**IN THE HIGH COURT OF TANZANIA**

**DAR ES SALAAM DISTRICT REGISTRY**

**AT DAR ES SALAAM**

**CIVIL REVIEW NO. 9 OF 2019**

*(Arising from the Misc. Civil Application No. 675 of 2017)*

**KUNDA I. MWASHA..... APPLICANT**

**VERSUS**

**ZUMBE KIHIYO .....RESPONDENT**

# RULING

*Date of Last Order: 9/9/2021*

*Date of Ruling: 16/08/2022*

**S.M. KULITA, J**

This is an application for review filed by the Applicant herein, KUNDA I. MWASHA. It is against the decision of this court in the Misc. Civil Application No. 675 of 2017 delivered on 28/03/2018. The applicant is represented by the Learned Counsel Ditrick Mwesigwa, Advocate while the Respondent, ZUMBE KIHIYO is represented by Geofrey John Mundigile through power of attorney. The application has been made under Order XLII, Rule 1(b) and 3;

Order XXXIX, Rule 1(1) and (2) of the Civil Procedure Code [Cap. 33 RE 2002].

In his application the Applicant seeks for review on two issues as follows; **First,** that, upon striking out the application for none citation of relevant provision, this court ought to have directed the Applicant on the relevant provision he is required to cite. **Secondly,** that, apart from section 95 there is no specific provision in the Civil Procedure Code which moves the court for the orders sought by the Applicant in the Misc. Civil Application No. 675 of 2017.

In his written submission the Applicants counsel submitted that before making an order of striking out the Misc. Civil Application No. 675 of 2017 on that 28/03/2018 the presiding Judge raised an issue whether the court has been properly moved for the citation of section 95 of the Civil Procedure Code only, in the application for setting aside the dismissal order. He said that the Judge proceeded to strike out the application without directing which provision was indeed proper in the circumstances. The Counsel concluded that, failure of the court to direct in its order, the relevant provision applicable after finding out that section 95 of the Civil Procedure Code was not relevant, is an apparent error on the face of record.

On furtherance to that the Applicant's Counsel connected the above submission with the second ground that there is no specific provision in the Civil Procedure Code which moves the court in dealing with the application to set aside the dismissal orders, the prayer that had been sought in vain by the Applicant in the Misc. Civil Application No. 675 of 2017. He concluded that it is only the cited section 95 which is relevant.

In the reply thereto the Respondent submitted that not every error on the face of the record is subject to appeal, it must be the one which would result into the miscarriage of justice. As for the matter at hand the Respondent submitted that the Applicant has not shown that omission of the alleged provision in the High Court decision from which this application arises, has resulted into miscarriage of justice.

The Respondent concluded by praying this court to dismiss the application with costs.

In rejoinder the Applicant almost reiterated what he had submitted in his submission in chief.

Before going to the submissions I went through **Order XLII, Rule 1 of the Civil Procedure Code [Cap 33 RE 2002]** which provides the circumstances under which the review can be entertained. The provision states:-

*"(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 a discovery of a 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 mistaken or error apparent on the face of 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 the judgment to the court which passed the decree or made the order.*

*(2).....not applied....."*

The above cited provision has been clarified in a case **of ALFRED ANASA SHARA V. TANZANIA TELECOMMUNICATIONS COMPANY LIMITED, Misc. Civil Cause No. 151 of 2007, High Court, DSM District Registry (unreported)** in which the case of **KARIM KYARA V. R, Criminal Appeal No. 4 of 2007, CAT at Dodoma (unreported)** was cited. The court said;

*"The principle underlying review is that the court would have not acted as it had if all the circumstances had been known. Therefore review would be carried out when and where it is apparent that-First,* ***there is a manifest error on the face of the record which resulted in a miscarriage of justice.*** *The applicant would therefore be required to prove very clearly that there is a manifest error apparent on face of the record. He will have to prove further, that such an error resulted in injustice (see Dr. Aman Walid Kabourou Vs. The Attorney General and Another, Civil Application No. 70 of 1999 -unreported). Second, the decision was obtained by fraud. Third, the application was wrongly deprived the opportunity to be heard. Fourth, the court acted without jurisdiction (see C. J. Patel V. R. Criminal Application No. 80 of 2002)"* ***(emphasis is mine).***

The Court of Appeal in **JUMANNE KILONGOLA @ ASKOFU v. R, Criminal Application No. 64/01 OF 2020, CAT at DSM** provided a summary of the situation in which the Review case can be instituted. The said court mentioned the following;

*"(a) the decision is based on a manifest error on the face of the record resulting in the miscarriage of justice; or*

*(b) a party was wrongly deprived of an opportunity to be heard; or*

*(c) the court's decision is a nullity; or*

*(d) the court had no jurisdiction to entertain the case; or*

*(e) The judgment was procured illegally or by fraud or perjury."*

As earlier stated, the applicant has hinged the grounds for review relying on the manifest error on the face of the record. Having examined the grounds of review and submissions of the parties I am now in a position to determine, whether the grounds advanced by the applicant justify the review of this Court's decision delivered on 28/03/2018.

In my analysis I find it imperative to start with analyzing as to **what constitutes manifest error on the face of record**. The said phrase was discussed in the case of **Chandrakant Joshubhai Patel V. Republic [2004] TLR 218** wherein the Court of Appeal stated: -

*"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 reasoning on points*

*on which there may conceivably two opinions.....It must further be an error apparent on the face of record..."*

Upon determining the complaints and examining the Court's decision under scrutiny, as I have so pointed out earlier that **O. XLII, R. 1 of the Civil Procedure Code** expresses the circumstances under which a review may be entertained. The same was stated in **ALFRED ANASA SHARA V. TANZANIA TELECOMMUNICATIONS COMPANY LIMITED (Supra)**. It was also stated in the case of **KARIM KYARA V. REPUBLIC (Supra)** and **JUMANNE KILONGOLA @ ASKOFU v. R, CRIMINAL APPLICATION (Supra).**

Having carefully gone through the parties' submissions and the above cited provisions and cases , I have noticed that the sought review does not solicit this court to rectify any manifest error on the face of the record which resulted in a miscarriage of justice, or address fraud or that the applicant was wrongly deprived the opportunity to be heard and/or that the court acted without jurisdiction in respect of the Misc. Civil Application No. 675 of 2017.

I say so basing on the reason that, it was not mandatory for the presiding Judge in the original case (Misc. Civil Application No. 675 of 2017) to provide a relevant provision ought to have been cited

by the party or his Advocate. The Judge could have do so just for the sake of clarification of his decision or insisting his instructions to the party(s). It is therefore not an error for the Judge, while striking out the matter before him, not to clarify to the party(s) on the provision that he/she was supposed to cite or is required to cite when he re-files it. It is the duty of the parties themselves to find the relevant citation(s). From the impugned decision I don't see any manifest error on the face of the record.

Even if it was mandatory for the presiding Judge to make that clarification to the party(s) but he didn't do so, still it could not be fatal, as what is used to be reviewed according to **O. XLII, R. 1 of the Civil Procedure Code [Cap 33 RE 2002]** and the cited cases of **ALFRED ANASA SHARA V. TANZANIA TELECOMMUNICATIONS COMPANY LIMITED** (Supra)**, KARIM KYARA V. REPUBLIC (Supra)** and **JUMANNE KILONGOLA @ ASKOFU** is the **manifest error on the face of the record which resulted into the miscarriage of justice.** See also the case of **TRANSPORT EQUIPMENT LTD V. DEVLAM P. VALAMBHIA [1998] TLR 90.**

As for the matter at hand, the matter has just been struck out, which means that the Applicant is still at liberty to re-file the same

upon making proper citation. Therefore, the issue of miscarriage of justice is not there.

The Applicant also came up with the issue of absence of any other provision, apart from section 95 of the Civil Procedure Code which moves the court for the orders sought by the Applicant in the Misc. Civil Application No. 675 of 2017. On this he tried to justify this court that the Applicant was right to cite section 95 only as there is no other provision which is relevant for the application to set aside the dismissal order for none appearance.

In my scrutiny over this matter I have noted that the Applicants litigation based on challenging the impugned decision rather than showing the manifest error on the face of the record, which could amount to review. In review jurisdiction, a mere disagreement with the judgment cannot be a ground for invoking the same. As long as the point has already been dealt with and determined, the parties are not entitled to challenge the impugned judgment under review jurisdiction. This was also held in **Blue Line Enterprises Ltd V. The East African Development Bank (EADB), Civil Application No. 219 of 2012 (unreported).** A similar stance was taken in the case of **Minani Evarist V. Republic, Criminal Application No. 5 of 2012 (unreported),** also in **MUHSIN MFAUME V. R, Criminal Application No. 43/01 of 2020.**

In fact this application is an appeal in disguise. The mere fact that the Applicant is not happy with the decision of the court would not amount to a ground for Review. In **Chandrakant Joshubhai Patel (supra),** borrowing from **MULLA 14th Edition at pg. 2335-6,** it was stated that a mere error of law is not a ground for review. That, a decision being erroneous in law is not a ground for ordering review. It is an error which may fit well as a ground for appeal rather than a review.

In view of what I have stated above, I find and hold that the application was filed without any justifiable ground for review. I accordingly **dismiss** it with costs.

**S.M. KULITA**
**JUDGE**
**16/08/2022**