IN THE COURT OF APPEAL OF TANZANIA

AT DAR ES SALAAM

(CORAM: SEHEL, J.A, KIHWELO, J.A. And MDEMU, J.A.)

CIVIL APPLICATION NO. 98/17 OF 2022

SALMIN MBARAK SALIM
t/a EAST AFRICA INVESTMENT ..... APPLICANT

VERSUS

RAS INVESTMENT..... RESPONDENT

(Application from the decision of the High Court of Tanzania
Land Division at Dar es Salaam)

(Msafiri, J.)

dated the 18th day of January, 2022
in
Land Review No. 331 OF 2021

.....

RULING OF THE COURT

11th & 2nd July, 2024

KIHWELO, J.A.:

In this application, the applicant through a notice of motion under section 4(3) of the Appellate Jurisdiction Act, Cap. 141 as well as rule 65 (1), (2), (3) and (4) of the Tanzania Court of Appeal Rules, 2009 ("the Rules") is seeking to challenge the decision of the High Court of Tanzania, Land Division (Msafiri, J.) in Land Review No. 331 of 2021 in which the High Court dismissed the application for review on account that there was no apparent error on the face of record in the ruling in respect of Reference No. 7 of 2020 which was the subject of review.

We find it imperative to briefly give a historical account of this matter, which is, ostensibly, short and not very difficult to comprehend. It all started with Land Case No. 1 of 2015 (the suit), before the High Court of Tanzania, Land Division, in which the applicant lodged the suit against the respondent, the Permanent Secretary, Ministry of Works, Tanzania National Roads Agency (TANROADS) concerning application for permission to develop temporary parking lots within the road reserve area, along Nyerere/Chang'ombe road adjacent to Plot No. 2701/1B (the premise in dispute), in which both the applicant and the respondent claimed to have ownership interests as joint owners with National Housing Corporation. The applicant blamed TANROADS for illegally and unjustifiably refusing his application and instead, granting the respondent. He therefore, urged the High Court to compel TANROADS by way of mandatory injunction to grant him the sought permission. Furthermore, he implored the High Court to declare the grant of permission to the respondent illegal and ineffectual and that the respondent has no capacity to develop a parking lot on the premise in dispute.

Conversely, the respondent refuted entirely the applicant's claims and defended the decision of TANROADS to grant it permission to develop a parking lot on the premise in dispute. During trial, the applicant produced

three witnesses to build up its case, whereas the respondent produced one witness to disprove the case against it. At the height of the trial, on the 1st November, 2019, the court came to the conclusions that, the applicant did not produce any document to establish its title on the plot under discussion and therefore the court remained with no factual materials on the basis of which it could determine whether or not the applicant had any necessary standing to institute the suit. Consequently, the court found the suit incompetently before the court for want of necessary standing. It accordingly struck it out with costs.

Subsequently, the respondent lodged a Bill of Costs No. 186 of 2019 claiming an amount of TZS. 27,050,000.00 as the amount to be taxed being instruction fees, attendance and disbursement. Upon listening to the rival submissions of the parties, the Taxing Master (Tengwa) taxed the entire amount to the tune of TZS. 11,105,000.00. Feeling that justice was not done to him, the applicant lodged Reference No. 7 of 2020 in terms of Order 7 (1) and (2) of the Advocates Remuneration Order, Government Notice No. 264 of 2015 (G.N. No. 264 of 2015) seeking to reverse and set aside the decision of the Taxing Master dated 1st July, 2020. The application for reference was disposed through written submissions which were duly filed by the parties. Upon considering the submissions by the parties, the

presiding Judge on reference, Maghimbi, J., on 3rd May, 2021 taxed off TZS. 3,000,000.00 from the instruction fees of TZS. 9,000,000.00 to TZS. 6,000,000.00 while leaving the other amounts on filing fees and attendance undisturbed.

Still disgruntled, the applicant further lodged another application that is Land Review No. 331 of 2021 in terms of sections 78 (1) (b), 95 and Order XLII rules 1 (b) and (3) of the Civil Procedure Code, Cap 33 (the CPC). In the application for review, the applicant sought the High Court to review the ruling and order of the court in Reference No. 7 of 2020 on the grounds among others that, there was an apparent error on the face of record in awarding the respondent TZS. 6,000,000.00 as instruction fees without making any remarks or reason. Having considered the submission by the parties, the High Court (Msafiri, J.) was satisfied that there was no apparent error on the face of the record as the purported error is subject to more than one interpretation or opinion. In her view, the grounds for review and the submissions in support are more suited for appeal than review. Consequently, the application was dismissed with costs. The applicant was still aggrieved.

On 16th March, 2022 the applicant lodged the present application through the services of Mr. R.B. Shirima, learned counsel of AKSA

Attorneys, seeking the Court to call for and examine the record of proceedings, ruling and order in Land Review No. 331 of 2021 for purposes of satisfying itself as to the correctness, legality and propriety of that decision or any other decision made thereon. The application was premised on the following crystalized grounds:

> *"(1) Since the High Court's rejection of the review is not appealable, Revision is the only available remedy to the applicant;*
>
> *(2) The High Court erred to award the respondent TZS. 6,000,000.00 as instruction fees without there being EFD receipt, manual receipt or any receipt or document to support it in the Bill of Costs;*
>
> *(3) The High Court erred to find that the respondent was entitled to costs having found that the award of instruction fees by the Taxing Master was exorbitant and at a high side not commensurate to the work done.*
>
> *(4) The High Court erred to find that the award of attendance and filing fees remain intact without assigning any reason; and*
>
> *(5) The High Court erred to hold that the grounds of review ought to be canvassed in appeal and not in review."*

The application has been supported by an affidavit duly sworn by the applicant to fortify his quest. For its part, on the adversary side, the

respondent filed an affidavit in reply duly sworn by Mr. William Mang'ena, learned counsel of FB Attorneys, gallantly contesting the application.

At the hearing before us, parties were represented by the same counsel who represented them before the High Court. The learned counsel prayed to adopt the written submissions which were earlier on lodged in court in terms of rule 106 of the Rules, without more.

We prompted Mr. Shirima, on the relevance, necessity and propriety of the additional ground of appeal which he sought to pray for the leave of the Court to introduce and argue as an additional sixth ground in terms of rule 106 (3) of the Rules, as it was not taken in the notice of motion, to which he unhesitatingly prayed to withdraw it and we accordingly noted so.

At the outset, the applicant in its written submissions prefaced the submission by giving an abridged background of the appeal before us and went ahead to submit that, the applicant lodged the instant application before the Court, since it was the only available remedy under the law citing to us Order XLII, rule (7) of the CPC as well as the cases of **Halais Pro-Chemie v. Wella A.G** [1996] T.L.R. 269 and **Hassan Kibasa v. Angelisia Chang'a** (Civil Application No. 405 of 2018) [2021] TZCA 148 (30 April, 2021: TanzLII) for the legal proposition that a party to the proceedings in the High Court can invoke the revisional jurisdiction of the

Court in matters which are not appealable. The counsel for the applicant took the view that, the applicant was justified to lodge the instant application for revision.

The applicant chose to argue the second, third, fourth and fifth grounds of revision conjointly. Arguing in support of these grounds of revision, the applicant contended that, in the impugned application for review which was decided by Msafiri, J, the applicant sought to challenge the decision of the High Court (Maghimbi, J.) in reference, on account that, the High Court would not have acted as it did, if all the circumstances of the case were known. Illustrating, the applicant argued that, in terms of Order 48 of G.N. No. 264 of 2015, the respondent was not entitled to costs since more than one-sixth of the total amount of the Bill of Costs exclusive of court fees was disallowed. In the applicant's view, the essence of this provision is to prohibit exaggeration or inflation of costs of cases by litigants who seek to unfairly enrich themselves upon emerging victorious in the case.

Elaborating further, the applicant contended that, the respondent's Bill of Costs was for the sum of TZS. 27,105,000.00 and one-sixth of it is TZS. 4,517,500.00 and therefore, by awarding TZS. 8,050,000.00 only, the amount taxed off was more than one-sixth of the total amount in the Bill

of Costs, and therefore, the respondent was not entitled to costs of such taxation.

According to the applicant, it was erroneous for the High Court on review to come to the conclusions that, the omission of the High Court Judge on reference to observe Order 48 of G.N. No. 264 of 2015 and other grounds raised on review were not errors apparent on the face of the record to warrant review of the decision complained of, but rather they were fit grounds for an appeal. For, in the view of the applicant, the Judge on review went against the peremptory principle of review as clearly spelt out in the celebrated case of **Chandrakant Joshubhai Patel v. Republic** [2004] T.L.R. 218. The applicant also cited the case of **Mantra Tanzania Limited v. Joachim Bonaventure** (Civil Appeal No. 145 of 2018) [2020] TZCA 356 (17 July, 2020; TanzLII) to bolster his argument. In all, the applicant urged us to allow the application with costs.

Conversely, the respondent premised its submission by first of all, not opposing the first ground which in principle restates the correct position of the law. To be more precise, the respondent argued that a decision emanating from a dismissal of review can only be challenged to the Court by way of revision.

In response to the other grounds, the respondent argued that, the Judge on review was correct to hold that the grounds raised were suited for an appeal than a review. The respondent referring to the case of **Chandrakant Joshubhai Patel v. Republic** (supra), submitted that, the applicant did not raise the issue of one-sixth as provided under Order 48 of G.N. No. 264 of 2015, during the hearing and determination of reference, but rather, this issue emerged for the first time during the application for review and even then, faulting the Judge who determined the reference and not the Taxing Master who determined the Taxation of Costs.

Responding further, the respondent contended that, having thoroughly researched all authorities touching on what amounts to an error apparent on the face of record, the respondent convincingly found none that fits the circumstances explained by the applicant. The respondent paid homage to the case of **Tanganyika Land Agency Limited & Others v. Manohar Lai Aggrawal**, Civil Application No. 17 of 2018 (unreported), to demonstrate the position of his argument. The respondent distinguished the circumstances in the case of **Mantra Tanzania Limited v. Joachim Bonaventure** (supra) cited by the applicant with the circumstances in the instant appeal in which the complaint regarding Order 48 of G.N. No. 264 of 2015 was not raised in the application for reference while in the former

case the issue of reliefs which was complained of was raised before the Commission for Mediation and Arbitration.

The respondent argued in the alternative that, even if we assume for the sake of argument that the complaint on Order 48 of G.N. No. 264 of 2015 is a ground for review, it is the respondent's submission that the applicant's interpretation is wrong and misguided and the correct interpretation is that, in the event that the amount taxed off exceed one-sixth, then, the one presenting the Bill of Costs will be denied the costs of prosecuting such taxation, which is usually left to the discretion of the Taxing Master to grant it or not. The respondent argued further that, denying the respondent costs will be double punishment which is not the intention of the law. For in the respondent's view, the mandate to grant or refuse costs in civil matters is within the powers of the court citing section 30 (1) of the CPC. The respondent implored us to dismiss the application for being devoid of merit.

Our reading and understanding of the foregoing submissions, the vexing issue which stands for our determination is whether or not it was correct to hold that the grounds raised in the impugned decision were suited for an appeal than a review. Our starting point for any consideration of the authority on this point depends entirely on whether in the reference

subject of the impugned review there was an error apparent on the face of the record to warrant review. The meaning of manifest error on the face of the record was discussed at considerable length in the case of **Tanganyika Land Agency Limited** (supra) in which we sought some guidance from the Indian case of **Thungabhadra Industries Ltd v. The Government of Andra Pradesh** AIR 1964 SC 1372 at page 1377 where the court stated that:

> *"A review is by no means an appeal in disguise whereby an erroneous decision is reheard and corrected, but lies only for patent error. We do not consider that this furnishes a suitable occasion for dealing with this difference exhaustively or in any great detail, but it would suffice for us to say that where without any elaborate argument one could point to the error and say here is a substantial point of law which stares one in the face, and there could reasonably be two opinions entertained about it, a clear case of error apparent on the face of the record would be made out."*

Corresponding observations were made in the case of **Chandrakant Joshubhai Patel v. Republic** (supra) in which we stated thus:

> *"We would say, in the light of the authorities at hand, that an error which will ground a review, whether it be one of fact or one of law, will be an error over which*

there should be no dispute and which results in a judgment which ought to be corrected as a matter of justice."

We further held that, for an error to be apparent on the face of record, such an error must be an obvious and patent mistake and not something which can be established by long drawn process of reasoning on points which there may conceivably be two opinions, that a decision is erroneous in law is no ground for ordering review. Moreover, we held that, the ingredients of an operative error are**: one**, there ought to be an error; **two**, the error has to be manifest on the face of the record; and, **three**, the error must have resulted in miscarriage of justice.

Now, the question we are grappling with at this moment is, whether in the review under consideration, the three conditions listed above were met to merit a review. The applicant faults the Judge who determined the review for holding that the grounds raised on review were not errors apparent on the face of the record to warrant review of the decision complained of, but rather they were fit grounds for an appeal. A fleeting look at the memorandum of review, and in particular the four grounds at pages 814 and 815 of the record, the applicant was complaining on a number of things but mainly failure of the Judge in reference to assign

reasons for the award she granted, and also failure to provide a proper interpretation of Order 48 of G.N. No. 264 of 2015.

Admittedly, a review is by no means an appeal in disguise whereby an erroneous decision is reheard and corrected, but lies only for patent error. Undoubtedly, in the application before us, it is conspicuously clear that, looking at the four grounds of review, there is no apparent error on the face of record. In our respectful opinion, we think that, the positions stated in the cases cited above tells it all. The respondent argued, and rightly so in our view, that, it was erroneous for the applicant to have raised the complaint regarding Order 48 of G.N. No. 264 of 2015 in the review while the same was not determined during reference and considering that the genesis of the application before us is the Taxation of Bill of Costs by the Taxing Master and not the reference before the Judge of the High Court.

We have also given due regard to the argument by respondent that, denying the respondent costs will be double punishment which is not the intention of the law. However, in our respectful opinion, we think, this argument is decidedly thin and considering that this was not a fit ground for review but it could perfectly fit on appeal but not the situation obtaining in the impugned application which did not fall squarely within the purview

of an appeal. Similarly, the complaint that the Judge in reference did not give reason is not a ground for review. Like the learned review Judge, we can see no conclusion other than the fact that the application for review did not meet the criteria since the grounds raised were more suited for an appeal than an application for review.

In sum, we find this application totally lacking in merit. We therefore, dismiss it with costs.

DATED at **DAR ES SALAAM** this 26th day of June, 2024.

B. M. A. SEHEL
JUSTICE OF APPEAL

P. F. KIHWELO
JUSTICE OF APPEAL

G. J. MDEMU
JUSTICE OF APPEAL

The Ruling delivered this 2nd day of July, 2024 in the presence of Mr. John Kamugisha, learned counsel for the Respondent and in the absence of the Applicant; is hereby certified as a true copy of the original.

R. W. CHAUNGU
DEPUTY REGISTRAR
COURT OF APPEAL