

**THE UNITED REPUBLIC OF TANZANIA**  
**JUDICIARY**  
**IN THE HIGH COURT OF TANZANIA**  
**MBEYA DISTRICT REGISTRY**  
**AT MBEYA**  
**LAND REVIEW NO. 02 OF 2019**  
*(Originating from Land Appeal No. 41/2019*  
*High Court of Tanzania at Mbeya)*

**HYROD SIVONIKE NGO'NDYA.....APPLICANT**  
**VERSUS**  
**REV. PATRICK MWALUSAMBA.....1<sup>ST</sup> RESPONDENT**  
**THE BOARD OF TRUSTEE BAPTIST**  
**CONVENTION OF TANZANIA .....2<sup>ND</sup> RESPONDENT**

**R U L I N G**

***Date of Last Order:*** 26/03/2020

***Date of Ruling:*** 06/05/2020

**NDUNGURU, J.**

The applicant being aggrieved by the order of this court dated 8<sup>th</sup> May, 2019, dashed to the doors of this court with his memorandum of Review that contains three grounds to wit:

1. *That this honorable court erred in law for failure to consider that upon dismissal order, costs ought to follow the event in favor for the applicant herein.*

2. *That in alternative to ground 1 above, the honorable court erred in law for withholding costs without stating reasons thereof.*
3. *That the Honorable court erred in law for using its discretion injudiciously.*

The applicant prays for the following orders:

- (i) The application for review be granted with costs*
- (ii) Court order granting costs in favour of the applicant to the Dismissal Order dated 8<sup>th</sup> May, 2019 by D. B. Ndunguru Judge.*

Before venturing into the merits of this application, I find it appropriate to revisit albeit brief, the facts of the case that led this application as discarded from the impugned order. As it can be briefly stated, the respondents had lodged their Memorandum of Appeal in Land Appeal No. 41 of 2016 on 8<sup>th</sup> day of May, 2019. This court upon the continued absence of the Respondents, dismissed the appeal for want of prosecution. The court however did not enter any order pertaining the cost following the dismissal order. The applicant who was the respondent in that appeal therefore, came to this court with his claim that the court has erred in law for failure to issue cost against the appellants who are now the respondent in this application.

The application was resisted by the Respondents. They countered the application by filing a notice of preliminary objections consisting of two grounds namely:

- *This honorable court has no jurisdiction to entertain this application for review on account of errors in point of law.*
- *That the whole grounds of review are subject to appeal to the court of appeal hence this court is functus officio to entertain them.*

With the leave of the court, the parties opted to dispose the objections raised by way of written submissions. Mr. Mwamori, the learned counsel appeared for the Respondents while Mr. Aman Angolwise the learned counsel appeared for the Applicant.

Briefly, Mr. Mwamori in support of his first ground of objection, referred to the court the case of **Tanzania Trans Continental Trading Company vs. Design Partnership Ltd. (1999) T.L.R 258** where it was stated that the courts power of review ought to be exercised very sparingly and only in the most deserving cases bearing in mind the demands of public policy for finality of litigation and certainty of the law. For him, the applicant has intended to abuse the court process and prolong unnecessary litigation. Mr. Mwamori added that the

court is wrongly moved and that a review is a legal right and not a common law right hence it is governed by the statutes.

The learned counsel in amplifying his arguments cited Order **XLII, Rule 1 of the CPC**. Mr. Mwamori also referred to this court the case of **John Kishekya vs. Attorney General**, Civil Application No. 480/03 of 2018, Court of Appeal of Tanzania at Dodoma. He added that the manner in which those grounds are framed are purely point of law and not of review. For him, there is no error which is apparently on the face of the records resulting into miscarriage of justice.

In retorting to the grounds of objection raised, Mr. Mwamori, the learned counsel submitted that it is a trite law that review must not be used as alternative to appeal citing the case of **Lakhamshi Borthers Ltd. R Raja and Sons(1961) 1 EA 313**. For him, the court becomes functus officio. He referred to this court the case of **James Kabalo Mapalala vs. British Broadcasting Corporation [2004] T.L.R 143**. Mr. Mwamori at the end prays for the court to dismiss the application with costs.

On his part, Mr. Aman Angolwisye for the applicant in opposing the objections raised submitted that, the question of granting costs is the courts discretion, and that where the court direct that any cost shall follow the event, the court shall state so in writing. He added that, the

application for review is intended to correct an apparent error or omission on the part of the court. Mr. Aman referred to this court the case of **Chandrakant Joshubhai Patel vs. Republic [2004] T.L.R 218 at page 225.**

Mr. Aman insisted that the court has jurisdiction to try the matter since the application filed is based on apparent errors which are self-evident from the dismissal order dated 8<sup>th</sup> day of May, 2019. To end up his submissions, Mr. Aman maintained that it is not the law and it would be unreasonable and ridicule to hold that once the High Court has issued a dismissal order, the question of costs ought to follow the event will be determined by the Court of Appeal.

In rejoining the submission, Mr. Mwamori recapped his earlier submission in chief. He asserted that the risk on entertaining the points of laws on a review is to assume the jurisdiction of the superior court. After having gone through the rival submissions from both parties, the pertinent issue is on whether the two grounds of objections raised have merit? I am alive that this court has power to review its own decisions. This can only be done if there is apparently manifest error on the face of the record. The applicant has to show that such manifest error has occasioned injustice on his part. **Order XLII Rule 1 of the Civil Procedure Code, Cap 33. R.E 2002** is very clear on this. To find

more emphasis, I will preface legal circumstances in which this court can invoke its jurisdiction to review the case. The conditions are as follows:

- (i) *There is a party who is aggrieved by the decisions.*
- (ii) *There is a discovery of new and important matter of evidence which after due diligence was not within the knowledge of the party at the time the judgment and the decree was passed.*
- (iii) *Finally, there was an error on apparent on the face of the record or any other sufficient reason.*

The above stance was precisely underscored in the case of **John Kishekya vs. Attorney General**, Civil Application No. 480/03 of 2018, Court of Appeal of Tanzania at Dodoma which sets out the conditions for the High Court to review its own decisions are said to be as follows:

- (i) *That the decision was based on manifest error on the face of the record resulting in the circumstances.*
- (ii) *A party was wrongly deprived of an opportunity to be heard.*
- (iii) *The court has no jurisdiction to entertain the case or*
- (iv) *The judgment was produced illegally or by fraud or perjury.*

Basing on the grounds of review filed, there is no gainsaying that the entire memorandum of review filed does not contain any single ground of review but rather it consists of ground of appeal. I am of the considered view that the omission by the court to award cost when the matter was dismissed, does not form a manifest error apparent on the face of record that can be cured by way of review. I wish to find refuge in the case of **African Marble Company Ltd. vs. Tanzania Saruji Corporation Limited**, Civil Application No. 132 of 2005 (unreported) quoting **Mulla, Indian Civil Procedure Code, 14<sup>th</sup> edition** where it was stated observed that:

*"An error apparent on the face of the record must be such as can be seen by one who writes and reads, that is, obvious and patent mistake and not something which can be established by a long-drawn process of reasoning on points which there may conceivably be two opinions".*

The same stance was also taken in the case of **John Kishekya vs. Attorney General (supra)**. From this reasoning, the applicant has failed to prove that the impugned order was based on manifest error on the face of record resulting into a miscarriage of justice that can be entertained by way of Review.

In his written submissions, Mr. Aman insisted that upon reading the dismissal order, the trial judge didn't issue any order as to costs hence the High Court can review its own decision since this is an error self-evident that needs no elaboration by arguments. It is with due respect that, such argument raised by the Applicant does not fall in what has been stated in **John Kishekya vs. Attorney General, (supra)**. The applicant desires the court to undertake the powers that it does not have. At this juncture, I find it proper to find shield in the case of **Lakhamshi Brothers Ltd. vs. Raja and Sons [1966] 1 EA 313**, Where it was stated that:

*"In a review, a 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 what clearly would have been intention of the court had some matter not been inadvertently omitted".*

I will agree with the Respondent that the applicant's application is an appeal in camouflage where by an erroneous decision is reheard and corrected. The Court of Appeal while adopting the India decisions has once held that a review is by no means an appeal or revision in camouflage. This was undoubtedly stated in the Indian Decision where parties are **Thungabhandra Industries vs. Andra Pradesh [1964]**



**SC 1372**, cited my Mulla, 14<sup>th</sup> Edition, quoted with approval in the case of **John Kishekya Vrs Attorney General**, Civil Application No. 480/03 of 2018, Court of Appeal of Tanzania at Dodoma at page 9 where it was stated that:

*"A review is by no means an appeal or a revision in disguise whereby an alleged erroneous decision is reheard and corrected."*

I am of the considered view that the omission by the court to award cost when the case was dismissed in their absence for want of prosecution does not form a manifest error apparent on the face of record. I will agree with the learned Counsel for the respondent that, the proper channel to take is by filing an appeal to the court of Appeal since this court becomes functus officio.

In the upshot, the grounds of preliminary objection raised by the Respondent are sustained. The application is thus devoid of merit and I hereby dismissed it.

No order as to costs.

It is so ordered.



  
**D. B. NDUNGURU**  
**JUDGE**

06/05/2020

**Date: 06/05/2020**

**Coram: D. B. Ndunguru, J**

**Applicant:**

**For the Applicant:**

**1<sup>st</sup> Respondent:**

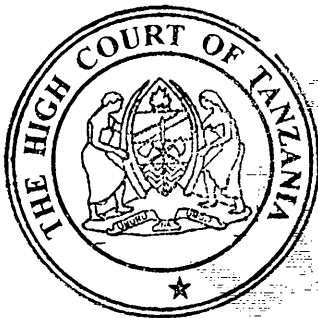
**2<sup>nd</sup> Respondent:**

**For the Respondents:**

Absent

**B/C: M. Mihayo**

**Court:** Ruling delivered in the absence of both parties.



**D. B. NDUNGURU  
JUDGE**

06/05/2020