IN THE HIGH COURT OF THE UNITED REPUBLIC OF TANZANIA

LABOUR DIVISION

AT DODOMA

REVIEW APPLICATION NO. 1045/2023

(Arising from Miscellaneous Labour Application No. 3 of 2023)

CHAMA CHA WALIMU TANZANIA (CWT).....APPLICANT

VERSUS

DEUS GRACEWELL SEIF.....1ST RESPONDENT

ABUBAKAR SALUM ALLAWI.....2NDRESPONDENT

RULING

Last Order: 16/4/2024
Date of Ruling: 21/6/2024

MASABO, J.:-

On 19 December 2023, while presiding over Miscellaneous Labour Application No. 3 of 2023, I overruled a preliminary objection raised by the applicant herein. In that application, the respondents who were the applicants therein had prayed that this court find the applicant (the respondent herein), in contempt of a court order and be pleased to commit to prison the respondent's Secretary General/ Principal officer one Maganga Moses Japhet. After the Application was served on the respondent, they raised a preliminary objection premised on the following three limbs**: one,** the application is time barred; **two**, the application is *sub judice* to Civil Application No. 49/03 of 2023 which was pending before the Court of Appeal;

and **three** the application is bad in law for citing Maganga Moses Japhet who was not a party to Misc. Labour Application No. 17 of 2022. The preliminary objection was overruled for want of merit. The Applicant was disgruntled. She has come back by way of review. In her memorandum of review filed in this court on 18th January 202, she has set out the following five grounds of review:

a) There is an error on the face of the record as the court held that the application was still maintainable notwithstanding that Misc. Labour Application No. 17 of 2022 under which it was granted had already been withdrawn.

b) There is an error on the face of the record in that the court used Penal Code provisions related to criminal contempt to consider matters pertaining to civil contempt whereas the Penal Code is not applicable.

c) There is an error on the face of the record in that the court relied on the case of **Mukisa Biscuits** to reject the first and the second limbs of the preliminary objections while the Court of Appeal in **Ali Shaban and 48 others versus Tanroads, Civil Application No.** 161 of 2020 had departed from **Mukisa Biscuits** and allowed the use of credence to determine preliminary objections.

d) There is an error on the face of the record in that the court applied the provisions of section 8 of the Civil Procedure Code to determine that the application was not *sub judice* while it is not applicable if one matter is pending in the Court of Appeal and the other in the High Court. Only the nexus between the two is required; and

e) There is an error on the face of the record in that the court held that the application for contempt is of the nature of the enforcement of the decree thus its limitation falls under item 20 of Part III to the schedule to the Law of Limitation Act instead of item 21 of the same part, thus erroneously holding that the limitation time is 12 years instead of 60 days.

Based on these five grounds, the applicant has prayed that this court be pleased to review its ruling, set it aside and uphold the preliminary objection.

When the application came for hearing, Messrs. Gabriel Simon Mnyelle, Barnabas Nyalusi, Leonard Mwanamonga Haule, Florence Burdaa and Josefa Tewa, all learned counsels represented the applicant whereas the respondent enjoyed the service of Mr. Jeremiah Mtobesya, learned counsel.

Opening his submission in support of the review, Mr. Mnyele submitted that, under Order XVII of the Civil Procedure Code, Cap 33 R.E. 2019, review as a remedy, is available to a party who is aggrieved by a decision of a court and can be invoked where the aggrieved party has not preferred an appeal or where the order he intends to challenge is not appealable. Also, in terms of section 78(1)(b) and Order XLII rule 1(a), (2) and (3) under which the present review has been instituted, a review may be preferred where there are errors on the face of the ruling or judgment intended to be reviewed or for a good cause. Having set this foundation, he abandoned the grounds set out under paragraphs (a), (b), (c) and (d) above and confined his submission to ground (e).

While referring to pages 16 and 17 of the ruling, he submitted that this court lucidly misdirected itself by equating the contempt proceedings with proceedings for enforcement of a decree or an order as in law, these proceedings are distinct and unrelated. He argued that the error occasioned by the court falls squarely in the scope of errors classified as 'error(s) on the face of the record'. In fortification of his argument, Mr. Mnyele referred this court to its decision in **Lukolo Company Limited vs Bank of Africa Limited** (Civil Review 14 of 2020) [2021] TZHC 2402 TanzLII in which it extensively discussed what amounts to 'an error on the face of the record'. He submitted that, as per this ruling and the authorities cited therein, for an error to be regarded as 'an error apparent on the record' for purposes of review proceedings, the error must indeed be apparent on the face of the record.

It was argued that, in the instant case, the error is indeed apparent because Miscellaneous Labour Application No. 3 of 2022 is a labour matter and this court was entertaining it in its jurisdiction as a labour court. In the exercise of such jurisdiction, the court is mandated to enforce orders and decrees. Such powers are regulated by rule 48(3) of the Labour Court Rules, 2007 and are more or less similar to the powers vested in this court by Order XXX1 of the Civil Procedure Code, Cap 33 R.E 2019. Thus, the enforcement of the order of the Labor Court should proceed in compliance with Order XXI of the Civil Procedure Code. None of the rules of this Order provides for imprisonment of a person for contempt of court. Thus, it was a lucid misdirection for this court to equate the proceedings in Misc. Application No.

3 of 2023 with the enforcement of a court order. The court ought to have exclusively invoked the provision of item 20 of part III of the Law of Limitation Act, Cap 89 R.E. 2019 which sets a limitation of 60 days for applications whose time limitation is not expressly provided.

Mr. Mnyele, further submitted on the difference between civil and criminal contempt and argued that, unlike criminal contempt which is regulated by the Criminal Procedure and the Penal Code, civil contempt is regulated by section 95 of the Civil Procedure Code as stated in **Nkumbi Malashi Holela vs Musa Christopher Ginawele @ Musa Balali & 6 Others (**Misc. Land Application No. 7 of 2023) [2023] TZHC 15699 TanzLII and in the case of **Tanzania Bundu Safaris Ltd vs. Director of Wildlife and Another** [1996] TLR 246. Summing up his submission, Mr. Mnyele submitted that the purpose of an application for contempt is not to enforce any order of the court as stated in **Tanzania Bundu Safaris Ltd vs. Director of Wildlife and Another** (supra). Rather, it is to vindicate the rule of law to protect the prestige of the court as a law enforcement organ. Thus, this court was materially wrong in equating the two.

In reply, Mr. Mtobesya started by challenging the competence of the review. He submitted that it is untenable as it is a disguised appeal brought contrary to the established legal principles. He argued that, as the review is predicated on the existence of an error on the face of the record, it must have complied with what was stated by this court on page 9 of the ruling in the case of **Lukolo Company Limited vs Bank of Africa Limited** (supra).

The counsel made further reference to the decision of the Court of Appeal in the case of **Charles Barnabas vs Republic** (Criminal Application 13 of 2009) [2010] TZCA 111, TanzLII and **Ruth Makaranga vs Salum Ayub** (Civil Application 363 of 2021) [2022] TZCA 562 TanzLII in fortification of his argument that a review is not an appeal or a second bite. In view of these authorities, Mr. Mtobesya wrapped up that, where a party alleges that there is an error on the face of the record, he should confine his case to a reviewable error instead of raising a ground that requires a long-drawn argument to establish it.

The alleged error, he argued, cannot stand as an error on the face of the record because it requires a long-drawn argument to establish it as demonstrated in Mr. Myele's submission which was a long submission arrived at after an analysis of statutes and decided cases. Mr. Mtobesya argued further that the long-drawn argument made by Mr. Mnyele constitutes his own opinion of the ruling and cannot stand as a justification for review. He added that if there is any error in the ruling, it is on the reasoning of the court and cannot be established without going all the way to the different provisions in the Civil Procedure Code and the Labour Court Rules. He concluded that since this can only be done in an appeal and not in a review, the instant review is not a review but a disguised appeal hence untenable. He also cited the case of **Pelagia Kukuhirwa Herman v Japhet Mtani Wang'uba**, Civil Review No. 04 of 2021 HC at Musoma in fortification and he prayed that the review be dismissed.

On the merit of the review, it was argued that when a court seats to decide an application for contempt, it basically seats to enforce its orders as contempt is all about the enforcement of law and order. Thus, this court was right in equating the contempt proceedings with proceedings for enforcement of a decree or order of the court and in declining to invoke the provision of item 20 of Part III of the Schedule to the Law of Limitation Act. If the applicant is disgruntled, she should invoke a proper remedy which is an appeal to the higher court. Lastly, he submitted and prayed that this application is without merit and should be dismissed with costs.

Mr. Nyalusi, briefly rejoined by reiterating the submission in chief and stressing that an error on the face of the record is obvious and patent as demonstrated in the submission in chief. As for the decision of the Court of Appeal in **Ruth Makaranga v Salumu Ayub** (supra) he submitted and argued that it is distinguishable from the present review as the application from which it emanates was for contempt filed under section 95 of the Civil Procedure Code. He concluded that, based on what was submitted in the submission in chief, it is in the interest of justice that the court find merit in the review and be pleased to review its decision.

I have considered the rivalry submissions by the learned counsel. The sole issue for determination from these rival submissions is whether the review has merit. Before delving into this question, I prefer to start with the enabling law. As alluded to in the prelude, the instant review was instituted under section 78(l)(b) of the Civil Procedure Code, Cap 33 R.E. 2019 read together

with Order XLII rules 1(b), (2) and (3) of the same Code and Rule 55 of the Labour Court Rules, 2007. Of these, section 78(l)(b) and Order XLII rules 1(b) are of particular relevance as they deal with reviews that are predicated on the existence of an error on the face of the record. Their substances are conveniently reproduced below for ease of reference. Section 78(l)(b) states that:

> 78 (I) Subject to any conditions and limitations prescribed under section 77, any person considering himself aggrieved: -
> (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."

And, Order XLII rule l (b) of the same law states that:

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

This being the case and considering that the applicant has abandoned the first four grounds of his review, I will refine the issue for determination as follows: whether in view of the fifth ground of the review, the ruling of this

court in Misc. Labour Application No. 3 of 2023 manifests an error(s) on the face of it. As both parties have extensively relied on the ruling of this court in **Lukolo Company Limited vs Bank of Africa Limited** (supra), I will reproduce the most relevant part of the ruling to derive its stance. On page 6 of this ruling, it was stated that:-

> "Luckily, as it will appear from the submission by both parties, 'manifest error on the face of the record' as a ground for review has been broadly canvased in a plethora of authorities from the Court of Appeal. Starting with the case of **Chandrakant Joshubai Patel v R** (supra) which is the oldest of the authorities cited by the parties, the Court having referred with approval plethora of authorities from our jurisdiction and other jurisdictions, India and Uganda, in particular, it relied upon the following excerpt from Mulla, (14 ed), pages 2335-36 as a correct articulation of what constitutes an error manifest on the face of the record:
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> > An error apparent on the face of the 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 a long-drawn process of reason on points on which there may conceivably be two opinions State **of Gujaratv. Consumer Education and Research Centre** (1981) AIR GU] 223] ... Where the judgment did not effectively deal with or determine an important issue in the case, it can be reviewed on the ground of error apparent on the face of the record [**BasseiiosM. Athanasius** (1955) 1 SCR 520] ... But it is no ground for review that the judgment proceeds on an incorrect exposition of the law [**Chhajju Ram v. Neki** (1922) 3 Lah. 127]. A mere error of law is not a ground for review under this rule. That a

> decision is erroneous in law is no ground for ordering review: **Utsaba v. Kandhuni** (1973) AIR Ori. 94. It must further be an error apparent on the face of the record. The line of demarcation between an error simpliciter, and an error on the face of the record may sometimes be thin. It can be said of an error that it is apparent on the face of the record when it is obvious and self-evident and does not require an elaborate argument to be established [**Thungabhadra Industries Ltd v. State of Andhra Pradesh** (1964) SC 1372]

Further to this authority, the court cited the decision of the Court of Appeal in the case of **John Kasheka v AG,** Civil Appeal No. 408/03 of 2018 (unreported); **African Marble Company Ltd v. Tanzania Saruji Corporation Limited,** Civil Application No. 132 of 2005, CAT (unreported) and **Vitatu and Another v Bayay and Others**, Civil Application No. 16 of 2013 (unreported) and observed that, in all these cases, the principle in Chandrakant **Joshubai Patel v R** (supra) was followed and it specifically stated that in **Vitatu and Another v Bayay and Others,** (supra) the Court of Appeal had this to say:-

> "Taking a leaf from case law, a manifest error for purposes of grounding an application for review must be an error that is obvious, self-evident, etc., but not something that can be established by a long-drawn process of learned argument: **Chandrakant Joshughai Patel v. Republic**, [2004] TLR 218. The decision of the Court of Appeal of Kenya in **National Bank of Kenya Limited v Ndungu Njau** [1997] eKLR can as well provide us with a persuasive guide when it stated:

> *"...A review may be granted whenever the court considers that it is necessary to correct an apparent error or omission on the part of the court. The error or omission must be self-evident and should not require an elaborate argument to be established. It will not be a sufficient ground for review that another Judge could have taken a different view of the matter. Nor can it be a ground for review that the court proceeded on an incorrect exposition of the law and reached an erroneous conclusion of law. Misconstruing a statute or other provision of law cannot be a ground for review.*

Also, in **Ruth Makaranga vs Salum Ayub** (supra), the Court of Appeal dealing with a similar issue, held thus:

> From our examination of the grounds of review before the High Court, the applicant did no more than asking the court to sit on its own judgment and rewrite it. With respect, that was beyond the scope of review on account of apparent error on the face of the record. We say so alive to the settled law on review which holds that, the power of review should not be confused with appellate powers which enables an appellate court to correct all errors committed by the subordinate court. Commenting on this issue, Justice C.K. Takwani, the author of Commentary in Civil Procedure, 6th Edition observes at Page 544 thus: .... "
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> > .... " a review cannot be equated with the original hearing of the case and finality of the judgment by a competent court cannot be permitted to be reopened or reconsidered...". Be it as it may, as the complaint was on the alleged error apparent on the face of the record, the applicant was bound to place her case within the confines of reviewable errors; a self-evident error on the face of the record not involving an examination or

> arguments to establish it. To put it differently, an error which has to be established by a long drawn process or arguments and reasoning to establish it on points capable of two opinions cannot qualify to be an error apparent on the face of the record."

In the instant review, Mr. Mtobesya has argued that the purported review falls outside the purview of 'an error on the face of the record' as encapsulated in the above authorities while on the other hand Mr. Mnyelle and Mr. Nyalusi has argued in affirmation of the tenability of the review as, in their considered opinion, it is within the confines above. I respectfully differ with them and concur with Mr. Mtobesya because, as per the authorities above cited, for an error to stand as 'an error on the face of the record', it must be a self-evident error. To the contrary, as correctly argued by Mr. Mtobesya and as seen through Mr. Mnyele's submission in chief, the error if any is not self-evident and cannot be established in the absence of a long drawn argument involving a thorough examination of different provisions of the Civil Procedure Code and the Labour Court rules. Also, as correctly submitted by Mr. Mtobesya, it is capable of two or more opinions as evidenced in Mr. Mnyelle's submission which is a different opinion from the opinion held by this court. As such, it cannot qualify to be an error apparent on the face of the record.

In the foregoing, I concur with Mr. Mtobesya that the point raised could have been best canvased in an appeal and not in this review else, the review would be rendered a disguised appeal. Accordingly, it is hereby held that the

review is untenable and it is consequently dismissed for want of merit. The costs are to be shared by each of the parties bearing its respective costs.

DATED and **DELIVERED** at **DODOMA** this 21st day of June 2024

J. L. MASABO

JUDGE