IN THE HIGH COURT OF TANZANIA

(IN THE DISTRICT REGISTRY)

AT DAR ES SALAAM

CIVIL REVIEW No. 2 OF 2020

(Arising from Judgment/Ruling by De Mello J; In Civil Case No. 234 of 2017)

NANJIWA GEOFFREY NZUNDA.....APPLICANT

Versus

FOCUS PATRICK MUNISHI.....RESPONDENT

RULING

18th September – 22nd October, 2020

J. A DE-MELLO, J;

A Review has been lodged by the Applicant, moving the Court under **section 78,** read together with Rule **1 (1) (a)** of **Order XLIII** of **Cap. 33 R.E 2002.** As this was the case, the Respondent lodged a **Notice of Preliminary Objection**, stating that;

The Application for Review is improperly before the Court as there is no ground for Review as contemplated by Order XLII Rule 1 (1) (b) (3) and (4) of Civil Procedure Code Cap. 33 R.E 2002.

Written submissions prayed by **Counsels Edward Chuwa** and, **John Seka** for the **Respondent** and, **Applican**t respectively, was granted, with the pattern that, the Respondent, one moving the Court with the said objection to file his on, **27th** of **August 2020**, reply by the Applicant on the **8th**

September 2020, while rejoinder if any, on the **18th September, 2020.** Both have complied and, on record.

Submitting on the said objection, **Counsel Chuwa** is of the view that, in absence of copies of ruling Judgement, Decree and Order, the application has violated **Order XLII Rule 3** of the **Civil Procedure Code Act Cap. 33.** As observed, Counsel pointed out that, **Order XLIII** cited by the Applicant is misconceived for a **Review**. As if this is not enough, no grounds for objection have even been set forth, concisely and, under distinct heads to the decree appealed from. Not even numbering without argument or narration, he noted. Vivid as it reads, the said Application are what **paragraphs A 1 -8** are outcome of the Review, a matter of prerogative of the Judge and, not anyone else. Strangely, Counsel has in the mentioned paragraphs directed or rather instructed the Judge to refer to statutes and books. There also arguments as seen in **paragraph B 1-5.** It is **Chuwa's** prayers that, the Court rejects the Application, it being incompetent.

Opposing the objection **Counsel Seka** reminded the Court of what he submitted orally and, which then attracted written submission with respect to the incompetence of the objection for improper citation of enabling provision of the law. He disputes the existence of neither **Order XLII Rule 1 (1) (b) (3)** nor **Order XLII Rule 1 (1) (b) (4)** rendering the objection incurably defective. Condensing his position, Counsel cited the cases of **Jimmy Lugendo** vs. **CRDB Bank Ltd. Civil Application No. 171 of 2017, Mustapha Songambele** vs. **Republic, Criminal Application No. 3 of 2016** and **African Banking Corporation (T) Ltd.** vs. **George Williamson Ltd, Civil Application No. 349 of 2018.** Such defectives

reflects the incompetence of the said objection, which then attracts a **Struck Out,** he observed, as was the findings in the cases of **Ally Mussa & Others vs.** vs. **East African Spirit T. Ltd. Civil Revision No. 1 of 2019** amongst several others, cited. Attacking the second limb of the substantive objection for not attaching copies of Judgment, Ruling, Decree and Drawn order. **Counsel Seka** submits that, it is no longer a requirement to do so, basing his contention on plethora of authorities. Cases of **Chiku Hussein Lugonzo** vs. **Brunnids S. Paulo [2001] TLR 49, Kijakazi Mbegu** and, **5 Others** vs. **Ramadhani Mbegu [1999] TLR 170** and, **Tina & Co. Ltd & 2 Others** vs. **Euraafrican Bank Ltd, Commercial Review No. 7 of 2018**, settling for not accompanying copies as submitted by the Respondent. If at all, the omission is not fatal, he states, praying for dismissal of the objection. In line with this, Counsel restricts it to matters of form in terms of Title, Name of Parties, Date of Decree, Number of Suit and Numbering of Paragraphs. Conclusively, Counsel contends that, the objection is misconstrued and, wrongly interpreted. A Rejoinder has been filed which the Respondent's Counsel noted absence of response to the fact raised that of, the Memorandum itself has no grounds for Review which is the substance of the objection raised. Failure to address the same translates into conceding on the part of the Applicant he further observes. He found it improper for Applicant Counsel to raise an objection towards the objection, it being misplaced with a view of pre empting the existing objection. The settled principle in support of this, was drawn from the case of **Dar Es Salaam Institute of Technology** vs. **Deusdedit Mugasha, Civil Reference No. 11 of 2016** approving the case of **Method Kimomogoro** vs. **Board of**

Trustees of TANAPA, Civil Application No. 1 of 2005. In those two cases, the Court of Appeal categorically cautioned Advocates with the practice of raising objections against another objection. This aside, **Counsel Chuwa** reiterates absence of grounds for Review that, **Order XLII Rule 1 (1) (b), (3) & (4)** of **Cap. 33 RE 2002** contemplates.

For the sake of clarity and, based on what **Counsel Seka** submitted in his opening remarks, regarding non existence **of Order XLII Rule 1 (1) (b) (3) & (4),** I find it wise to ascertain and, verify whether this is the position or else. The reading from the **Civil Procedure Code Act** has the following;

78. Review

Subject to any condition and limitations prescribed under section 7, any person considering him aggrieved-

(a) By decree or order from which an appeal is allowed by this Code but from which no appeal has been preferred; or

(b) by a decree or order from which no appeal is allowed by this Code

Order XLII Rule 1 (a) (b) (3) & (4)

(1) Any person considering himself aggrieved-

(a) By a decree or order from which an Appeal is allowed but from which no appeal has been preferred; or

(b) By a decree or order from which no appeal is allowed,

And who, from the discovery of new and important matter or evidence which, after the exercise of due diligence, was not within

the knowledge or could not be produced by him at the time when the decree was passed or order made, or on account of some mistake or error apparent on the face of record, or for any other sufficient reasons, desires to obtain a review of the decree passed or order made against him, , may apply for a review of judgment to the Court which passed the decree or made the order.

(3) Form of applications for Review

The provisions of the form of preferring appeal shall apply mutatis mutandis to applications for review

(4) Application where rejected or granted

Where it appears to the Court that there is no sufficient ground for review, it shall reject the application.

Without mincing words and, with no much further ado, with great humility and respect to **Counsel Seka,** the provision is existing and, actually the right one for **Review.** It is apparent that, provision referred to by **Counsel Seka** that of, **Order XLIII Rule 1 (1) (supra),** is inappropriate and, wrong whose effect is clear as backed up by litany of cases but, of interest is the celebrated case of **Edward Bachwa & Three Others** vs. **AG & Another, Civil Application No. 128** of **2006.** Further even is that, the objection and, pre emptive by nature, is not only misplaced but, more even unmerited. In his rejoinder and, vividly observed, is non response by **Counsel Seka** on the contention towards absence of grounds in the Memorandum of Review. As well in the reliefs **Counsel Seka** prayed for grant of the Application for

Review. Let me albeit briefly discuss the rationale and, essence of this, as was discussed in a list of authorities namely; **Lulu Taj Mohamed Omar** vs. **Li Jinglan, Misc. Land Application No. 18 of 2012, Chandrakant Joshubhai Patel** vs. **Republic, Criminal Appeal No. 8 of 2002 and Eric Raymond Mchatta** vs. **TIB Bank, Msolopa Investment, PS Presidents Office** and **AG, Civil Case No. 176 of 2012.** These all had dealt on the what **Order XLII Rule 1** on Reviews or Orders demands, to include; '**discovery of new and important matter or evidence, mistake or error apparent on the face of record or for any other sufficient reasons'.** In the case of **Chandrakant** (supra) a full bench of seven Judges ostensibly considered whether the Court has inherent power to review its decision for proper administration of justice. The Bench went further deliberating that, this is possible only when there is **manifest error on the face of record, which resulted in miscarriage of justice; where the decision was obtained by fraud; or where a party was wrongly deprived the opportunity to be heard.** The lamentation brought forward by **Counsel Seka,** I am afraid to observe, does not fit the grounds to which would justify a Review by me of the order made. As sated in the case of **Atilio** vs. **Mbowe [1970] HCD No. 3** stating;

"The principle underlying a Review is that the Court would not have acted as it had all the circumstances had been known".

Counsel may wish to explore recourse to the Court of Appeal, rather than this Court. For the reasons advanced above, I '**Strike Out**' the Application with costs for its incompetence.

In the circumstance above, resident Magistrate decision dated **8th** day of July, **2008, Misc. Application Cause No. 77 of 2017** thus its proceedings and, decision are hereby nullified. I order the file to be remitted before the Resident Magistrate in charge for trial *de-novo* of the entire Application. The nature of Application being an Employment Cause, I reserve costs as, each bear its own.

Ordered accordingly.

J. A. DE-MELLO

JUDGE

22nd October, 2020.