IN THE HIGH COURT OF THE UNITED REPUBLIC OF TANZANIA

IN THE DISTRICT REGISTRY OF ARUSHA

AT ARUSHA

CIVIL REVIEW NO. 03 OF 2021

(C/F Civil Appeal No. 20 of 2017 in the High Court of Tanzania at Arusha, Originating from Karatu District Court, Civil Case No. 06 of 2016)

AMSI SHAURI.....APPLICANT

VERSUS

BILAURI BUGHE @ ABDALLAH BUGHE.....RESPONDENT

RULING

22/07/2022 &22/09/2022

GWAE, J

This is the ruling which stems from a preliminary objection raised by the respondent on the following two points of law;

1. That, this Honourable Court is functus office to entertain Civil Review No.03 of 2021 and its prayers now pending before this Honourable Court.
2. This Honourable Court lacks jurisdiction to entertain the Civil Review No. 3 of 2021 and its prayers now pending before this court.

Primarily, the applicant was dissatisfied with the judgment and decree of this court (Hon. Maghimbi, J) delivered on 3rd July 2018. Therefore, he filed this review application on the following grounds;

1. That this Honourable Court erred in condemning the applicant to pay the costs of the appeal while the alleged error was committed by the trial court and that is contrary to the guiding principles and practice of the Court.
2. That, this Honourable Court erred in quashing and setting aside part of proceedings, judgment and decree of the trial court relying on legal technicalities instead of looking into the substantial justice.

Basing on the above grounds for the sought review, the applicant thus prayed for the following orders of the court;

1. This Honourable Court be pleased to review, reverse and set aside the judgment and decree dated 3rd July 2018.
2. The proceedings, judgment and decree of the trial court be upheld/left undisturbed.

The respondent's preliminary objection was orally argued by the parties' advocates namely; Mr. Geofrey Mollel and Mr. Gwakisa Sambo

who appeared in court duly representing the applicant and respondent respectively.

Strongly supporting the preliminary objection, the respondent's counsel argued as follows; **firstly,** that, this court is functus officio to entertain Civil Review No. 3 of 2021 together with its prayers because by doing so will amount to fault the judgment of my fellow judge and that even if Hon. Maghimbi, J who heard and determined Civil Appeal No. 20 of 2016 was the one presiding this application, she could not be legally competent to set aside the judgment and decree which she had already pronounced and passed. The learned counsel then urged this court to make a reference to the decision of the Court of Appeal in the case of **Hermanus P. Steyn vs. Charles Thys**, Civil Application No. 120 of 2016 (unreported) where it was authoritatively emphasized that a mere error of law is not ground for review and a review is by no means is an appeal in disguise. In light of the above decision, Mr. Gwakisa was of the opinion that, this court cannot review or reverse and set aside the decision of this court in a matter heard and conclusively determined enter-parties by itself and

Secondly, that, this court cannot be competent to reverse its decision or order as prayed in the Memorandum of Review. He supported

his point of objection with the decision of the Court of Appeal in the case of **Angumbwikwe Kamwambe vs. Republic**, Criminal Appeal No. 10 of 2015 (unreported-CAT), at page 8 where it was stated that, this court correctly held that it could no longer be invited to reverse its own decision. He equally invited the court to make reference to the case of **Omari Idd Mbezi and 2 others vs. Republic**, Criminal Application No. 31/01/2020 at page 11 where it was stated that, the judgment of the court is final. Therefore, the court which rendered its decision cannot subsequently sit as an appellate court of its own decision. Therefore, it was his submission that, once the case is decided by the court cannot be re-opened and reheard by the same court. It was therefore his opinion that this application is wrongly filed before this court. He finally sought this application be struck out with costs.

In his response to the submissions by the respondent's advocate strongly argued that, the respondent's counsel is misleading, the court on the ground that, this court can only be functus officio when the matter was previously and finally determined on the same matter, he referred to the case of **Kamungi vs. Republic** (1973) EA 540. Mr. Mollel went on to state that this application was brought under Order XLII Rule 1 (a) of the Civil Procedure Code Cap 33, Revised Edition, 2019 which reads that, any

person considering himself aggrieved on which an appeal is allowed but no appeal has been preferred and who from discovery of new or important matter which was not within knowledge or could not be produced by him at the time when a decree or an order or on account of mistake or error apparent on the face of record or any other sufficient reason desire to obtain a review of decree or order made against him may apply for a review of judgment to the court which passed the decree or made the order. From the provisions of the law and judicial precedent cited above, the counsel for the applicant prayed for an order overruling the PO raised by the respondent's counsel.

In his short rejoinder Mr. Sambo stated that, judicial precedent cited by the applicant's advocate is distinguishable as the appeal before the court was heard on merit adding that, Order XLII Rule 1 (a) and section 78 of Civil Procedure Code (Supra) are not useful to the applicant since conditions for the review have not been met as the Memorandum of Review is silent if there are new discoveries of important matter or evidence or apparent error on the face of the record. He thus sought an order striking out this application with costs.

Before I start determining the respondent's limbs of objection, I should start by acknowledging that, ordinarily, an application for review

is conveniently heard and determined by an adjudicator who passed the questionable decree or order except in the following situations; where the one who passed the decree or made the order has been transferred like the present application or is dead or he or she unable to discharge his or her duties for one or other reasons. Following undisputed transfer of **Hon. Maghimbi,** J, for that ground, I am so entitled to proceed determining this application for review as a successor.

Now to the determination of the respondent's PO, I have carefully considered the oral submissions of the parties' counsel, the impugned judgment its decree which are the subject of this review, prayer contained in the Memorandum and come up with an observation that, in essence the applicant is challenging the decision of this court which ordered the applicant, the then respondent to pay costs of the appeal especially as depicted in ground 1.

According to the applicant, the impugned order as to costs of the respondent's Civil Appeal No. 3 of 2017 made by the court is contrary to the guiding principles and practice of our courts and parts of the court's proceedings, judgment and decree be quashed and set aside in adherence to the principle of overriding objective whose objective is to dispense justice without regard to legal technicalities. In order to be in a better

position to determine the respondent's PO, it is perhaps apposite if Order XLII Rule 1 (a) & (b) of the CPC that has been cited to move this court for the sought review is reproduced as herein under;

> *"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)."*

My reading from the above quoted provision of the law, makes me not say more as the wording of the statutory provision is unambiguous and to the effect that, an application for review can be preferred in any of the three or both or all three scenarios; **firstly**, in a situation where there are discoveries of not only new matter (s) or evidence but also significant matter (s) or evidence which after exercise of due diligence on

the part of the applicant were not within his or her knowledge at the time the decree was passed or the order was made. Hence, the applicant has to show that such discoveries could not be easily discovered before passing of decree or making of an order despite his or her efforts **secondly**, it can be pursued where there are mistakes or errors apparent on the face of record and **thirdly,** for any other good cause.

Therefore, the question that follows is, whether the grounds of review registered by the applicant in his memorandum of review fall within the purview of Order XLII Rule 1 (a) & (b) of the CPC (supra). The answer is simply No. I unhesitatingly hold so for an obvious reason that, the grounds listed are more effectual the grounds for an appeal than grounds for review.

In our present application, the applicant has not demonstrated any new discoveries or shown any mistake or error apparent on the face of record to legally warrant this court to review its own decision. To say the least, going through the judgment I have noted that, in her conclusion, the learned appellate judge plainly made the order as to costs to be borne by the respondent now applicant. It is therefore my considered view that, had the learned judge in her finding that is prior to her conclusion waived costs of the appeal to the parties due to the fact that the error was not

caused by the parties but inadvertently, in the conclusion she made such order that, would constitute an apparent mistake or error on the face of the record unlike to present situation.

Similarly, the reliefs sought by the applicant are in fact intended to move this court to correct the orders already pronounced by my learned sister as no apparent error on the face of the record. Essentially, my hands are tied up to make rectifications in the decision passed by this court and by doing so this court will be sitting as an appellate court to make its own corrections instead of the Apex Court of the land as by holding that, the court was tied up by legal technicalities or that the court omitted to adhere to the guiding principles and usual practice of our courts is tantamount to reversing my own decision. I am fortified by the decision of the Court of Appeal of Tanzania in the case of **Rizali Rajabu vs. The Republic,** Criminal Appeal No. 4 of 2011 (Unreported) cited with approval in the case of **Hermanus P. Steyn vs The Republic,** Civil Application No. 120 of 2016 where the Court stated as follows;

> *"We are alive to a well – known principle that a review is by no means an appeal in disguise. To put is differently, in a review the court should not sit on appeal against its own judgment in the same proceedings....."*

The same position was recapped by the Court of Appeal of Tanzania in the case of **Omari Iddi Mbezi** (supra) cited by the respondent's counsel where the court stated;

> *"It has been the stance of the court in any application that bears some resemblance to the present one that, a judgment of the court is final and review of such judgment is an exception. Moreover, it is the position of the law that, a court will not sit as a Court of Appeal from its own decision, 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....."*

Guided by the above the court's decisions and reasons that I have endeavoured to demonstrate, with the outmost due respect with the learned counsel for the applicant, this application is not maintainable for the sought review since neither recovery of new and important matter or evidence immediately after passing of decree or order that has been demonstrated nor apparent mistake or error on the record that has been shown. More so, the 2nd prayer contained in the Memorandum of Review is seriously misplaced since he plainly prayed for upholding of the trial court's proceedings, judgment and decree which means the applicant is challenging the legality or correctness of the judgment and its decree dated 3rd July 2018.

Basing on the foregoing reasons, the respondent's preliminary objections are meritorious, the same are upheld. In the event, the application for review is hereby struck out with costs.

It is so ordered.

M. R. GWAE
JUDGE
22/09/2022

Court: Right of appeal to the Court of Appeal fully explained

M. R. GWAE
JUDGE
22/09/2022