IN THE HIGH COURT OF THE UNITED REPUBLIC OF TANZANIA
DAR ES SALAAM DISTRICT REGISTRY
AT DAR ES SALAAM

CIVIL REVIEW NO. 14 OF 2020
(Arising from Misc. Civil Application No. 494 of 2020)

LUKOLO COMPANY LIMITED .....APPLICANT
VERSUS

BANK OF AFRICA LIMITED.....RESPONDENT

RULING

last order 30/12/2020
Date of Ruling: 12/2/2021

MASABO, J.:-

About ten years ago, the parties executed a credit facility agreement. The facility was in a form of irrevocable advance payment guarantee payable on call to Songea Municipal Council. Last year, the applicant filed a suit in this court complaining that the respondent negligently paid the credit sum to Songea Municipal Council contrary to the terms of the agreement. She subsequently filed an application for application under certificate of urgency praying for injunctive orders against the respondent. In support of the application, she averred that, in an attempt to recover the credit sum, the applicant has appointed a Receiver Manager who has already issued a public notice as to the receivership of her assets. The injunctive orders were, therefore, sought to restrain the receiver manager from exercising his duties. Having heard both parties, on 15th December 2020, I entered a ruling in

favour of the respondent. It is this ruling which is the subject for this review filed under Order XLII Rule 1(1)(b) and section 78(1)(b) of the Civil Procedure Code, Cap 33 RE 2019.

The grounds for review as set out in the memorandum for review are as follows:

1. The court inadvertently under looked the fact that there is no tried issue in the main case by relying on the likelihood of success while the applicant's main complaint was on whether the respondent did breach the facility agreement by paying the called payment guarantee by Songea Municipal Council as source of dispute which ought not to pay;

2. The court under looked the legal and factual implications as to the facts of irreparable loss and hardship to be suffered by the applicant as disclosed with evidence on the affidavit in support of Misc. Application No. 494 of 2020 by determining that evidence was never disclosed which in essence the deposed matters clearly are the basis for granting temporary injunction.

At the hearing, both parties had representation. On the applicant's side, there were two counsels. Messrs Seleman Almas and Hassan Kiango, learned Counsels. For the Respondent, it was Mr. Ereneous Swai, learned Counsel. Submitting in support of the review, Mr. Almas cited the decision of the Court of Appeal in **Edgar Kahwil v Amer Mbaraka & Azania Bank**, Civil Application No. 21/13/2017 and **Karim Kiara v R,** Criminal Appeal No. 4 of 2007, (both unreported) and submitted that one of the grounds for review

is a manifest error on the face of record resulting in injustice. He then proceeded to argue that, the two grounds for review revolve around manifest error on the face of record.

In justifying his point, he passionately argued that the affidavit in support of the application for injunctive orders sufficiently disclosed that there is triable issue between the parties, namely the respondent's negligent payment to Songea Municipal counsel and that, the applicant ably established that she has overwhelming chances of success. Therefore, the finding by this court that a *primafacie* case with a likelihood of success was not established, is a manifest error amenable for review.

On the second ground, it was submitted that, the finding that the applicant did not sufficiently prove the alleged irreparable loss and hardship likely to be occasioned to the applicant by the receivership authority, was equally erroneous. In specific, it was argued that the oral averment about the existent of 300 employees likely to be rendered redundant, construction projects for the government and the likelihood that the applicant would be rendered insolvent and its ranking as first-class construction company be downgraded, sufficiently established that the applicant would suffer an irreparable loss.

In reply, Mr. Swai, ardently argued that, the submission fronted by the Applicant's counsel vividly demonstrated that the application falls outside the scope of the grounds for review as expounded under Order XLII (1) (b) of

the Civil Procedure Code, Cap 33 RE 2019. He submitted that for review to be considered there should be a discovery of new important matters or evidence which after the exercise of due diligence was not in the applicant's knowledge hence could not be produced by him at time the decree was passed or order made or on account of some mistake or error apparent on the record.

Relying on the interpretation of what constitutes an error on the face of record as expounded by Court of Appeal in **John Kasheka v AG**, Civil Appeal No. 408/03 of 2018 (unreported), Mr. Swai argued that the applicant has not shown the error worth of review. He further submitted that, the two grounds advanced by the applicant are in fact, grounds of appeal which cannot be entertained in an application for review. Thus, the application should fail for being outside the scope of review. The case of **Chandrakat Patel v R** [2014] TLR 218, **Tina Company & 2 others v EuroAfrican Bank**, Commercial Review No. 7 of 2018, HC (Commercial Registry) were cited in support. In the alternative, it was submitted that the finding reached by the court was correct as it is based on sound and valid principles of law governing injunctive orders. Thus, the application for review is unmerited.

Re-joining, Mr. Almas submitted that there is a proper review before this court. He relied on ***Karim Kiara's case*** and argued that the grounds for review are not exhaustive thus, this application merits consideration. Distinguishing the case of **Chandrakant Patel** (supra) he argued that the

circumstances of the instant case are dissimilar as there is no right of appeal. This marked the end of the submissions.

I have carefully considered the submissions made by the counsels and I commend both of them for their industry. The application being for review for which no appeal lies, is governed by section 78(1)(b) and Order XLII of the Civil Procedure Code, Cap 33 RE 2019. Section **Section 78(1)(b)** states that:

> 78 (I) Subject to any conditions and limitations prescribed under section 77, any person considering himself aggrieved: -
> (b) by a decree or order from which no appeal is allowed by this code, may apply for a review of judgment to the court which passed the decree or made the order and the court may make such order thereon as it thinks fit."

On its part, Order XLII (1)(b) which expounds the criteria/grounds for review provides that:

> 1.-(1) Any person considering himself aggrieved-
> (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 his 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 the record, or for any other sufficient reason, 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.

The applicant has submitted that, there is error apparent on the face of the record as expounded in the two grounds of review. On the Respondents part, it has been argued that, the two grounds expounded in the memorandum of review and the counsel's submission does not constitute an 'error apparent on the face of the record' and therefore, do not merit the prayer for review.

Certainly, from these facts and submissions, I am called upon to determine whether the two grounds manifest an apparent error on the face of record and to warrant the prayer for review. Luckily, as it will appear from the submission by both parties, 'manifest error on the face of record' as a ground for review has been broadly canvased in a plethora of authorities from the Court of Appeal. Starting with the case of **Chandrakant Joshubai Patel v R** (supra) which is the oldest of the authorities cited by the parties, the Court having referred with approval plethora of authorities from our jurisdiction and other jurisdictions, India and Uganda, in particular, it relied upon the following excerpt from **Mulla,** (14 ed), pages 2335-36 as a correct articulation of what constitutes an error manifest on the face of the record:

> An error apparent on the face of the 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 reason on points on which there may conceivably be two opinions *State of Gujarat* v. *Consumer Education and Research Centre* (1981)

> AIR GU] 223] ... Where the judgment did not effectively deal with or determine an important issue in the case, it can be reviewed on the ground of error apparent on the face of the record *[Basselios* v. *Athanasius* (1955) 1 SCR 520] ... But it is no ground for review that the judgment proceeds on an incorrect exposition of the law *[Chhajju Ram* v. *Neki* (1922) 3 Lah. 127]. A mere error of law is not a ground for review under this rule. That a decision is erroneous in law is no ground for ordering review: *Utsaba* v. *Kandhuni* (1973) AIR Ori. 94. It must further be an error apparent on the face of the record. The line of demarcation between an error simpliciter, and an error on the face of the record may sometimes be thin. It can be said of an error that it is apparent on the face of the record when it is obvious and self-evident and does not require an elaborate argument to be established *[Thungabhadra Industries Ltd* v. *State of Andhra Pradesh* (1964) SC 1372].

This decision was followed in John **Kashekya v AG** (Supra) where in addition to **Chandrakant Joshubai Patel v R** (supra), the court cited with approval its earlier decisions, including, **African Marble Company Ltd v. Tanzania Saruji Corporation Limited**, Civil Application No. 132 of 2005 CAT (unreported).

Also relevant is the decision of the Court of Appeal in **Vitatu and Another v Bayay and Others**, Civil Application No. 16 of 2013 (unreported). In this case, it was held that:

> "Taking a leaf from case law, a manifest error for purposes of grounding an application for review must be an error that is obvious, self-evident, etc., but not something that

can be established by a long-drawn process of learned argument: **Chandrakant Joshughai Patel v. Republic,** [2004] TLR 218. The decision of the Court of Appeal of Kenya in **National Bank of Kenya Limited v Ndungu Njau** [1997] eKLR can as well provide us with a persuasive guide when it stated:

> "...A review may be granted whenever the court considers that it is necessary to correct an apparent error or omission on the part of the court. The error or omission must be self-evident and should not require an elaborate argument to be established. It will not be a sufficient ground for review that another Judge could have taken a different view of the matter. Nor can it be a ground for review that the court proceeded on an incorrect exposition of the law and reached an erroneous conclusion of law. Misconstruing a statute or other provision of law cannot be a ground for review.

All these authorities provide a nuanced exposition of what constitutes a manifest error on the face of record. When the above exposition is applied to the two grounds of review expounded in the memorandum of review and the submission there to, it becomes apparent, as argued by Mr. Swai, that the applicant has failed to demonstrate that the ruling sought to be reviewed was based on a manifest error on the face of record. The finding that a *primafacie* case with the possibility of success has not been established and that the evidence rendered did not sufficiently establish the irreparable loss

likely to be suffered by the applicant, does not and cannot under the circumstances, amount to a manifest error on face of record. Needless to add, even if it was assumed that indeed the two constitute an error, such an error would still fail the test as it is not one that is too obvious and patent such that it can be easily seen by one who runs and reads the ruling. Rather, it can only be drawn through a long-drawn process of reason on points on which there may conceivably be two or more opinions.

Let me windup with the following wisdom of the Court of Appeal in in **Charles Barnabas vs. Republic**, Criminal Application No. 13 of 2009, Court of Appeal of Tanzania (unreported), where it stated that:

> ".... review is not to challenge the merits of a decision. A review is intended to address irregularities of a decision or proceedings which have caused injustice to a party. ....., a review is not an appeal. It is not "a second bite so to speak.

And, as held in **National Bank of Kenya Limited v Ndungu Njau** (supra), it is not a sufficient ground for review that another Judge could have taken a different view of the matter and is similarly wrong to rely on the mere ground that the court proceeded on an incorrect exposition of the law and reached an erroneous conclusion of law as misconstruing a statute or other provision of law cannot be a ground for review. In my considered view, whereas the two grounds raised by the applicant may make good grounds for appeal, they are certainly not good grounds for review. Blessing

the review on these two grounds would be tantamount to this court sitting appeal on its judgment which is not legally permissible.

The argument that the application for review should be entertained as no appeal lies against the order sought to be reviewed, is with respect, a lucid misdirection on the law as section 78(1)(b) and Order XLII of the Civil Procedure Code, Cap 33 RE 2019 through which this application was preferred specifically caters for non-appealable orders. It appears the applicant intends to "appeal" against the aforesaid decision through back door and since our legal system has no provision for that, I dismiss the application for lack of merit. Costs on the event.

DATED at **DAR ES SALAAM** this 12th day of February, 2021

J. L. MASABO

JUDGE