IN THE HIGH COURT OF TANZANIA

(DAR ES SALAAM DISTRICT REGISTRY)

AT DAR ES SALAAM

CIVIL REVISION NO. 07 OF 2021

(Arising from the Ruling and Order of the High Court of Tanzania at Dar es salaam in Misc. Civil Application No. 646 of 2019 delivered on 17th April, 2020 by Hon. **R.A. Ebrahim J**)

ELIA AGOSTINO LYIMO.....APPLICANT

VERSUS

ZANZIBAR TELECOM LIMITED-ZANTEL.....RESPONDENT

RULING

12th Oct, 2021 & 12th Nov, 2021.

E. E. KAKOLAKI J

Before this court and under certificate of urgency, the applicant has applied for review of the decision of this court in its ruling in Misc. Civil Application No. 646 of 2019 delivered on 17th April, 2020, **Ebrahim J**, dismissing his application for appointment of an umpire in respect of the dispute between him and the respondent. He has thus advanced two grounds of review going as follows:

1. That Honourable Court Ruling and Order have an error apparent on the face of record, in holding that, this Court has no jurisdiction to determine Application.
2. That the Honourable Court Ruling and Order have an error apparent on the face of record by joining a party to the application who was not party to the Application.

The applicant is thus seeking for the following prayers:

(i) The ruling and order of the High Court be quashed and set aside.

(ii) That the prayers sought in Misc. Civil Application No. 646 of 2019 be granted.

(iii) That the Respondent be ordered to pay the Applicant's costs.

(iv) Any other reliefs(s) this honourable court may deem just and fit to grant.

Briefly the applicant under section 8(2) of the Arbitration Act, [Cap. 15 R.E 2002], filed in this court an application for appointment of an umpire in respect of the dispute between him and the respondent arising from breach of lease agreement by the respondent which was entered between

them way back in November, 2005. It was one of their terms of agreement as per article/section 15.0 of the said agreement that, any dispute arising out of the said agreement be settled through and by way arbitration. That, each party had to appoint one arbitrator and the two appointed arbitrators would appoint the umpire. And further that, should there be no consensus on the appointment of the umpire then the President of Tanganyika Law Society would be responsible to appoint him/her. Abiding to their terms of agreement the applicant appointed its own arbitrator and issued the respondent with a notice to do the same so that the umpire could be appointed by the two arbitrators but no response came forth from the respondent the result of which was the filling of this application before this court seeking for its intervention to appoint the umpire. Upon hearing of both parties on merit this court (Ebrahim J) ruled out that parties had intended to have the umpire be appointed by the President of Tanganyika Law Society as per article/section 15.0 of the agreement, thus this court had no jurisdiction to entertain the matter hence dismissed it. It is also worth noting that, when this application for review was made, it was placed before my sister Ebrahim, J who was later on transferred to another duty station hence re-assignment to me.

During the hearing both parties were represented and with leave of the court proceeded with hearing by way of written submissions. The applicant hired legal services of Mr. Allen E. Kabitina, learned advocate while the respondent fended by Mr. Hendry P. Kimario, learned advocate. Submitting in support of the application Mr. Kabitina told the court, the law under Order XLII Rule 1(b) of the CPC limits the remedy of review to the aggrieved party on four grounds or conditions. **One**, there must be a party which is aggrieved. **Second**, there must be discovery of new and important matter or evidence which was not within the knowledge of the applicant or could not be produced by him at the time which the decree or order was made. **Third**, there must be some mistake or error apparent on the face of record, or **fourth**, any other sufficient reason. He said, the applicant being aggrieved party assails the decision of this court in Misc. Civil Application No. 646 of 2019 for containing some mistake or error apparent on the face of record, mentioning the error to be on the interpretation of the clause 15.0 of the Lease Contract which is the source of parties' dispute. He contended, the court was in error to find it had no jurisdiction to appoint the umpire but rather the TLS President as agreed in clause 15.0 of the lease contract while the issue at hand was not the

appointment of the umpire but rather the arbitrator whom the respondent on her part refused to appoint so as to enable the two arbitrators appoint the umpire. He lamented, unless this court intervenes, the respondent is taking advantage to hinder the applicant from seeking redress as per their agreement by refusing to appoint the arbitrator on its part. He therefore, implored the court to allow the application with costs by quashing its ruling and order and proceed to appoint the arbitrator in respect of the dispute between the parties.

In rebuttal submissions Mr. Kimario for the respondent contended, the parties' failure to appoint arbitrators who would consequently appoint an umpire amounted to nothing but lack of consensus leading to appointment of umpire thus a dispute befitting reference to the TLS president as per clause 15.0 of the lease agreement. He said, the assertion by the applicant that the issue is dispute before the court was not for appointment of the umpire but rather the arbitrator is misleading as the prayer in the said Misc. Civil Application No. 646 of 2019 was for appointment of the umpire and not the arbitrator. With regard to the central issue whether the applicant managed to establish mistake or error apparent on the face of record is existing in the impugned ruling as one of the ground for review as

per the requirement of Order XXLII Rule 1(1) of the CPC, he argued, the condition was not met. Placing reliance on the cases of **Mirumbe Elias @ Mwita Vs. R**, Criminal Application No. 04 of 2015 and **Halimashauri ya Kijiji cha Vilima Vitatu and Another Vs. Undaghwenga Baya and 16 Others**, Civil Application No. 16 of 2013 (both CAT-unreported), he stressed the arguments put forward by the applicant on the interpretation of clause 15.0 of the contract between parties do not disclose any mistake or error apparent on the face of record as required by the law. He contended, the matter by the applicant ought to have been appealed against under section 5(1)(c) of the Appellate Jurisdiction Act, [Cap. 141 R.E 2019] as this court correctly interpreted clause 15.0 of the agreement and proceeded to invite the court to dismiss the application with costs. In his rejoinder submission Mr. Kabitina almost reiterated his submission in chief while insisting failure of this court to effectively interpret clause 15.0 of parties' agreement which caused injustice on the applicant's part qualifies the court to entertain the application. He insisted this court had power to entertain the applicant's prayer for appointment of arbitrator under section 8(2) of the Arbitration Act, [Cap. 15 R.E 2002]. Finally the court was referred to the cases of **State of Gujarat Vs. Consumer**

Education and Research Centre (1981) AIR GU 223 and **Chandrakat Joshubai Patel Vs. R** (2014) TLR 218, which were both cited in the case of **Lukolo Company Limited Vs. Bank of Africa Limited**, Civil Review No. 14 of 2020 (HC-unreported) articulating on when a judgment can be reviewed on ground of an error apparent on face of record and what constitutes an error manifest on the face of record respectively. He ended his rejoinder submission by reiterating his earlier prayers.

I have dispassionately considered rival submissions of both parties concerning the grounds of review, the impugned ruling and the pleadings thereof. What is gleaned from the parties' submission is that both are at one that, this court when reaching its decision of dismissing the applicant's application in Misc. Civil Application No. 646 of 2019, for want of jurisdiction relied on clause 15.0 of their lease agreement. What remains in dispute in which this court is called to determine is the issue as to whether there is a mistake or an error apparent on face of record entitling the court to review its decision in Misc. Civil Application No. 646 of 2019. There is a lot of literature and plethora of authorities on what amounts to an error on the face of record and the principles under which review application can be dealt with by the court. I am intending to address some in the course of

this ruling. The Court of Appeal in the case of **Mirumbe Elias @ Mwita** (supra) when faced with similar predicament on when the court can review its own decision lucidly enumerated seven principles as established by the case law in our jurisdiction and other outside jurisdiction under which powers of review can be exercised. The court listed them thus:

> *"**One**, the principle underlying a review in that the court would not have acted as it had, if all the circumstances has been known. (See **Attilio Vs. Mbowe** [1970] HCD No. 3. **Two**, a judgment of the final court is final and review of such judgment is an exception. (See **Blue Line Enterprises Ltd Vs. The East African Development Bank**, (EADB), Civil Application No. 21 of 2012. **Three**, in review jurisdiction, mere disagreement with the view of the judgment cannot be ground for invoking the same. As long as the point is already dealt with and answered, the parties are not entitled to challenge the impugnebd judgment in the guise that an alternate view is possible under review jurisdiction. (See **Blue Line Enterprises Ltd Vs. The East African Development Bank**, (EADB), (supra) and **Lamlesh Varma Vs. Mayawati and Others**, Review Application No. 453 of 2012 – EAC. **Four**, the review should not be utilized as a backdoor method to unsuccessful litigants to re-argue their case. Seeking the re-appraisal of the entire evidence on record for finding the error, it tantamount to the exercise of appellate jurisdiction which*

is not permissible (See ***Meera Bhanja Vs. Nirmala Kumali Choudury*** *(1955) ISCC India.* ***Five,*** *the power of review is limited in scope and is normally used for correction of a mistake but not to substitute a view in law. (See* ***Pater Ng'omamngo Vs. Gerson A.K. Mwanga and Another,*** *Civil Application No. 33 of 2002 (CAT-unreported) and* ***Devender Pal Singh Vs. State, N.C.T of New Delhi and Another,*** *Review Petition No. 497,620,627 of 2002 (India Supreme Court).* ***Six,*** *the term 'mistake or error on the face of the record' by its very connotation signifies an error which is evident* ***perse*** *from the record of the case and it does not require detailed examination, scrutiny and clarification either of the facts or legal exposition. If an error is not self-evident and its detection requires a long debate and process of reasoning, it cannot be treated as an error on the face of record. In other words, it must be such as can be seen by one who runs and reads:* ***MULLA,*** *Commentary on the Indian Code of Civil Procedure, 1908, 14th Edition at pages 2335-6,* ***State of Gujarat Vs. Consumer Education and Research Centre*** *(1981) a Guj. 233,* ***State of West Bengal and Others Vs. Kamal Sengupta and Another,*** *(208) 8SCC 612 and* ***Chandrakat Jushubhai Patel Vs. R,*** *Criminal Appeal No. 3 of 2013 (CAT-unreported).* ***Seven,*** *a Court will not sit as a Court of Appeal from its own decisions, nor will it entertain applications for review on the ground that one of the parties in the case conceived himself to be aggrieved by the decision. It would be*

intolerable and mots prejudicial to public interest if cases once decided by the Court could be re-opened and re-heard. (See ***Blue Line Enterprises Ltd Vs. EADB*** *(Supra) and* ***Autodesk Inc. Vs. Dyason*** *(No. 2) (1993) HCA 6 (Australia)."*

On what constitutes an error manifest on the face of record in the case of **Chandrakat Joshubhai Patel** (supra) the Court had this to say:

"An error apparent on the face of record must be such as be seen by the 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.*** *" (Emphasis added)*

In this case as alluded to herein above Mr. Kabitina relying on the cases of **State of Gujarat** (supra) and **Chandrakat Joshubhai Patel** (supra) is arguing this court did not effectively deal with the interpretation of clause 15.0 of the lease agreement thus, the application is within the purview of Order XLII Rule 1(1)(b) of the CPC as that is an error apparent on face of record. Mr. Kimario is of the contrary view that, there is no any error advanced by the applicant as this court correctly interpreted the clause and arrived into a conclusive decision. It is true as stated by Mr. Kabitina a judgment can be reviewed on the ground of an error apparent on face of record when the same does not effectively deal with or determine an

important issue. The Court in the case of **State of Gujarat** (supra) observed that:

> ***"Where the judgment did not effectively deal with or determine an important issue in the case,*** *it can be reviewed on the ground of an error apparent on the face of record."* *(Emphasis supplied)*

My perusal of the impugned ruling drives me to the finding that, the interpretation of clause 15.0 of the agreement was effectively dealt with as rightly submitted by Mr. Kimario as the issue in dispute there whether the court had jurisdiction to appoint the umpire as per the applicant's prayer was resolved conclusively and in negative that, in accordance with the terms of the said clause this court lacked jurisdiction to so do as the power was vested on TLS president. The argument by Mr. Kabitina that, in the said application it was not intended to appoint the umpire but rather the arbitrator, with due respect to the learned counsel that is a misleading submission as also correctly put by Mr. Kimario and I will tell why. In the chamber summons before this court in Misc. Civil Application No. 646 of 2019, the following was the applicant's prayer and I quote for easy of reference:

1. *That this Honourable* ***Court be pleased to appoint an umpire*** *in respect of a dispute between the Applicant and Respondent. (Emphasis supplied)*

As the prayer made during the hearing of Misc. Civil Application No. 646 of 2019 and determined by this court was none but the appointment of an umpire, the applicant cannot be heard at this stage complaining that the same was not intended and therefore that amounts to an error on face of record as this court as could not entertain the prayer for appointment of arbitrator which was not placed before it by the applicant. It was held in **Mirumbe Elias @ Mwita** (Supra) that:

> *"In a nutshell, apart from the applicant raising complaints on the deficiencies at the trial,* ***his complaints were dealt with and answered by the court in the impugned judgment.*** *Therefore,* ***the applicant is not permitted to challenge the impugned decision*** *in the guise that an alternative view is possible under review." (Emphasis supplied)*

Applying the above cited principle to the facts of this case where the applicant is seeking for appointment of the arbitrator on a pretext of being aggrieved with the decision in Misc. Civil Application No. 646 of 2019, rejecting to appoint the umpire for want of jurisdiction, the point at issue which he alleges was not the intended one for determination by this court

but rather appointment of arbitrator, I hold the applicant in not entitled to challenge it as to allow him to so do will be tantamount to re-opening of hearing of the application under new prayer of appointment of arbitrator through a back door or this court to entertaining appeal from its own decision the practice which is very much detested as it amounts to abuse of court process contrary to the spirit of the case of **Mirumbe Elias @ Mwita** (supra). In this case when the Court of Appeal was revisiting the principles under which review can be entertained by the Court held as the seventh principle thus:

> *"A Court will not sit as a Court of Appeal from its own decisions, nor will it entertain applications for review on the ground that one of the parties in the case conceive himself to be aggrieved by the decision.* ***It would be intolerable and most prejudicial to the public interest if cases decided by the Court could be re-opened and re-heard.*** *(See* ***Blue Line Enterprises Ltd Vs. EADB*** *(Supra) and* ***Autodesk Inc. Vs. Dyason*** *(No. 2) (1993) HCA 6 (Australia)."* (Emphasis supplied)

The Court went on to state in conclusion that:

> *"...we entirely agree with the learned Senior State Attorney that, the applicant has not properly moved the Court to review its*

earlier decision. Apart from not meeting the required criteria warranting the review, the applicant has not made out a case for reviewing the judgment. ***The intended re-opening, re-hearing and re-arguing of what is already determined by the Court is an abuse of the court process.*** *" (Emphasis added)*

In view of the above analysis and authorities, I find the applicant has failed to demonstrate in this matter there is an error manifest apparent on the face of record warranting this court to review its own decision as what is seen in the submission in the misconceived submissions and long-drawn arguments contrary to what is defined by the case of ***Chandrakat Jushubhai Patel*** (supra) as what is constituting an error on the face of record.

In the premises and for the fore stated reasons and law, I am convinced that this application is wanting in merits and the same is hereby dismissed.

I order each party to bear its own costs.

It is so ordered.

DATED at DAR ES SALAAM this 12th day of November, 2021.

E.E. KAKOLAKI

JUDGE

12/11/2021

Delivered at Dar es Salaam in chambers this 12th day of November, 2021 in the presence of Mr. Allan Kabitina, advocate for the appellant, Mr. Method Nestory advocate for the respondent and Ms. Asha Livanga, court clerk.

Right of appeal explained.

E. E. KAKOLAKI

JUDGE

12/11/2021