IN THE HIGH COURT OF TANZANIA

(DAR ES SALAAM DISTRICT REGISTRY)

AT DAR ES SALAAM

MISC. CIVIL APPLICATION NO. 419 OF 2023

(Arising from Civil Case No. 19 of 2023)

INDEPENDENT POWER TANZANIA LIMITED ..... 1ST APPLICANT

HARBINDER SINGH SETHI ..... 2ND APPLICANT

VERSUS

DIAMOND TRUST BANK TANZANIA LTD ..... RESPONDENT

RULING

16th October & 05th December, 2023

BWEGOGE, J.

The applicants herein filed a memorandum of review in respect of an order entered by this court in Civil Case No. 19 of 2023 dated 06th June, 2023. This application was brought under the provisions of section 78 (1) (b) and Order XLII, rule 1 (1) (b) and rule 3 of the Civil Procedure Code [Cap. 33 R.E. 2019] (henceforth "the CPC") and premised on a single ground for review hereunder reproduced *verbatim*:

1. *That there is an error apparent on the face of the record, in that the Court erroneously entered an order for withdrawal of Civil Case No. 19 of 2023 instead of entering an order for striking out the suit."*

Ms. Dora Mallaba, learned advocate, represented the applicants whereas the respondent was represented by Mr. Stephen Axwesso, learned advocate. The matter herein was agued orally.

In substantiating the application herein, Ms. Mallaba submitted that when the respective suit was brought before this court on 06th June, 2023 for setting the date for hearing of the preliminary objections advanced by the defendant (respondent herein), she prayed that the plaint be struck out in order to save the precious judicial time of the court so that the plaintiffs would comply with mandatory requirement to attach Board resolution for suing. And, the counsel for the adverse party didn't object to the prayer for striking out the case but prayed for costs. However, upon receiving the order, it was discovered that, erroneously, the court entered an order for withdrawal of the suit instead of entering an order for striking out the same. Hence, this application.

Further, the counsel argued that it is the law of this land that the application for review is granted when it is discovered that there is

manifest error on the face of the record which occasioned miscarriage of justice. That the law requires the applicant to prove that there is manifest error apparent on the face of record. And, in the same vein, the applicant is obliged to prove that such error resulted in miscarriage of justice.

In tandem to above, the applicants' counsel argued that there is an error on the face of the record of this court in that the court erroneously entered an order for withdrawal of the case instead of an order for striking out the same. That the respective error occasioned injustice to the applicant, as the same cannot refile the suit. The counsel clarified that, in substance, the prayer for striking out the suit was intended to provide room to the plaintiffs to procure the Board resolution for suing and refile the suit so that the dispute between the parties herein would be determined on merit. The counsel referred the cases of **Masudi Selemani vs. Republic** (Criminal Application 92 of 2019) [2020] TZCA 18 and **Chandrakant Joshubai Patel vs. Republic** [2004] TLR 218 in buttressing her point that the manifest error on the face of the order entered by this court which occasioned miscarriage of justice for the reason that the impugned order barred the applicant to refile the suit.

And, invoking the provisions of Article 107 A(2)(e) of the Constitution of the United Republic of Tanzania of 1977 (as amended), the counsel prayed this court to grant the application herein in the interest of justice.

On the other hand, Mr. Axwesso contended that the application herein is devoid of merit. That the record of this court entails that the applicants' counsel prayed to withdraw her case, the prayer which was granted by this Court; hence, the prayer made herein is not only improper, but an abuse of court process. It was the argument of the respondent's counsel that the error apparent on face of record is one that is directly noticeable, such as clerical mistakes which can be seen by mere reading not otherwise. The counsel directed the mind of this court to the interpretation of the term "manifest error" in the cases of **Omari Mussa @ Selemani @ Akwishi & Others vs. Republic** (Consolidated Criminal Application 117 of 2018) [2019] TZCA 378 and **Chandrakant Patel** case (supra), among others.

The respondent's counsel concluded by opining that the prayer made in this court is without substance as this court granted what was prayed for; and the error referred to is not apparent on the face of the record as contemplated by the law. Based on the above premises, the counsel prayed the case to be dismissed with costs.

In rejoinder, apart from reiterating her submission in chief, the applicants' counsel contended that upon notice of preliminary objection being filed, the other party cannot pray to withdraw the suit, as it would be tantamount to preempting the preliminary objection. And, the counsel maintained that this court made a *bonafide* error in entering the impugned order as the intention of the applicants was to have the suit struck out so that they could complying with the mandatory procedure and refile the same. Hence, this court should be pleased to rectify the error occasioned.

The issue for determination is whether the application herein is merited.

At the outset, I find it pertinent to reproduce the provisions under which the matter herein has been brought. The provision of section 78 (1) (b) of the CPC provides *viz*: -

"

> *(1) Subject to any conditions and limitations prescribed under section 77, any person considering himself aggrieved-*
>
> *(a) .....inapplicable*
>
> *(b) by a decree or order from which no appeal is allowed by this Code,* ***may apply for a review of judgment to the court which passed the decree***

or made the order, *and the court may make such order thereon as it thinks fit."*(Emphasis added).

In the same vein, the provisions of Order XLII, rule 1 (1) (b) of the CPC provides aptly;

"

1.-(1) Any person considering himself aggrieved-

(a) .....(inapplicable).

(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).

The apposite interpretation of the term "error on the face of record" was assigned in the case of **Chandrakant Joshua Patel vs. Republic** (supra) in which the Apex Court quoting with approval a leaf from Mulla, 14th Edition, aptly held:

"An error apparent on the face of 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 long-drawn process of reasoning on points on which there may conceivably be two opinions...."* See also the same view in the cases; **African Marble Company Ltd vs. Saruji Corporation Limited** (Civil Application 132 of 2005) [2005] TZCA 79, **Omari Mussa @ Selemani @ Akwishi & Others vs. Republic** (Consolidated Criminal Application 117 of 2018) [2019] TZCA 378 and **Justus Tihairwa vs. Chief Executive Officer, TTCL**, (Civil Application 131 of 2019) [2019] TZCA 77."

In the same vein, in **Masudi Selemani vs. Republic** (supra) the Apex Court citing the previous decisions in cases: **Karim Kiara vs. Republic**, Criminal Application No. 04 of 2007 (unreported) and **Lakhamshi Brothers Ltd vs. R. Raja and Sons** [1966] 1 EA 313, among others, stated:

> *"In a review,* ***the court has inherent jurisdiction to recall its judgment in order to give effect to its manifest intention*** *on what clearly would have been the intention of the court had some matter not been inadvertently omitted."*

Having revisited the law above, I now revert back to the matter at hand. It was submitted by the counsel for the applicants in that on the day the main suit was brought for hearing of the preliminary objections, one of

them being wanting Board resolution for suing, raised by the defendant (respondent herein), she prayed to this court that the plaint be struck out in order to save the precious judicial time of the Court so that the plaintiff would comply with mandatory requirement to attach Board resolution for suing, whereas the prayer was not contested. However, the counsel contended, upon receiving the ruling, it was discovered that erroneously, the court entered an order for withdrawal of the suit instead of entering an order for striking out the same. Hence, this application. Therefore, on the above premise, the counsel argued that there is manifest error on face of the record resulting in a miscarriage of justice, which she prays for review.

On the contrary, the respondent's counsel vehemently contested the prayer made by the applicants' counsel contending that this court granted exactly what was prayed for by the applicants' counsel. That the prayer for striking out the suit purported to have been made by the Counsel herein is not supported by the record of this court. Hence, the prayer made herein is baseless and unfounded. The counsel opined that the error referred to is not the error apparent on the face of the record as contemplated by law, as the order is clear in itself.

I have given anxious attention to the submissions made by counsel herein. And, having gone through the record of this case, I have the following observations: **One,** it is uncontroverted fact that on the date set for hearing of the preliminary objections advanced by the respondent herein, specifically, in that the suit was untenable for want of Board resolution, the applicants counsel herein, upon deliberations, found the objection unanswerable. The applicants' counsel opined that, to avoid wasting the judicial time of this court, she found it prudent and, or convenient to concede to the preliminary objection. It was obvious that she had intended to put the record properly and brace herself for refiling and prosecution of her case. To my knowledge, there was no intention on her part to forego her pursuit of the case. The purported manifest intention to relinquish the case, as the respondent's counsel is persuading me to apprehend, is not reflected in the prayer recorded by this court and final order entered.

Two, it is uncontroverted fact that the respondent had raised a notice of preliminary objection whereas this court was bent on scheduling the case for hearing. It is a well settled principle that prayer to withdraw the matter upon finding the preliminary objection unanswerable, or otherwise an attempt to rectify the error on which the objection is pegged, is

tantamount to preempting the objection advanced which is legally prohibited. See the cases; **Shahida Abdul Hassanali Kassam vs. Mahedi Mohamed Gulamali Kanji,** Application No. 42 of 1999, CA (Unreported); **Almas Iddie Mwinyi vs. National Bank of Commerce & Another** [2001] TLR 83**; The Minister for Labour, Youth Development & Shirika la Usafiri DSM vs. Gaspa Swai & 67 others** [2003] TLR 239 and **Frank Kibanga vs. ACCU Ltd,** Civil Appeal No. 24 of 2003, CA (unreported)

Moreso, based on the circumstances of the case, I am of the view that the respondent's counsel could not support the prayer for withdrawal of the case having lodged the preliminary objection which had capacity to dispose of the suit. I need not reiterate that such a prayer for withdrawal of the case upon being served with the notice of the preliminary objections would be tantamount to preempting the same. This is yet another ground constraining me find the complaint made by the applicants' counsel with substance.

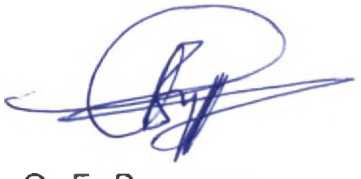
In view of the foregoing, I am constrained to align with the argument made by the applicants' counsel that she prayed for striking out of the case not withdrawal. In the event, admittedly, the court erroneously entered the prayer for the withdrawal of the case instead of striking out

the same. I need not press on the point that the final order entered by this court doesn't reflect the manifest intention of the prayer made by the applicants' counsel.

Finally, in view of the foregoing, I find the application for review of the order entered by this court in Civil Case No. 19 of 2023 dated 06th June, 2023 with merit. The application is hereby granted on its entirety. The record of this court marking the case to have been withdrawn is hereby rectified and or, substituted with an order for striking out the same.

I so order.

DATED at **DAR ES SALAAM** this 05th day of December, 2023.



O. F. Bwegoge

JUDGE