IN THE HIGH COURT OF THE UNITED REPUBLIC OF TANZANIA

(ARUSHA DISTRICT REGISTRY)

AT ARUSHA

CIVIL REVIEW NO. 3 OF 2022

(Originating from High Court Civil Case No. 8 of 2021)

CHRISTINA LEMBRIS MOLLEL .....1ST APPLICANT

MUSTAPHA BOAY AKUNAAY.....2nd APPLICANT

VERSUS

MOSES MEIMARI LAIZER.....RESPONDENT

RULING

17/11/2022 & 24/01/2023

GWAE, J

This ruling emanates from an application for review of the judgment and decree of the court (**Gwae, J**) delivered on 12th day of July 2022 directing return of the District Court's Case file and an amendment by relinquishing the applicants' claims on landed properties and the same be filed to a proper court forum.

The application is brought under Order XLII Rule 1 (1) (a), (b) 4 (2) and section 78 (1) (a) (b) of the Civil Procedure Code, Cap 33 Revised Edition, 2019. The following are the applicants' grounds for the review;

1. That, there is an error apparent on the face of the record in that the court ordered the plaintiff to amend the plaint and separate claims of the landed properties and file its claim in the land tribunal.
2. That, the said decision was made without having in mind that when there is dispute over estate of the deceased only the probate and administration court seized of the matter can decide on the ownership as decided in the case of **Mgeni Seif vs. Mohamed Khalfan,** Civil Appeal No. 1 of 2009 (Unreported), The court of Appeal sitting at DSM
3. That, if the sad decision is implemented the applicants will lose truck of seeking their rights in the distribution of the estate of the deceased
4. That, for the sake of ends of justice the court is asked to review the decision passed in Civil Appeal No. 8 of 2021.

The factual background of the dispute between the parties is not complicated, it is as follows; the applicant filed in the District Court of Arusha at Arusha a Civil Case registered as Civil Case No. 16 of 2018. The defendant now respondent canvassed a preliminary objection comprised of seven points of law one being that, the magistrate courts are not

clothed with jurisdiction on the matter /claim on ownership of land. Basing his decision on jurisdictional issue raised by the respondent, the learned Resident Magistrate dismissed the applicants' case with costs. Aggrieved by the decision of the District Court, the applicant appealed to the court via Civil Appeal No. 8 of 2021 whose decision is subject of the review at hand.

On 17th day of November 2022 Ms. Faudhia and Ms. Ayo appeared representing the applicants and respondent respectively. This application was ordered to be disposed of by way of written submission after the parties' advocates had sought and obtained leave. The Parties' written submissions were filed.

Supporting this application, the applicants' advocate elaborated that, this court is empowered, in exceptional circumstances; to rectify its apparent error emanating from its decision which it passed in other words the court is clothed with jurisdiction to change its earlier decision. She cited section 78 (1) (a) of the Civil Procedure Code, Cap 33, Revised Edition, 2019. According to the applicants' counsel, failure by the court to construe the cause of action by splitting the claim amounts to manifest error on the face of the impugned judgment. She added that the court has inherent jurisdiction to review in the following scenarios; One, where

there is a manifest error on the face of the record resulting in manifest miscarriages of justice. Two, where the decision was obtained by fraud or where a party was deprived of the opportunity to be heard. Bolstering her argument, the learned counsel for the applicants urged this court to refer the decision of the Court of Appeal in the case of **Transport Equipment Ltd v. Deveram P. Vallambia**, Civil Application No. 18 of 1993 (unreported-CAT) and the one she duly cited in the Memorandum of Review (Mgeni's case (supra)).

Resisting this application, the respondent's counsel argued that, the applicants are challenging points of law that had already been decided by the court while the court is empowered to review its decision normally for correction of mistakes. He cited the **Majid Goa @Vedastus v, Republic**, Criminal Appeal No. 303 of 2013 (unreported-CAT).

Challenging the 1st and 2nd ground for review, the counsel for the respondent argued that, the same are baseless since this court reasoned those estates as per the applicants' plaint that was filed before the District Court. According to the respondent's counsel, there are no cogent reasons justifying this court to review its own decision. He thus prayed for an order dismissing this application with costs.

In their brief rejoinder, the applicants stated that, if the impugned judgment is implemented the complaint filed in the land tribunal, the same will be dismissed on the ground of lack of jurisdiction on the part of the tribunal. They reiterated the adherence to the decision of the Court of Appeal in **Mgeni Seif vs. Mohamed Khalfan,** (supra) where it was held that only the Probate and Administration Court can explain how the deceased person's estate passed onto beneficiary or bonafide purchaser of the estate for value.

Having briefly outlined what transpired before this court and the court below as well as the parties' written submissions. I am now duty bound to determine the 1st and 2nd ground for the review as presented and argued since ground 3 is nothing but a mere repetition of the ground 2 and 4th ground is not a ground for review in the eye of the law but a mere prayer.

Before I start considering merit or otherwise of this application, I think it is apposite to have in our minds that, there has been an error caused either by the trial court and or the parties during filing of the appeal before the court vide Appeal No. 8 of 2021 and Misc. Civil Application No.47 of 2020 before me in the status of the respondent. I am of such observation, as the respondent ought to be sued as

administrator of the estate of the late Lucia Lotorivoki Laizer as initial pleadings depict and not in his personal capacity. However, I think that alone does not go to the root of the case since the initial proceedings reflect that, the respondent herein is acting in the capacity of the administrator.

As to the order of splitting the applicants' claim which is complained to have contained material illegality apparent of the face of the judgment. There are guiding principles that justify the same court which passed its judgment and decree to legally rectify the same by way of review. However, this avenue must be diligently applied otherwise the court may sit as trial court and then as an appellate court for its own decision. Therefore, litigants and courts must be guided by well-known principles in order to avoid our courts to sit as trial courts and then as appellate court. In **Chandrakant Joshubhai Patel vs. Republic (2004) TLR 218** where it was held that,

> "(i)The Court of Appeal held that it has inherent jurisdiction to review its decision and it will do so in any of the following circumstances (which are not necessarily exhaustive):
>
> (a) Where the decision was obtained by fraud;
> (b) Where a party was wrongly deprived of the opportunity to be heard; and

(c) Where there is a manifest error on the record, which must be obvious and self-evident, and which resulted into a miscarriage of justice;

(ii) Consideration of additional evidence by the Court of Appeal in a manner contrary to established principles does not, even if correct, constitute an error which will ground an application for review.

(iii) Failure or omission by an appellate Court to draw an adverse inference or any inference from non-disclosure of evidence at the trial is a non-direction which may be a good ground for appeal, where further appeal lies, but cannot be a good ground for review".

The Court of Appeal had also have an opportunity of explaining and emphasizing the limitations of the use of the application for review in the case of **Mapalala vs. British Broadcasting Corporation** (2002)1 EA 132 where it was stated:

"The conditions necessary for granting a review application under Order XLII, Rule 1 of the Civil Procedure Code are that; ***firstly,*** *there is a party which is aggrieved by the decision,* ***secondly,*** *there is a discovery of a new and important matter or evidence which, after due diligence was not within the knowledge of the party at the time of judgment or,* ***thirdly****, there was an error apparent on the face of the record".*

See also the courts' decision in **Sasini Tea and Coffee Ltd v Obwogi** (2003) 1 EA 277 and **Kanyabwira vs. Tumibaze** (2005) 2EA 86.

In view of the above binding decisions of the Court of Appeal, there are definitive limits for review unlike the applicants' assertions through their counsel submission. In our instant application had this court considered only the prayers contained in the plaint that would be proper to move this court by way of review. Currently, there is neither apparent and self-explanatory error in the impugned nor an additional evidence is discovered.

However as earlier determined in the applicants' appeal (See page 7 of the typed judgment), the "will" annexed in the amended plaint is to the effect that, the applicants were given their distinct pieces of landed properties by the deceased, one Lucia Lotorivoke Laizer on 8th August 2012 prior to her demise. In law if one is given a gift or a property out of love and affection, that property becomes the property of the donee and not that, of the donor (giver). Since in the impugned judgment, I open free for the applicants to amend their plaint relinquishing the claim over landed properties whose proceeding may be instituted to this court or District Land and Housing Tribunal depending on the estimated value of

the two properties alleged to have been given to the applicants prior to the deceased person's death.

It is further the view of this court, that joining of the 2nd applicant certainly because of the claim of ownership over the land enlisted in the will. More so, how one can claim compensation only without establishing ownership over certain property? The answer is no other than negative. Answer. A person claiming ownership over a piece of land must first establish such ownership followed with an alternative prayer of payment of compensation.

It is complained that in my decision I had overlooked to adhere to the binding decision of the Court of Appeal of Tanzania in the case of **Mgeni** (supra). It is my considered opinion that, such omission does not constitute an apparent error since the decision in **Mgeni's case** (Supra) is all about unclosed Probate and Administration Cause. Therefore, in the former case (**Mgeni's case (supra)**), the court responsible to determine to determine ownership was the court, which was presiding over the Administration Cause (primary court) unlike in the present case where there is a close of the Administration proceedings, and the courts are different ones. Likewise, the one sued in the capacity of an administrator

(respondent) of the deceased person's estate had already distributed the estate including those mentioned in the will.

Before I type off this judgment, I would like to state that, in written judgments or rulings or written submissions or any pleadings and the like, there might human or typo errors which, in my view, should not necessarily be used to mislead or misguide the contents of the subject matter. For example, I have noted that, the counsel for applicants to be muscularly contending on the word used by the respondent's counsel "**Maliciously"** instead of the word "**Meticulously**" when stating that "we have maliciously gone through..." and eventually sought for an order expunging the respondent's written submission. That is wrong since the error is minor one which does not affect the essence of the submission. Equally, the words "**expunged judgment**" repeatedly written by the applicants' counsel should not be considered to have different meaning other than "**impugned judgment**" instead of expunged judgment. It follows therefore; those are common mistakes and human errors. Thus, they have nothing to do with substantive justice.

In the upshot, I am fully satisfied that, the applicants have not advanced any ground fit for the sought review. Hence, this application lacks merits and I proceed dismissing it. I shall make no order as to the

costs of this application due to the relationship that exists between the 1st applicant and respondent.

It is so ordered.

DATED at **ARUSHA** this 24th January 2023

M. R. GWAE
JUDGE