THE UNITED REPUBLIC OF TANZANIA

IN THE HIGH COURT OF THE UNITED REPUBLIC OF TANZANIA

DAR ES SALAAM SUB-REGISTRY

AT DAR ES SALAAM

REVIEW NO. 15 OF 2021

(Arising from Judgment and Decree of the High Court in Civil Appeal No.160 of 2020, as per Hon.Mlyambina,J., dated 3rd September 2021)

Between

RANDA HOLDING LTD.....APPLICANT

VERSUS

GILBERT FREDRICK MONGI.....RESPONDENT

RULING

Date of last Order: 01/11/2023

Date of Ruling: 21/11/ 2023

HON.GONZI,J.;

In the application for review, the Applicant is seeking to review the decision of this Court (Hon.Mlyambina,J) delivered on 3rd September, 2021. Since the Hon. Judge is not in this duty station now, the file has been assigned to me as the successor Judge to step in the shoes of my Brother Judge and reconsider the decision of this court in line with the grounds and arguments brought forward in this application.

The case has its origin in Civil Case No.254 of 2016 in the Primary Court of Manzese/Sinza where the parties referred their case based on breach of

interest carrying money lending contract. The Applicant had given loan to the Respondent with interest of 30% per annum. The contract was breached hence a suit was filed. Aggrieved with the decision of the Primary Court, the Respondent appealed to the District Court of Kinondoni vide Civil Appeal No.69 of 2018 where he lost again. When the decision of the District Court on first appeal was pronounced on 24th June 2019, the Respondent appealed to the High Court. The High Court in its decision on appeal held:

> "***in the instant case, the Respondent has not disputed the illegality of lending money with interest without having such legal capacity. The trial Court, or even the District Court on appeal had a duty to decided on such illegality. It is the final findings of this court that though parties are bound by the agreements freely entered, when it comes to money lending contract, parties are not allowed to enter into contract with interests without a licence from the Bank of Tanzania (BoT). otherwise, it will be a total violation of section 6 and 7 of the Banking and Financial Institutions Act (Supra) and section 3 of Business Licencing Act Cap 208 (R.E.2002).***
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> ***In the premises of the above, I hereby uphold this appeal and set aside the decisions of the two courts below. For equity purposes, I order the Appellant to repay the principal sum borrowed without any interest and costs of this appeal be shared."***

The Applicant has now approached this court to conduct review of its above said decision. He has advanced four grounds of review in its memorandum of review as follows:

1. That the Honourable Judge erred in law and fact by relying on the new issue of illegality of contract which was not raised in the previous court proceedings, since the applicant herein was not accorded his right to adduce evidence concerning the new issue raised by the respondent on the stage of appeal to the High Court.
2. That the Honourable Judge erred in law and fact by accepting that the applicant has no business licence which permitted him to lent money to Respondent while the applicant hold the said licence since year 2015 with registration No. B2094235 of 2015 and B2415065 of 2016.
3. That the Honourable Judge erred in law for not providing the applicant with the right to defend himself on the matter of business licence as it was the new issue raised in Court.
4. That the Honourable Judge erred in law and facts by deciding the matter relying on false information provided by the Respondent for

he had intentions of misleading the court to make decision in respondent's favour.

The Applicant therefore prayed for the application for review to be allowed with costs.

The application was heard by way of written submissions. Ms Alice Frank Kilawe, Advocate, represented the Applicant while Ms Marietha Loth Mollel Advocate, represented the Respondent.

The Applicant opted to combine the first and second grounds of review and argue them together. Also she combined the 3rd and 4th grounds of review. In respect of the combined first and second grounds of review, the learned counsel for the Applicant submitted that since the issue of Applicant's qualification to lend money as a lending entity was raised for the first time in the District Court, the High Court was the first appellate Court in respect of that issue. As such under Order XXXIX Rule 27(1),(b) of the Civil Procedure Code, it had powers to call for and receive new evidence on appeal. The Applicant referred the court to the case of **Ismail Rashid versus Mariam Msati,** Civil Appeal No.75 of 2015 decided by the Court of Appeal. The Applicant submitted that if this

court had followed the legal avenue under Order XXXIX Rule 27(1),(b) of the Civil Procedure Code, it would have come to a different conclusion and find that the Applicant company is registered as a lending company since 2015 with certificates B2094235 for 2015 and B2415065 for 2016 respectively.

On the third and fourth grounds of review, the Applicant submitted that the decision of this court was based on manifest error on the face of record resulting into miscarriage of justice. She submitted that the loan agreement was valid and undisputed as its admission as evidence was not objected to during the trial. The learned counsel referred to the case of **Euphracie Mathew Rimisho t/a Emari Provision Store & Another versus Tema Enterprises Limited** and another, Civil Appeal No.270 of 2018 decided by Court of Appeal of Tanzania.

The Applicant concluded by submitting that this court has got powers to review its own judgment under section 78 and Order XLII(1)(a),4(2) of the Civil Procedure Code Cap 33 of the Laws of Tanzania. She submitted that in the present case there are new facts or evidence found and that if they were produced at a time before the impugned decision was pronounced, then the outcome of the said decision would not have been

the same. She submitted that this is one of the circumstances where this court can exercise its authority under the aforementioned provision given the apparent error clearly stated.

In reply submissions, the learned advocate for the Respondent submitted with regard to the consolidated 1st and 2nd grounds of appeal as follows.

That a matter of point of law can be raised at any time including in appeal. She cited the case of **Julius Josephat versus R,** No.3 of 2017. Therefore, she submitted, the Honorable High Court Judge was correct to do so. She argued further that if indeed the Applicant had the said evidence proving its competency to lend money with interest, the same should have been tendered in the trial court. She referred to the case of **Idrisa R.Hayeshi versus Emmanuel Elinani Makundi,** Civil application No.11 of 2020 which stated that: except on ground of fraud or surprise, the general rule is that an appellate court will not admit fresh evidence , unless it was not available to the party seeking to use it at the trial, or that reasonable diligence would not make it so available. The Respondent argued that the Applicant lacked reasonable diligence.

On the 3rd and 4th grounds of review, the Respondent submitted that the issue of business licence was not new because in order for the Applicant to justify the loan agreement against the Respondent, the Applicant was supposed to show her existence as a financial institution by providing its licences issued by the Bank of Tanzania.

The respondent concluded by submitting that during the hearing of the appeal, the Applicant was given a chance but he did not introduce the new evidence. She also argued that actually the Respondent had long paid the Applicant Tshs.10 million and interest of Tshs.3,500,000/=.

The Applicant made a brief rejoinder reiterating the submissions in chief.

I will proceed now to determine the first two grounds for review. The Applicant is essentially arguing that since the issue of Applicant's qualification to lend money as a lending entity was raised for the first time in the District Court, the High Court was the first appellate Court in respect of that issue. As such under Order XXXIX Rule 27(1),(b) of the Civil Procedure Code, it had powers to call for and receive new evidence on appeal. The Applicant referred the court to the case of **Ismail**

Rashid versus Mariam Msati, Civil Appeal No.75 of 2015 decided by the Court of Appeal. The Applicant submitted that if this court had followed the legal avenue under Order XXXIX Rule 27(1),(b) of the Civil Procedure Code, it would have come to a different conclusion and find that the Applicant company is registered as a lending company since 2015 with certificates B2094235 for 2015 and B2415065 for 2016 respectively.

The foregoing argument by the Applicant is premised on the High Court being the first appellate Court. I paused to consider whether indeed the High Court in the circumstances of this case which originated from Primary Court, was the first appellate court? Clearly, the case between the parties herein started in the Primary Court. The first appeal was made to the District Court. The second appeal was made to the High Court. The Applicant has argued that only for the purpose of the issue of applicant's legality to do money lending business, which for the first time was raised in the District Court, then the High court should consider itself as the first appellate court and only with respect to that particular newly raised issue which has its genesis in the District Court. I have considered these arguments passionately and I should say that

they do not hold water. What makes a court the first or second or third appellate court is not the nature of the issues raised there in. Rather, it is the level of the court in the judicial hierarchy. Under normal circumstances, an appeal in respect of a matter that originates in the Primary Court to the District Court, is the first appeal. Further appeal therefrom to the High Court is the second appeal. It doesn't matter which side of the case initiated the appeal and on what grounds. The Plaintiff may lodge an appeal to the District Court on different grounds and the Defendant may lodge further appeal to the High Court on different grounds. What matters is that it is the second time the particular case is being appealed.

I decline to accept the argument that when the high Court in this case entertained the appeal and determined the point of competency of the Respondent to lend money with interest, a point which emerged for the first time in the District Court, it was the first appellate court. That is not the law. In respect of a matter that originated from the Primary Court, the High Court was the second appellate court.

The applicant has argued that if this court had followed the legal avenue under Order XXXIX Rule 27(1),(b) of the Civil Procedure Code, it would

have come to a different conclusion and find that the Applicant company is registered as a lending company since 2015 with certificates B2094235 for 2015 and B2415065 for 2016 respectively. But as submitted by the Respondent's counsel, during the hearing of the appeal in this case, before the High Court, there was no prayer by the Applicant to introduce the alleged new evidence. The Applicant is now un procedurally trying to bring that new evidence to an appeal whose case is closed, through review thereof. That is not legally tenable.

I have also considered the present application in line with applicable law. Does it fit within the parameters of review? The application is brought under section 78.-(1) (a) and (b) as well as Order XLII of the Civil Procedure Code. I reproduce Order XLII of the Civil Procedure.

XLII-(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.

In the case at hand, it was argued by the Applicant that this court has got powers to review its own judgment under section 78 and Order XLII(1)(a),4(2) of the Civil Procedure Code Cap 33 of the Laws of Tanzania. The Applicant submitted towards the end of her submissions in chief that "**in the present case there are new facts or evidence found that if were produced at a time before the impugned decision was pronounced then the outcome of the said decision would not have been the same**".

I paused to consider what are the new facts or evidence which the Applicant has in mind? The answer is in the submissions of the Applicant where it is explained that:

"the Applicant company is registered as a lending company since 2015 with certificates B2094235 for 2015 and B2415065 for 2016 respectively".

I think the learned counsel for the applicant did not read through the entire Order XLII rule 1(a) of the Civil Procedure Code. Where the application for review is brought on the basis of discovery of new matter or evidence, it must also be proved further that the said new matter or evidence "***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".*** Can it be said that the fact or evidence of the Applicant possessing business licences issued to the applicant in 2015 and 2016 was not within the knowledge of the Applicant with due diligence? If we are to go by his own version of argument, the Applicant has been holding these documents since 2015 and 2016 even before the case started. He had the opportunity to tender them in the Primary Court. He did not do so. He had an opportunity to produce the same as additional evidence in the District Court on first appeal. He did not do so. Again, going by the version of story of the Applicant, she submitted that actually the question of her competency to lend money with interest was raised for the first time in the District Court. That gave her an opportunity to introduce new evidence, if she was diligent. I find that the application at hand does not

meet the conditions prescribed under Order XLII(1)(a) of the CPC. I reject the 1st and 2nd grounds of review.

On the 3rd and 4th grounds of review, the Applicant submitted that the decision of this court was based on manifest error on the face of record resulting into miscarriage of justice. She submitted that the loan agreement was valid and undisputed as its admission as evidence was not objected to during the trial. In my view, the Applicant is now trying to fault the decision of the High Court on merits by this ground. She should have appealed against the said decision by following the necessary protocols to lodge a third appeal. I can see no manifest error on the face of record of the decision delivered by this court. Actually a on manifest error on the face of record .With regard to an error apparent on the face of the record, Mulla, Indian Civil Procedure Code, 14th Edition Pages 2335 – 36, states that –

> **WITH REGARD TO AN ERROR APPARENT ON THE FACE OF THE RECORD, MULLA, INDIAN CIVIL PROCEDURE CODE, 14TH EDITION PAGES 2335 – 36, STATES THAT –**
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> **AN ERROR APPARENT ON THE FACE OF RECORD MUST BE SUCH AS CAN BE SEEN BY ONE WHO WRITES 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 BE TWO OPINIONS.

I could not find any such errors in the decision of Hon. Mlyambina, J., as to warrant the invocation of review based on apparent errors on the face of record. I find no merits in the 3rd and 4th grounds of review.

Finally, as I have found the application devoid of any merits, the law enjoins me to reject the application.

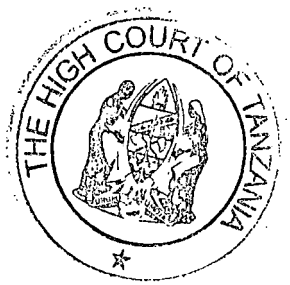
Order XLII (4)(1) of the CPC provides as follows:

4.- (1) Where it appears to the court that there is not sufficient ground for a review, it shall reject the application.

I hereby reject the application for review for being without any merits.

The Applicant shall bear the costs of this application.

It is so ordered.



A. H.Gonzi

Judge

21/11/2023

Ruling is delivered in court this 21st day of November 2023 in the presence of Mr. Mkama Advocate for the Applicant also holding brief for Advocate Marietha Mollel for the Respondent.

A.H.Gonzi

Judge

21/11/2023