IN THE HIGH COURT OF THE UNITED REPUBLIC OF TANZANIA

(IN THE DISTRICT REGISTRY OF MWANZA)

AT MWANZA

CIVIL REVIEW NO. 01 OF 2021

Originating from Miscellaneous Land Application No. 164 of 2019 of the High Court of Tanzania at Mwanza)

FURUZA KAHUZU .....APPLICANT

VERSUS

MATHIAS KWEZAHO..... RESPONDENT

RULING

28/10/2021 & 15/03/2022

F. K. MANYANDA, J.

This Court is being moved under the provisions of section 2(1) of the Judicature and Application of Laws Act, [Cap. 358 R. E. 2019], sections 78(1)(b) and 95 and Order XLII Rule 1(b) of the Civil Procedure Code, [Cap. 33 R. E. 2019] to review its own decision in Miscellaneous Land Application No. 164 of 2019 dated 18/12/2020. The Memorandum of Review contain only one ground which reads as follows: -

> *"That there is sufficient reason/an error and mistake in the face of record as the court strike out Miscellaneous Land*

Application No. 164 of 2019 for not having a notice of appeal which was filed in the Court of Appeal of Tanzania."

On 18/12/2020 this Court struck out Miscellaneous Land Application No. 164 of 2019 filed by the Applicant Furuza Kahuzu for certificate on point of law on reason that it didn't exhibit any notice of appeal filed in the Court of Appeal of Tanzania signifying existence of an appeal.

In this matter the Respondent successfully sued the Applicant for a disputed parcel of land in Land Application No. 30 of 2013/2014 in the Nyakahula Ward Tribunal. However, the said trial Ward Tribunal did not award costs to the Respondent. Then, he applied for execution in the District Land and Housing Tribunal (DLHT) for Chato District which was executed accordingly. After the execution, the Applicant filed a Bill of Costs against the Respondent in the DHLT which awarded him the costs to the tune of TShs. 8,062,300/=. To recover the costs the Applicant filed another application for execution No. 31 of 2015 against the Respondent which the DLHT ordered sale of the Respondent's house which ultimately was sold and the proceeds pocketed by the Respondent.

Being aggrieved, the Applicant successfully appealed to the High court which quashed the proceedings, attachment and sale orders by the DLHT on reasons among others that both the trial Ward Trial tribunal did not award him costs

and ordered the Applicant return the proceeds to the Respondent. The Applicant decided to appeal to the Court of Appeal of Tanzania against the decision of the High Court. Being a third appeal, the same needs a certificate of point of law of this Court; hence Miscellaneous Land Application No. 164 of 2019 which was struck out on reasons explained above.

At the oral hearing, the Applicant was represented by Mr. Mr. Innocent Bernard, learned Advocate and the Respondent enjoyed the representation services of Mr Majid Kangile, learned Advocate.

Mr. Bernard submitted in support of the application arguing that at page 8 of its ruling this Court held that the application was pre-mature for want of a notice of appeal to Court of Appeal as required by Order 46(1) of the Court of Appeal Rules, 2009. The Counsel contended that that piece of finding is an error because there was a notice of appeal filed on 23/09/2019 and filing fees paid per Exchequer Receipt No. 245119114 dated 23/09/2019. He observed that since the notice of appeal was already filed, the advice of this Court to the Applicant to file first a notice of appeal is untenable because there existed a notice already. That, according to the Counsel constitutes a "sufficient reason/an error and mistake in the face of record."

In his reply Mr. Kangile submitted opposing the application arguing that the ruling was, and it is to date correct in law. The Counsel stated the law in review

that there must be a discovery of a new or important evidence which was not within the knowledge or could not be produced by the Applicant. The Counsel observed that in the instant application the issue of lack of notice of appeal was initially raised as a preliminary objection, therefore, it was within the knowledge of the Applicant. Further, even after the objection was overruled when the application came for full hearing the issue of lack of notice of appeal re-surfaced, as a matter of evidence, the same was found missing. The Counsel questioned if in those circumstances the Applicant can be said to have unaware about its existence.

To stick a hot nail on a sore, the Counsel questioned the reasons for failure to serve the Respondent as required by law of appeal to the Court of Appeal. Moreover, he questioned failure of registering the same in the High Court Registry as per Rule 83(1) of the Court of Appeal Rules. He was of the views that a fresh notice of appeal be solicited and handled in accordance with the relevant laws.

In rejoinder, Mr. Bernard reiterated his submissions in chief and added that the law recognizes other reasons which empowers this Court to exercise its discretionary powers to review its decision where it finds expedient.

Those were the submissions by the Counsel for both sides. I am thankful to them; both Counsel with the usual zeal and eloquence, argued their

positions well. Moreover, I sincerely register my apology for late delivery of this judgement, the causes of delay were out of my control.

The question is whether this application meets the conditions for review. As it can be seen from the submissions by the counsel for the Applicant in his rejoinder he stated as follows: -

> *"But the law he cited provides also 'for any other reasons'".*

The Counsel was responding to the submission by the Counsel for the Respondent that the Applicant failed to demonstrate existence of any error or mistake in the face of record. This means the Counsel for the Applicant admitted that the impugned ruling has no error or face on the face, but there are other reasons which can empower this Court to exercise its discretionary powers to review its decision. He contended that the reasons are an error because there was a notice of appeal already filed and that no new notice can be lodge while there exists another.

In this land, the law is well settled on reviews. First of all, there is Section 78(1) of the Civil Procedure Code of which relevant provisions for this matter provides as follows: -

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

(a) NA

(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."

Another provision relied on in moving this Court is Order XLII Rule 1(1)(a) which provides that:

1.-(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 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.* (emphasis added).

These provisions of the law have been interpreted by courts of record in several occasions. In the case of **East African Development Bank Vs. Blueline Enterprises Tanzania Ltd,** Civil Application No. 47 of 2010 (unreported). The Court of Appeal cited with approval the case of

Chandrakant Joshubhai Patel v Republic (2004] TLR 218 that adopted the reasoning in MULLA 14th Edition pp 2335-36 thus: -

> *"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 drown process of reasoning on points on which there may conceivably be two opinions ... A mere error of law is not a ground for review That a decision is erroneous in law is no ground for ordering review ... It can be said of an error that 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 ... "*

It follows therefore that an apparent error on the face of the records envisaged under Order XLII Rule 1(1) of the CPC must be obvious one that strikes in the eyes immediately after looking at the records and it does not require a long-drawn process of reasoning on points where there may be possibly two opinions. It is an error which is patently clear and self-evident such that it does not require any extraneous matter to show its existence and which no court would leave it to remain on records.

The other aspect which emerges out of the said decisions is that an application for a review is not supposed to be an appeal in disguise

through which an applicant seizes an opportunity for a fresh hearing of the case in the hope that the court will re-evaluate the evidence afresh and come to a different view from the original one. This is evident from an examination of the commentaries by **Mulla (supra),** enumerated by the Respondent's Counsel and the *ratio decidendi* in the case of the **East African Development Bank vs. Blue Live Enterprises Ltd,** Civil Application No.21 of 2012 (unreported) referred to by the Court of Appeal in **Kitinda Kimaro vs. Anthony Ngoo** & **Davis Anthony Ngoo,** Civil Application No. 79 of 2015 (unreported). For better appreciation of principles, I take the liberty to reproduce a passage from **Kitinda Kimaro** (supra) citing **Nguza Vikings @ Babu Seya** & **Another V. Republic** making reference to an earlier decision of the same court in **Chandrakant loshubhai Patel vs. Republic** [2004] TLR 218 thus:

> *"There is no dispute as what constitutes a manifest error on the face of the record. It has to be such an error that is an 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 Court of Appeal then gave a menu of instances which do not warrant exercise of the power of review, the Court of Appeal listed the following:

i. *If the error is not self-evident and has to be detected by the process of reasoning,*

ii. *If there are two possible views regarding the interpretation or application of the law,*

iii. *Any ground of appeal,*

iv. *An erroneous decision,*

v. *A mere error or wrong view and,*

vi. *A different view on a question of law or an erroneous view on a debatable point or wrong exposition or wrong application of the law.*

The directions that are taken after scrutinizing a review were spelt in the case of **Masoko Agencies (T) Limited vs. Precision Air Services PLC,** Commercial Review No. 06 Of 2019 by Hon. Fikirini, J. (as he then was) who cited the case of **James Kabalo Mapalala** v. **British Broadcasting Corporation [2004] TLR 143,** when the Court had this to state:

> *"..... in an application for review, the judge is not sitting as an appellate Court. In that situation, if the judge is satisfied that the tests for review laid down under Order XLII, rule 1 are met, it is expected of him to grant the application by effecting the relevant and necessary rectification and corrections sought* ***in the judgment*** *which in warranting circumstances,* ***may be varied as a result of the new and***

important matters discovered. Otherwise, the judgment is not quashed in a review application. *On the other hand, if the judge is satisfied that there is no sufficient ground to justify a review, the application is rejected by dismissing it."*

From the length authorities I have cited above, it remains a true principle of law that for review to succeed, the error or mistakes in the impugned decision must not be detectable by the process of reasoning, must not be capable of two possible views regarding the interpretation or application of the law and should not be ground of appeal or mere erroneous decision.

In the matter at hand, the impugned ruling has no such error or mistakes because at the time of hearing of the application that led to this matter, there was no evidence at all adduced before this Court by the Applicant showing that there was a notice filed in the Court of Appeal of Tanzania. Moreover, there is evidence showing that the issue of lacking notice of appeal was in discussion first in a preliminary objection and second in the application of the application that gave the impugned ruling. The reasons stated above, makes this Court find that the issue of notice in this matter is not within a situation envisaged under Order XLII Rule 1(1) of the CPC, that is, the discovery of new and important matter or evidence which,

was not within his knowledge or could not be produced by him at the time when the decree was passed or order made.

I say so because, the notice was within the knowledge of the Applicant and that he could produce the same. There is no reason given what prevented him from producing it during the hearing even after been made aware of its importance by a preliminary objection.

In my opinion to allow review due to such lax reasons which basically it is out of sheer negligence is to read the law and the authorities cited above upside down.

It is on these reasons that I find the application failing to meet the threshold put under the provisions of the law under which this review has been brought. I hereby reject and dismiss this application for want of merit with costs.

It is ordered accordingly.

THE HIGH COURT OF TANZANIA

F. K. MANYANDA

JUDGE

15/03/2022