the previous order of the Court directing that the appeal, subject of this review, be placed for determination by the same panel members who had ordered for the taking of additional evidence. In our considered opinion this was not brought before the attention of the Court on appeal. More so, it does not fall within the ambits of Rule 66(1) of the Rules.

Further on ground six the applicant is also questioning the outcome of the appeal; the Court allowed the appeal. The applicant's observations are that the appeal should have proceeded on the available evidence or for the Court to exclude the evidence forming part of cross examination or ordered a retrial. In view of what we have found above, particularly on grounds, 1, 2, 3 and 5, we do not see any need to consider this ground.

In the event, we allow the application and review our decision dated the 15th day of December, 2022. We thus order the appeal to be heard by the Court. It is so ordered.

DATED at **DAR ES SALAAM** this 14th day of May, 2024.

R. K. MKUYE
JUSTICE OF APPEAL

A. M. MWAMPASHI
JUSTICE OF APPEAL

Z. G. MURUKE
JUSTICE OF APPEAL

The ruling delivered this 16th day of May, 2024 in the presence of Mr. Petro Frederick Musimwa, learned counsel for the applicant also holding brief for Mr. Samson Mbamba, learned counsel for the respondent, is hereby certified as a true copy of the original.

A. S. CHIGULU
DEPUTY REGISTRAR
COURT OF APPEAL