IN THE HIGH COURT OF THE UNITED REPUBLIC OF TANZANIA

(ARUSHA DISTRICT REGISTRY)

AT ARUSHA

REVIEW APPLICATION NO. 1 OF 2023

(Arising from High Court Civil Case No. 10 of 2020)

GASPER EZRON TESHA.....APPLICANT

VERSUS

LINDERMAN ALFRED LEKEY.....RESPONDENT

RULING

26/07/2023 & 29/09/2023

GWAE, J

On 28th July 2021 the judge mediator so appointed by the judge in-charge entered the applicant's suit registered as Civil Case No. 10 of 2020 assigned to **Mzuna, J** now retired judge as settled out of the court. It is such order of the court that has aggrieved the applicant, Gasper Erzon Tesha.

Feeling dissatisfied by the order of the court, the applicant has filed this application for review brought under section 78 (1) (a) and Order XLII Rule 1 (a) of Civil Procedure Code, Cap 33, Revised Edition, 2019 (herein the CPC). Now, the applicant has applied for the review of the impugned order for the following grounds;

1. That, the decision was based on manifest error under Order XXIII Rule 3 of the CPC as the court held that the matter was settled out of the court while there was neither deed of settlement nor consent decree as required by the law
2. That, the decision was based or manifest error under Order XXIII Rule 18 (2) of the CPC the court failed to consider if the parties intended to settle and failed to require the parties to furnish the court with any information as it considers desirable for securing a just, expeditious and economical disposal of the suit or proceeding
3. That, there is apparent error on the face of the records under Order VIII B Rule 18 (3) of the CPC as the counsel for the plaintiff unreasonably misled the court and prayed for settlement order, the prayer which cannot be made in the absence of the plaintiff and the court order the matter as settled while there was neither the settlement deed nor consent judgment and decree as required under the law
4. That, since Civil Case No. 10 of 2020 was marked as settled out of the court but the respondent has not paid the applicant full amount of outstanding balance for the sold shares with the commercial interest of 25 % daily from 31st August 2019 to the date of final settlement of the defaulted amount as inserted under clause 2:2:3 of the agreement dated 26th February 2019 and the applicant has no any other to enforce the alleged settlement because there is no deed of settlement as the same was not recorded, there is no

consent judgment as well as decree and the case remained unsolved to date.

Basing on the above grounds, the applicant has prayed for the following reliefs;

a. An order of the court reviewing its order dated 28th July 2021 and vacates on the reasons that the same was erroneous issued
b. An order of the settlement order dated 28th July 2021 is in executable and the suit remains unsolved
c. An order allowing the review with costs and
d. Any other relief (s) that the court may deem fit and just to grant.

Mr. Gwakisa Sambo and Mr. Ombeni Kimaro, both the learned advocates respectively represented the applicant and respondent in the hearing of this application. By consensus, this application was argued by way of written submission.

Arguing for the application, Mr. Kimaro stated the said out of court settlement has an apparent error since neither the deed of settlement has been filed nor terms of the said settlement that were recorded by the court. Thus, no consent judgment nor decree that was issued by the court through the statutory mediation as required

under Order XXIII Rule 3 and Rule 18 (2) of the Procedure Code, Chapter 33, Revised Edition, 2019 (herein the Code). He thus opined that the applicant remains stranded for without being paid his claim in the sum of Tshs. 600,000,000/=. Bolstering his submission, the applicant's counsel cited the case of **Omari Mussa @ Selemani @ Akwishi and two others vs. Republic**, Consolidated Criminal Applications No. 117, 118 an*d 2019 of 2017 (unreported) where the Court of Appeal held;*

> *"An error apparent on the face of the record must be 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 long drawn process of reasoning on points on which there may conceivably two opinions... but is not ground for review that judgment proceeds on an incorrect exposition of the law... A mere error of the law is not a ground for review under this rule. That a decision is erroneous in law is no ground for ordering review. It must further be an error apparent on the face of the record*".

Mr. Kimaro decision also cited the case of **Grand Alliance Limited vs. Mr. Wilfred Lucas Tarimo and 4 others,** Civil Application No. 229 of 2020 (unreported). In this case where the Court of Appeal held among other things that normally review is used for correction of mistakes and

that the review cannot be exercised on the ground that the decision was erroneous on merit.

Mr. Kimaro further argued that under the circumstances where the applicant was not aware of the purported settlement out of the Court and in the absence of the consent of judgment and its decree, this court is thus empowered to invoke provisions of section 78 (1) (a) (b) and Order XLII (1) of the CPC. According to him, invocation of the said provisions of the law is justified since there is an apparent error on the face of the record.

The learned counsel for the applicant finally submitted that, since the said Civil Case No. 20 of 2020 was concluded without judgment and decree, thus an error apparent on the face of the record. He finally prayed this application be granted with costs.

Opposing the application, the respondent's counsel argued that, the applicant's assertion that he was not aware of the settlement of the court and arrangement thereof is not true. He added that the parties are entitled to settle out of the court taking into account of their blood relationship (father and son). The respondent's counsel further argued that the circumstances that led this application were not calling for written deed of settlement since the parties had orally also agreed to settle their dispute

as relatives. Mr. Sambo also stated that there was no requirement to record terms of a withdrawn case. Hence, according to him, XXIII Rule 3 of the Code is no applicable since as the parties decided to finalize their dispute without involvement of the court and that, there is no provision of the law, which forbids parties from settling out of the court.

It was further the submission by the respondent's counsel that the respondent has fully paid his debt emanating from shares and that was pursuant to the parties' agreement.

Arguing ground 3, the counsel for the respondent stated that if the applicant's advocate was negligent, the remedy available in his favour is to institute a suit against him and claim damages arising from professional negligence or misconduct. Strengthening his submission, Mr. Sambo invited the court to refer to the case of **Maulid Hussein vs. Abdallah,** Civil Application No. 20 of 1998 (unreported) where it was stated that an advocate negligence cannot amount to sufficient cause. He then prayed this application be dismissed.

Making a re-joinder to the submission by the respondent's counsel, Mr. Kimaro stated that, the respondent's assertion that, there was oral agreement to settle out of the court is nothing but mere words without proof as required under section 3 (2) (3) and 112 of the Tanzania Evidence

Act, Cap 6 Revised Edition, 2019. He further stated that the applicant's suit was not withdrawn but the same was settled out of the court as plainly revealed by the court record. He then referred to **Halfani Saudi vs. Chichili** (1998) TLR 526 where the Court of Appeal of Tanzania held that a court record is a serious document, it should not be lightly impeached and that there is always a presumption that a court record accurately shows what happened.

Mr. Kimaro further rejoinder that the parties could not orally agree to settle the matter out of the court without written agreement since the former agreement relating to sale of the shares was made in writing. Hence, if there was, which is not, subsequent oral agreement that one should be of no use. He urged this court to make reference to the case of **UMICO Limited vs. SALU Limited**, Civil Appeal No. 91 of 2015 (unreported) at page 4 and 5 of the typed judgment, the Court of Appeal held;

> "*We wish to begin by stating that it is trite principle of law that generally if the parties in dispute reduced their agreement to a form of a document, then no evidence of oral agreement or statement shall be admitted for the purpose of contradicting, varying, adding to or subtracting from its terms (See section 100 and 101 of the Evidence Act, Cap 6, R. E, 2002*

The applicant's advocate further argued that, the terms of the allegedly made settlement out of the court is known neither by the applicant nor by the court. Thus, an error apparent in the face of the record.

That is what briefly transpired during hearing of this application. Therefore, it is now the duty of the court. Considering the memorandum of review and written submission, there are only two grounds, **first**; whether there is an error apparent on the face of the record justifying the court to review its order and **second**, whether the then applicant's advocate (Josephat Msuya) who entered the appearance representing the plaintiff now applicant, unreasonably misled the court.

Primarily, it goes without saying that, I was appointed to be a judge mediator of the applicant's Land Case No. 10 of 2020 and that on 28th July 2021 Mr. Joseph Msuya and Mr. Maro, both the learned advocates who appeared representing the applicant and respondent respectively. It is also evidently clear that, on 6th July 2020, the trial judge **(Mzuna, J)** fixed the matter for mention before me as mediator with a view of fixing a date for the statutory mediation. It is also vividly clear from the record via Land Case No. 10 of 2020 that the suit was marked as settled out of the court

when it was called on for fixing a date of mediation and not withdrawn as purportedly argued by the respondent's counsel.

As rightly argued by the learned counsel for the applicant, record of the court is the one which represents accuracy or truthfulness of what transpired during court's proceedings compared to the litigants (See **Halfani's case** (supra). Therefore, it is crystal clear from the court record through Land Case No. 10 of 2020 that the applicant's case was marked as settled out of the court after the applicant's counsel duly notified the court that the matter was settled by the parties out of the court.

That being the case, I have to observe the moving provision of the law cited by the applicant to ascertain whether there is an error apparent to the face of the record justifying this court to review its order. Order XLII Rule 1 of the Code reads;

> "(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 mine)*

The Court of Appeal of Tanzania had an opportunity of interpreting the above provisions of the law in **Mapalala vs. British Broadcasting Corporation** (2002)1 EA 132 where it 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".*

The Supreme Court of Kenya in **Kanyabwira vs. Tumibaze** (2005) 2 EA 86 had these to say;

"In order for an error to be a ground for review, it had to be one apparent on the face of the record that did not require any extraneous matter to show its correctness. It had to be so manifest that no court would permit it to remain on the record. In this instance, the absence of an

affidavit of service from the record was an error justifying a review of the trial judge's refusal to set aside the ex parte judgment".

The Court of Appeal of Tanzania besides, the essential elements for review application provided by the law has added some criteria for review applications. These include but not limited, where a decision or order is obtained by fraud or where a party was deprived of a right to be heard for instance in **Chandrakant Joshubhai Patel vs. Republic** (2004) TLR 218.

In our instance application, the applicant is found complaining to have not been aware. Much as the matter before me was set for mention, I do not see if the presence of the parties was necessary since it was for fixing a date (s) for the intended mediation. In that premises, I therefore find there is an error apparent on the face of the record since the applicant's suit is founded on the written agreement relating to sale of shares. Hence, there could not be any other agreement in law by altering, adding, or subtracting without it being in writing as was correctly emphasized by the Court of Appeal in of **UMICO Limited vs. SALU Limited** (supra). Had the court being cautious of those facts) (that no out of the court settlement was made and that the parties' agreement dated 26th February 2019 was made in writing) and had the parties'

advocates acted professionally and honestly in assisting the court in dispensing justice between the parties, that, error apparent to the record would be avoided.

Similarly, if as contended by the respondent's learned counsel, there was subsequent agreement made by the parties immediately before 28th July, in my considered view, that would be made in writing and the parties' counsel would be subject to its filing and being recorded. By doing so, the said agreement would form a consent judgment and its decree as required under Order VIII Rule 18 (2) and (3) of the Civil Procedure Code (supra). Hence, capable of an enforcement.

In the **2nd ground** for review, whether Mr. Joseph Msuya, the learned advocate deliberately and unprofessional misled the court thereby causing miscarriage of justice on the part of the applicant. I agree with Mr. Sambo that the applicant has remedy of suing his former counsel, Mr. Msuya for mishandling his suit for either professional misconduct or gross negligence or both.

However, I have paused a question as why he should tell the court lies that the matter was settled out of the court and why the applicant strongly rebutted to have entered into any subsequent agreement to the former one dated 26th day of February 2019. In that situation, the issue

of fraud and or apprehension of a move for denial of right to be heard arises on the part of the applicant.

In the upshot, I am fully satisfied that, the applicant has advanced grounds fit for the sought review. Hence, I find the merit of the application and proceed granting it. I shall make no order as to the costs of this application due to the nature of the error. Applicant's Land Case No. 10 of 2020 is restored. The matter shall proceed with mediation before me **(Gwae, J)** on the date to be fixed herein below.

It is so ordered.

DATED at **DAR ES SALAAM** this 29th September 2023

M. R. GWAE
JUDGE

Court: Ruling delivered in the presence of the applicant's advocate namely; **Mr. Kimaro** and in the absence of the respondent

M. R. GWAE
JUDGE
29/09/2023

Order; Mediation on 25/10/2023 at **09: 00hrs**

M. R. GWAE
JUDGE
29/09/2023