IN THE HIGH COURT OF THE UNITED REPUBLIC OF TANZANIA

MWANZA DISTRICT REGISTRY

AT MWANZA

APPLICATION FOR REVIEW No. 02 OF 2021

(Arising from the Ruling of the High Court of Tanzania at Mwanza in Civil case No. 05 of 2019 dated 11th day of June 2021)

FAYAZ SHAMJI .....APPLICANT

VERSUS

THE REGISTERED TRUSTEES OF KHOJA SHIA

ITHNA – ASHERI JAMAAT MWANZA .....1ST RESPONDENT

ZULFIKAR KARIM.....2ND RESPONDENT

HUSSEIN MANJI PIRBHAI.....3RD RESPONDENT

MOHAMED MOLEDINA.....4TH REPSONDENT

ALLI HUSSEIN KHAKOO.....5TH RESPONDENT

SALIMALI PANJWANI.....6TH RESPONDENT

RULING

31st August & 28th September, 2021

TIGANGA, J

In this application the court has been moved by a chamber summons made under section 78(1)(b) together with Order XLII Rules 1(b) 2, and 3 of Civil Procedure Code [Cap. 33 R.E 2019] to review its decision handed down in Civil Case No. 05 of 2019 dated 11th day of June 2021 which

struck out the said land case after sustaining the preliminary objection raised by the respondent, that the court had no jurisdiction in terms of Article 19(2) of the Constitution of the United Republic of Tanzania, 1977 [Cap 2 R.E 2019], and for the applicants having not complied with the provision of section 67 of the Civil Procedure Code [Cap 33 R.E 2019].

The base of the said preliminary objection was that, the 1st respondent being a religious organization cannot have its dispute between its members or the matter pertaining for the leadership of the same be filed and resolved by the court od law in terms of Article 19(2) of the Constitution of the United Republic of Tanzania, 1977 [Cap 2 R.E 2019], and where need be should be filed either by the Attorney General or more than one persons having interest in the trust, and having obtained the consent of the Attorney General in writing, which conditions were not complied with.

Following that decision, the applicant filed a memorandum of review containing of four main grounds of review which for easy reference are hereby reproduced as follows:

1. That the High Court Judge being ruled on jurisdictional issues and sought remedies by the applicant through the court ruling dated

4th May 2020 it was an apparent error on the face of the record and resulting into miscarriage of justice for the same court to invite, determine and entertain the respondents' same objection and reach to the different conclusion, (sic)

2. The high Court Judge in striking out the applicants suit put a heavy reliance on the Article 19(2) of the Constitution of the United Republic of Tanzania [Cap.2 R.E 2019] whose interpretation directly led to absurd consequence and miscarriage of justice against the objective of the Societies Act [Cap. 337 R.E 2019] and the Trustee Incorporation Act, [Cap 318 R.E 2019], (sic)
3. The applicant was wrongly deprived an opportunity of being heard on account of failure by the High Court to consider the submissions made by the applicant at the trial.
4. The ruling and its subsequent order rendered by the High Court are a nullity for being inconsistent and creating confusion contrary to its own earlier rulings and drawn orders on the similar subject specifically rulings dated 4th May 2020 and 30th November 2020.

The decision sought to be reviewed is dated 11th June 2021, which struck out the Civil Case No. 05 of 2019. With leave of this court, the application was agued by way of written submissions. Parties filed their respective submissions as ordered by the court. In the submission in chief, the applicant strongly submitted that, the issue which was decided in the impugned decision had already been decided by the this court in the ruling dated 4th May 2020 at page 5 of the ruling where the court ruled that the suit disclosed the cause of action and that the applicant had exhausted all remedies before coming to court. It was also submitted that in yet another ruling delivered in Misc. Civil Application No. 55 of 2020 in which its holding was of the same effect the issue had already been decided.

Therefore as in both previous ruling the court ruled on the issue of jurisdiction thereby holding that the court had jurisdiction to entertain the matter before it, it was an apparent error on the face of the record which caused a miscarriage of justice to the applicant for the court to re determine the said objection and come to the different conclusion. The counsel went on that, the previous findings was supported by the decisions in the case of **The Registered Trustee of Tabasamu Private Secondary School vs Amin Huseein Rukoba and 2 Others,** Civil Case

No. 23 of 2017 and **Anver Shamji vs The Registered Trustees of the Khoja Shia Ithna Asher (Mwanza) Jamaat,** Civil Case No. 11 of 2016 and **Muhamad Rafik and 11 Others vs The AD HOC Committee Sunni Muslim Jamaat Dar es Salaam,** which cases were seeking relief similar to the one sought in the struck out Civil Case No. 05 of 2019.

He insisted that the court was duty bound to consider the decision of other brethren judges, and in such insistence he cited the case of **Ally Linus and 11 Others vs Tanzania Habours Authority & Labour Conciliation of Temeke District** [1998] TLR 1 CAT. Also that the impugned decision has not given reasons as to why the trial judge departed from the decision of his brethren. In addition to the above cited decision he submitted that this Court has in a number of occasion has warned the High Court Judges from improperly invoking inherent jurisdiction especially on matters which already settled the very High Court. He insisted that this court in **Mohamed Enterprises (T) Limited and Masoud Mohamed Nasser**, Civil Application No. 33 of 2012.

He also submitted that, the court erred in relying on the Constitution which does not have specific provision providing for objective and functions of the religious organization thereby neglecting the Societies Act and the

Trustees Incorporation Act, which are specific laws. He submitted further that, the court has never been reluctant to correct its decision where it observes that the consequent ruling lead to absurd consequence. In support of that argument he cited the case of **Phillip Tilya vs Vedastus Bwogi**, Civil Application No. 546/01 of 2017 and the **National Microfinance Bank vs Leila Mringo and 2 Others**, Civil Application No. 316/12 of 2020.

He submitted that the applicant was wrongly deprived of an opportunity to be heard on account of failure of the High Court to consider the submission made by the applicant at the trial, that the trial judge made a summary of the submission without making a finding. He submitted that the court did not analyse the law, as had he analyzed the law, he would not have reached at the conclusion he reached; he would have reached at a different conclusion. He submitted in the end that all grounds submitted be granted with costs.

In the joint submission filed in opposition of this application, Mr. Deya Outa, and Fidelis Cassian Mtewele learned counsel for the respondents submitted that, the application for review was misconceived in

law as it has not complied with the requirement of the law, that is Order XLII Rule 1(a) and (b) of the Civil Procedure Code [Cap 33 R.E 2019].

He submitted that the applicant was aggrieved by the ruling dated 11/06/2021 but is pegging his submission on the former court's ruling dated 30/11/2020. He reminded the court that the ruling dated 30/11/2020 based on the pleadings which were amended by the order of the court following the prayers made by the applicant. He reminded the court that once the pleading has been amended its existence ceases therefore it is not proper to keep on making reference on to such non existing document.

To support that argument they cited the decision in the case of **General Manager African Barrick Gold Mine Ltd vs Chacha Kiguha and 5 Others,** Civil Appeal No.50 of 2017.

He submitted that the decision was based on the interpretation of the provision of Article 19(2) of the Constitution of the United Republic of Tanzania and section 67 of the Civil Procedure Act, (supra), therefore if the applicant thought that the court misinterpreted the provisions then, the remedy was not to file the application for review, they supported the argument by the decision of the Court of Appeal of Tanzania in the case of

Majid Goa @ Vedastus vs Republic, Criminal Application No. 11 of 2014 CAT, Mwanza Registry,

It was also their arguments that, it will not be a sufficient ground for review that another judge would have taken a different view nor can it be a ground for review that the court preceded on incorrect exposition of the law, therefore misconstruing a statute or other provision of the law cannot be a ground for review. To support that allegations they cited the case of **Chandrakant Joshubhai Patel, vrs The Republic,** [2004] TLR 218 and the case of **Wambura Evalist and six Others vs Sadock Dotto Magai and Another,** Court of Appeal of Tanzania, Civil Application No. 127 of 2011 (unreported)

The counsel reminded the court that, review should aim at rectifying the manifest error on the face of the record. He submitted that the application at hand is not of that kind, therefore it falls short of the requirement of the law.

In rejoinder submission, the counsel for the applicant challenged the document filed by the respondent which is titled "Rejoinder Joint Written Submission" that it is unknown creature in the eyes of the law as the respondent has only the right to reply not to make rejoinder. He submitted

that, the document suffers legal infirmity and should be struck out with costs.

Further to that, he submitted that, various documents pleaded, attached and relied upon during submissions in reply are nothing but the waste, because in the case of the **Registered Trustee of the Archdiocese of Dar es salaam vs Bunju Chairman Bunju Village Government and 4 Others**, Civil Appeal No. 147 of 2006, it was held that evidence must be given in the affidavit not in the submission, he asked the court to ignore the same basing on the authority in the case of **MIC Tanzania Limited vs CXC Africa Limited**, Civil Application No. 172/01 of 2019.

He alerted the court that, the respondents' submission did not address the issue in dispute which the counsel for the applicant has raised the issue of the existence of the two rulings of the same court, determining the same or nearly related the subject matter, he said they believe that based on the judges forgetfulness, therefore reminding him of rectifying the error resulted by the confusion created is pure the ground of review, as be as it may the amendment of the applicant's pleading did not throw away the ruling rendered by the same court.

Further reminding the court, he submitted that, this is a court of record and therefore at any rate should not be taken into a confusion state by having two conflicting decision over the same subject. He warned that remaining with two decisions on the same subject would be tantamount to creating a breeding ground for pretenders, bush lawyers and impostors to take advantage of the two existing contradictory decisions, thus creating the confusion in the legal system.

Regarding the submission that the court has misconstrued the statute, he submitted that, that has never been the complaint of the applicant, what the applicant has submitted is that the interpretation has led to an absurd consequence. He submitted, by way of insistence that, the court has never been reluctant to correct its decision where it observes that, the consequent ruling would lead to absurd consequence, citing the cases of **Phillip Tillya vrs Vedastus Bwogi**, (supra) and **National Microfinance Bank vrs Leila Mringo and 2 Others**, (supra).

The other ground for review is that, the denial of the right to be heard in all occasions is considered to be fundamental ground for review and failure to consider the submission is a glaring error which court should

look at and reach a fair and just decision. He asked the court to find the application to be meritorious therefore grant it with costs to the applicant.

Having made a summary of the contents of application, and the argument advanced for and against the application, I find it pertinent that before going to the merits of the application, to address two issues which were raised in the nature of preliminary objection by the applicant in the rejoinder submissions against the submission in reply filed by the counsel for the respondent. These points are that, one, the documents filed by the respondent which is titled "Rejoinder Joint Written Submission" that it is unknown creature in the eyes of the law as the respondent has only the right to reply not to make rejoinder. He submitted that, the document suffers legal infirmity and should be struck out with costs.

Two, that, various documents pleaded, attached and relied upon during submissions in reply are nothing but the waste, because in the case of the **Registered Trustee of the Archdiocese of Dar es salaam vs Bunju Chairman Bunju Village Government and 4 Others**, Civil Appeal No. 147 of 2006, it was held that evidence must be given in the affidavit not in the submission, he asked the court to ignore the same

basing on the authority in the case of **MIC Tanzania Limited vs CXC Africa Limited**, Civil Application No. 172/01 of 2019.

I entirely agree with the counsel for the applicant that the said document filed by the respondent as it is titled is strange in law, however, its contents prove that it was intended to be a reply to the submission in chief. However under the advent of the principle of Overriding Objective brought by the Written Laws (Miscellaneous Amendments) (No. 3) Act, 2018 [ACT No. 8 of 2018] which now requires the courts to deal with cases justly, and to have regard to substantive justice; by the wise say that a book should not be judged by its cover, rather by its content, I find the error in the titling the document filed to be curable under the principle, in that as long as the filed document by its content proved that it is a reply to the submission in chief filed by the applicant. I thus find the issue raised to have no weight to affect the weight of the document.

Regarding issue number 2 I entirely agree with the principle that evidence are not presented by submission and that where evidence is brought by submission becomes waste and should be ignored. However, even if the submission by the respondent is ignored and disregarded, that does not shift the burden on the shoulder of the applicant in law of proving

that there are grounds for review. That being the case, I also find the issue to be of no effect, what is important of this court is to ascertain as to whether there are grounds for review.

Now having resolved the two issues that way, I find it important to start with the provision upon which this application has been preferred, that is section 78(1)(b) together with Order XLII Rules 1(b) 2, and 3 of Civil Procedure Code [Cap. 33 R.E 2019]

> *78 "Subject to any conditions and limitations prescribed under section 77, any person considering himself aggrieved:-*
>
> *(1) (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."*

While Order. XLII Rules 1(b) 2, and 3

> *"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."

Section 78(1)(b) provides for a substantive part conferring this court with the jurisdiction to grant the orders of review, while Order XLII Rule 1(1)(b) is a procedural provision providing for the criteria to be followed I grating the application.

Although rule 2 and 3 of the same order have been cited and relied upon by the applicant as enabling provision, their relevance is not direct and therefore I will not deal with them in this ruling. Thus having disregarded rule 2 and 3, my discussion will be centered on the provision of Order XLII Rule (1)(1)(b), of the CPC (supra) which in effect provides the following ingredients of review:-

(i) That the applicant must allege and prove that after the decision sought to be reviewed had been issued, he discovered the new and important matter or evidence,

(ii) That the discovered matter, 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

(iii) That the decision was made on account of some mistake or error apparent on the face of the record, or

(iv) That for any other sufficient reason, he desires to obtain a review of the decree passed or order made against him,

(v) That the application should be made to the court which passed the decree or made the order sought to be reviewed.

That has been the subject of discussion and decision of the court, in the case of **James Kabalo Mapalala vs The Bribitish Broadcasting Corporation** [2004] TLR 143. The other authority worthy relying on is the case of **John Kashekya vs Attorney General,** Civil Application No. 480/03 of 2018, although the same based on section 66(1) of the Appellate Jurisdiction Act, but some of the principle especially under paragraph (a) resembles the provision quoted above. This means the grounds of review before this court must center on the ingredients of elucidated herein above and not otherwise. Now the issue is whether the applicant's grounds of review are in conformity with the ingredients above?

The grounds for review are four, and in a summary but without distorting the meaning intended by the applicant they reads as follows;

(a) That the High Court Judge committed an apparent error on the face of the record which resulting into miscarriage of justice to the applicant, when the Judge entertain and determine the respondents' same objection on jurisdiction and reached to different conclusion while he had already dealt with it in his ruling dated 04th May 2020.

(b) The high Court Judge committed an error when he strike out the applicants suit relying heavily on the Article 19(2) of the Constitution of the United Republic of Tanzania [Cap.2 R.E 2019] whose interpretation directly led to absurd consequence and miscarriage of justice against the objective of the Societies Act [Cap. 337 R.E 2019] and the Trustee Incorporation Act, [Cap 318 R.E 2019]

(c) The applicant was wrongly deprived an opportunity of being heard on account of failure by the High Court to consider the submissions made by the applicant at the trial.

(d) The ruling and its subsequent order rendered by the High Court are a nullity for being inconsistent and creating confusion contrary to its own earlier rulings and drawn orders on the similar subject specifically rulings dated 4th May 2020 and 30th November 2020.

Looking at the grounds for review, it may quickly be concluded that they do not suggests to be framed in line of the ingredients underlined above as provided under Order XLII Rule (1)(1)(b), of the CPC (supra), the grounds are more like the grounds of appeal or revision to the higher court rather than being the grounds of review as provided under the above provision.

I hold so because, the grounds do not show and prove any discovery by the applicant of the new and important matter or evidence which after exercising due diligence was not within the knowledge or could not be produced by the applicant at the time when the decree was passed or order made, or that the decision was made on account of some mistake or error apparent on the face of the record, or that for any other sufficient reason, he desires to obtain a review of the decree passed or order made against him.

In my considered view, the argument made in support of the application is misconceived as in the submission in chief, the applicant posed as if he was before the Court of Appeal, as instead of indicating errors on the face of the record, he was showing the decisional errors which in my opinion is not the domain of this court to decide, as this court can not rectify decisional errors or mistakes it has allegedly committed, but the Court of Appeal can.

Further to that, the court was also invited to review the decision on the ground that the decision reached and the grounds relied on had already been raised entertained and decided, in the earlier on objection in the matter in question, and that in those previous ruling, the scale tilted on the side of the applicant, unlike in the impugned decision in which the decision was different from the former one. He submitted that, the later ruling created contradiction and confusion by having two different decisions on the same subject matter. To be more precise, the former decisions so referred were the one dated 04th May 2020 which based on two preliminary objections namely that, **one,** that the plaint does not disclose the cause of action and **two** that the plaintiff did not exhaust other available remedies before coming to court. In the impugned ruling, the objection was based

on the violation or otherwise of Article 19(2) of the Constitution of the United Republic of Tanzania, 1977, (supra) and section 67 of the Civil Procedure Code (supra). The impugned decision solely based on this issue only.

The second ruling is the one made in Misc. Civil Application No. 55 of 2020 which was an application for temporary injunction under Order XXXVII Rule 2(1) of the CPC, although the order sought were refused, yet the court in that ruling did not deal with the provision of Article 19(2) of the Constitution of the United Republic of Tanzania, 1977, (supra) or section 67 of the Civil Procedure Code (supra).

Therefore on that account, I find that the ruling formerly made by this court in Misc. Civil Application No. 55 of 2020 dated 30th November 2020 and in Civil Case No. 05 of 2019 dated 04th May 2020 do not in any way relate to the ruling in the Civil Case No. 05 of 2019 basing on the preliminary objection stemmed from the issue of the alleged violation or otherwise of Article 19(2) of the Constitution of the United Republic of Tanzania, 1977, (supra) or section 67 of the Civil Procedure Code (supra).

That said, it can be said that there is no any error in the said rulings as the said ruling though emanating from the same case but based on two completely different grounds and arguments.

Having discussed as I have done, I find the application at hand to be based on a misconception of facts and procedure, I find no reviewable matter, I therefore dismiss the application with costs.

It is accordingly ordered.

DATED at **MWANZA,** this 28th September, 2021

J. C. TIGANGA

JUDGE

This ruling delivered in the presence of Mr. Innocent Michael, learned Counsel for the applicant, and Mr. Deya Outa and Mr. Mtewele, learned counsel for the respondent on line vides audio teleconference.

THE HIGH COURT OF TANZANIA
MWANZA

J. C. TIGANGA

JUDGE

28/09/2021