

**IN THE HIGH COURT OF THE UNITED REPUBLIC OF TANZANIA**

**IN THE SUB - REGISTRY OF SHINYANGA**

**AT SHINYANGA**

**CIVIL APPEAL NO. 4 OF 2023**

**NDERUMO SECURITY GUARD**

**COMPANY LIMITED .....APPELLANT**

**VERSUS**

**EL- HILAL MINERALS LIMITED ..... RESPONDENT**

**[Appeal from the decision of the District Court of Shinyanga at Shinyanga.]**

**(Hon. Y. ZAHORO SRM.)**

**dated the 15<sup>th</sup> day of February, 2023**

**in**

**Misc. Civil Application No. 13 of 2022**

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**JUDGMENT**

*9<sup>th</sup> November, 2023 & 29<sup>th</sup> February, 2024.*

**S.M. KULITA, J.**

This is an appeal from Shinyanga District Court. The historical background behind this matter in a nutshell is that, the Appellant herein was the Applicant in the Misc. Civil Application No. 1 of 2022 at Shinyanga District Court. It was for restoration of the Civil Case No. 3 of 2021 which was

dismissed by that court on 11<sup>th</sup> August, 2022 for want of prosecution. While the said Misc. Civil Application No. 1 of 2022 was in progress there at Shinyanga District Court, it happened that the Appellant's Counsel, Mr. Gervas Geneya didn't turn up to court on 21<sup>st</sup> February, 2022 which was a date scheduled for the 1<sup>st</sup> Pre-Trial Conference (1<sup>st</sup> PTC). Having noticed that, there was no sufficient reason for his non-appearance, the trial Magistrate, Hon. Swallo RM, dismissed the application with costs.

That led the applicant herein to file the Application for Review before that said court, Misc. Civil Application No. 13 of 2023. The said application was entertained by Hon. Zahoro RM instead of Hon. Swallo RM, the one who had entertained the impugned matter that led to the institution of the Review case, as she had been transferred.

The said application for Revision was found to be unmeritorious, hence dismissed with costs. Aggrieved with the said decision, the Appellant herein, through his Advocate, Mr. Gervas Geneya, lodged this appeal at High Court relying on 5 (five) grounds which can be summarized into 3 (three) as follows;

1. That, the trial Magistrate erred in law and in fact in holding that there are doubts in the proceedings on the status of the Appellant's Advocate when he appeared at the High Court, Labour Division at Dar es Salaam.
2. That, the trial Magistrate erred in law and in fact in holding that the summons to the Appellant's Advocate were issued after the session and not before.
3. That, the trial Magistrate erred in law and in fact by considering extraneous and irrelevant matters of errors in the High Court proceedings in deciding on the review case before him.

The appeal was ordered to be entertained through written submissions. It was conducted *ex-parte* as the Respondent used not to turn up to court. The Appellant herein was enjoying the legal service of Mr. Gervas Geneya, Learned Advocate.

In his written submission in support of appeal, among the things that the Appellant's Counsel, Mr. Gervas Geneya had submitted were that the District Court erred while reviewing its decision in the Misc. Civil Application No. 1 of 2022 by failing to properly examine errors in the proceedings of that case and its decision thereon, which was made wrong due to the errors on the face of the record. Mr. Geneya further alleged that in the said review case,

the Presiding Magistrate noticed that in its proceedings, status of the Appellant's Advocate in the Labour cases at the High Court, Labour Division was contradictory, however, she didn't consider it being a reason for granting the said application for review. The Counsel further alleged that the record was clear that at the High Court, Labour Division, he appeared just as a party to the case, not as the Advocate.

He, as well submitted that he addressed the said court to go through the Labour Court's cause list, which shows that the Appellant's Counsel was among the parties in the said cases at the High Court Labour Division, but Hon. Zahoro didn't take trouble to consider that the District Court in the Misc. Civil Application No. 1 of 2022 had overlooked this issue. It just had in mind that the Counsel addressed the District Court that he was representing some parties in those said cases while in real sense and what was submitted was different.

There was no reply submission as the appeal was entertained *ex-parte*.

Upon going through the contents of the Memorandum of Appeal, the written submission and the original records for the Misc. Civil Application No. 13 of 2023 (Revision Case) and Misc. Civil Application No. 1 of 2022 (Application

for Restoration), both of Shinyanga District Court, I have noticed that the main issue for determination is whether this appeal is meritorious. I will therefore venture myself on that issue in resolving this appeal.

However, before I do so, I prefer to make it clear that, the matter from which this appeal arises is the Application for Review. Though the said matter, Misc. Civil Application No. 13 of 2023 which was entertained by Hon. Zahoro RM is the application in nature, ***it was supposed to be Registered as a "Civil Review"*** case, as the Review cases have their own registers, be it civil, criminal, Land or Labour. Such mode of registration of cases applies also in applications for Revision. That, they also have their own Registers. Therefore, for the District Court's case from which this appeal arises, Misc. Civil Application No. 13 of 2023, it was supposed to be registered as the ***Civil Review Case***, not Misc. Civil Application.

Now, back to the matter in question, which is merit of the appeal at hand. From what I can see in the records, submission and pleadings, I find it convenient for me to analyze all grounds of appeal collectively. The core issue being, as narrated herein before, whether the appeal is meritorious.

As stipulated herein before that this appeal arises from the review case which was determined by the District Court of Shinyanga. The applicant herein filed an application for Review seeking for the District Court to review its decision in the Misc. Civil Application No. 1 of 2022 delivered by that said court on 11<sup>th</sup> August, 2022.

I start my analysis by going through **Order XLII, Rule 1 of the Civil Procedure Code [Cap. 33 RE 2019]** which provides for the circumstances under which applications for review may be entertained. The provision states;

*"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". [emphasis is mine]*

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. In the said case it was held;

*"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 into 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 into 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**]*

Therefore, in interpreting the concept of Review, it is settled in law that, for the court to grant the application, certain grounds have to be met. These grounds have been ruled in plethora of case laws including the one cited above. My further explanation on the doctrine of Review makes me to go through the Court of Appeal case namely **Masudi Said Selemani V. The Republic, Criminal Application No. 92/107 of 2019, CAT at Mtwara**, at page 5- 6 it was held;



*"The Court has powers to review its own decisions. Rule 66 (1) of the Rules provides thus: - The Court may review its judgment or order, but no application for review shall be entertained except on the following grounds;*

***a) The decision was 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*

*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". [emphasis is mine]*

In a case of **Transport Equipment Ltd V. Devram P. Valambhia, Civil Application No. 18 of 1993, CAT at DSM** it was held;

*"The court has inherent jurisdiction to review decision and it will do so in any of the following circumstances to wit, **where there is a manifest error on the face of the record***

*which resulted in miscarriage of justice, or where the decision was attained by fraud; or where a party was wrongly deprived of the opportunity to be heard". [emphasis is mine]*

In a case of **Chandrakant Joshubhai Patel V. Republic [2004] TLR 218**, the court made it explicit that *a decision being erroneous in law is not a ground for ordering review*. Thus the ingredients of an operative error are that; **first**, there ought to be an error; **secondly**, the error has to be manifest on the face of the record; and **thirdly**, the error must have resulted into miscarriage of justice. Therefore, *Review is for addressing irregularities and not challenging the merits of the case*.

It has been a common tendency that Advocates use to represent clients in courts. It is very rare for them being parties to the cases. As for this matter, it seems the trial Magistrate tuned her mind on the fact that the Advocate's journey to Dar es Salaam was for representing his other client(s) in the case which is presided over there. In that sense, a possibility of the Magistrate to capture that concept is great. I can thus agree with the Counsel that there is an apparent error on the face of the record which is so patent that the Magistrate could have overlooked. Such error has resulted into the

miscarriage of justice against the Appellant herein as alleged, that, his case at the District Court was mistakenly dismissed. As it was held in **Chandrakant Joshubhai Patel (supra)**, for the Review application to succeed, the manifest error on the face of the record should have led to the miscarriage of justice. Thus, the current matter also falls on that ambit.

I therefore agree with Mr. Geneya, Advocate, that there was an error on the face of the record in the decision (ruling) of the trial Magistrate in the Misc. Civil Application No. 1 of 2022 which was entertained and finally determined by Hon. Swallo RM before she was transferred. The said issue involves a Cause List of the High Court, Labour Division which shows that the said counsel was among the parties whose cases had been cause listed during the period that the Application Case No. 1 of 2022 was also scheduled for 1<sup>st</sup> PTC at Shinyanga District Court.

Though the records do not show that the said copy of Cause List had been tendered to court before the dismissal of Misc. Civil Application No. 1 of 2022, still the trial Magistrate in Review had a venue to consider the same. Had the said Magistrate (Hon. Zahoro) considered this in the Review, he could be in compliance with the said "***discovery of a new and important matter or evidence***" which is among the conditions set in law for granting

the review application as per **Order XLII, Rule 1 of the Civil Procedure Code.**

In the impugned matter the applicant herein mentioned, among the other grounds for revision being that, the trial Magistrate in the Misc. Civil Application No. 1 of 2022 which was then reviewed, did take that she was addressed by the Advocate Geneya that he was among the Advocates in the said Labour Cases that he had attended at Dar es Salaam, but in real sense, as per the records, the said Advocate, attended in the said cases as the party, not as the Advocate. That's why even his name is not there in the proceedings of the Labour Court as one of the Advocates in those said cases.

Generally, in her analysis in the Misc. Civil Application No. 1 of 2022, the trial Magistrate seems to have been tuning her mind that the said Advocate, Geneya, lied to inform her that he was in Dar es Salaam attending session cases before the High Court, Labour Division without any proof on that. **The said Magistrate (Hon. Swallo) stated at page 3 of her ruling that, the Advocate tendered to court a copy of proceedings for the consolidated Labour Cases No. 352 and 362 of 2021, but the same do not show that he was among the Advocates who appeared to represent a particular party in those said cases.**

The simple interpretation of this phrase as captured in Hon. Swallo's ruling is that, it was in her mind that he was addressed by Mr. Geneya, Advocate that he appeared in the said cases at High Court as the Advocate, but in real sense, as submitted by Mr. Geneya himself before that said court that, he was among the parties. The evidence that the Advocate was attending cases in the Labour Division at Dar es Salaam as a party to the case, and not as the counsel for a particular party, can also be seen in the cause list which was tendered to the said court during the hearing of Review case, Misc. Civil Application No. 13 of 2023, before Zahoro, RM.

From the aforesaid analysis, it is obvious that the decision of the trial court in the Application No. 1 of 2022 Shinyanga District Court was incorporated with an error on the face of the record, which led to the miscarriage of justice on the part of the Appellant herein. Hence, its decision led to the wrongful dismissal of the Appellant's application No. 1 of 2022. The fact that, subsequently, upon the review being conducted, whereby the said errors came to be addressed before the District Court unsuccessfully, of which this court finds them genuine, it is my view that in its review order the District Court was supposed to reverse its previous decision of denying to restore the Civil Case No. 3 of 2021 done in the Misc. Civil Application No. 1 of 2022.

In upshot, **I find this appeal meritorious, hence allowed.** Thus, the Civil Case No. 3 of 2021, Shinyanga District Court, which was dismissed on 21<sup>st</sup> February, 2022 for want of prosecution is hereby restored. As the fault in trial have been contributed by the trial court, I make no order as to costs



**S.M. KULITA  
JUDGE  
29/02/2024**

**DATED** at **SHINYANGA** this 29<sup>th</sup> day of February, 2024.



**S.M. KULITA  
JUDGE  
29/02/2024**