IN THE HIGH COURT OF TANZANIA

(MAIN REGISTRY)

AT DAR ES SALAAM

MISC. CIVIL APPLICATION NO. 30 OF 2023

(Arising from Misc. Civil Application No. 18 of 2023)

FREDRICK ANTHONY MBOMA.....APPLICANT

VERSUS

SERIKALI YA MTAA KIBANGU .....1ST RESPONDENT

UBUNGO MUNICIPAL COUNCIL.....2ND RESPONDENT

ATTORNEY GENERAL.....3RD RESPONDENT

RULING

Date of Last Order: 06/02/2024.

Date of Ruling: 08/03/2024.

E.E. KAKOLAKI, J.

This ruling is in respect of the application for review by the applicant seeking to review ruling of this Court in Misc. Civil Application No. 18 of 2023 on the ground that, the presiding judge erred to strike out non-existing paragraphs from his affidavit. The application is brought under section 78(1)(b),3A,3B and 95; Order XLII rules 1(1)(a) and 3; and Order XXXIX Rules 1(1) and 1(2) of the Civil Procedure Code, [Cap. 33 R.E 2019]. The Court is therefore

invited to vacate its ruling and order issued on 11/08/2023 and allow the struck out application to be heard in its merits.

Briefly the applicant vide Misc. Civil Application No. 18 of 2023 unsuccessful applied for leave to appeal against the decision of this Court in Misc. Civil Application No. 19 of 2023 as the same was struck out on 11/08/2023 for want of proper affidavit to support it after paragraphs 2-12 of the same were expunged therefrom for containing issues and law, arguments, opinions and conclusions. It is from that Court's decision the applicant is seeking its review on the ground that, the Court struck out therefrom none existent paragraphs.

Hearing of the matter took the form of writings as the applicant proceeded unrepresented while the Respondents enjoying the services of Ms. Jesca J. Shengena, Principal State Attorney. Having travelled through both parties' submission the calling issue for determination is whether this application has merit.

Submitting in support of the application the applicant contended that, some paragraphs in his affidavit in support of Misc. Civil Application No. 18 of 2023 for leave to appeal to the Court of Appeal against the decision of this Court

in Misc. Civil Cause No. 39 of 2022 of 05/05/2023, were numbered using a combination of numerals and numbers as paragraphs 1, 2, 3, 4, 5, 6, 7(a), 7(b),8(a),8(b),9(a),9(b),9(c), 10,11, 12(a) and 12(b). According to him, in its decision this Court expunged some of the said paragraphs when referred them as paragraphs 3-7, 8-10 and 11 – 12 contrary to the way were numbered in the body part and verification clause, including paragraph 8(a) of the affidavit containing statement of fact independent and sufficient enough to support the application for leave. He said, since the said statement of fact has no extraneous matter it was improper for this Court to choose not to respect the way the applicant chose to number the paragraphs of his affidavit in particular paragraph 8(a) as stand-alone paragraph capable of supporting the application for leave. It was his invitation to this Court in view if his submission, to vacate the order striking out the application and allow it to be heard on merit.

In response Ms. Shengena held different view in that, review is by no means an appeal in disguise as it was held in the case of **National Microfinance Bank Vs. Leila Mringo and Others**, Civil Application No. 316/12 of 2020 (CAT), since it is a matter of policy that litigation must come to an end. Citing also the case of **Transport Equipment Ltd Vs. Dervan P. Valambhia**,

Civil Application No. 18 of 1993 (CAT) she argued that, Court will exercise its inherent jurisdiction to review its own decision only where the following circumstances exist:

(a) Where the is a manifest error on the face of record which resulted in miscarriage of justice, or

(b) Where the decision was attained by fraud; or

(c) Where a party was wrongly deprived of the opportunity to be heard.

Ms. Shengena went on to argue while referring the court to the definition of the term an error apparent on the face of record as defined in **Chandrakant Joshubhai Patel Vs. R** [2004] TLR 218 that, the Court then should ask itself whether the applicant has shown or demonstrated to its satisfaction that there is an error apparent on the face of record, serious one to result into miscarriage of justice. According to her none has been demonstrated by the applicant, hence called for dismissal of the application with costs.

In rejoinder submission the applicant attacked the authorities relied on by the respondents including the cases of **Leila Mringo and Others** (supra) and **Devram P. Valambhia** (supra) submitting that, the same were interpreting the Appellate Jurisdiction Act and Court of Appeal Rules

provisions distinct from the Civil Procedure Code provisions in which his application is stemmed, hence completely irrelevant as the referred provisions therein do not translate the provisions of the law under which this application preferred. He also countered the respondents' submission and call to this court to dismiss the application on the ground that, review is not an alternative to appeal, when submitted that, appeal has never been a remedy for refusal to grant the application for leave as the only remedy is to knock the Court of Appeal's doors for second bite. According to him this application is preferred under Section 78(1)(b) of Cap. 33, RE 2019 and Order XLII, rule 1(1)(a) of Cap. 33, RE 2019 in-stead of rule 1(1)(b) of the same Code which is a typo cured by the cited section 78(1)(b) from the Principal Act of Parliament. Thus, it is well within the precinct of the law governing the application for review. He said for this Court to review its own decision under Order XLII, rule 1(1)(b) of the CPC, there must be in the impugned decision **mistake or error apparent on the face of the record** as defined in the case of **Chandrakant Joshubhai Patel** (supra) or **any other sufficient reason**.

In the applicant's view this Court's act of expunging non-existent paragraphs including paragraph 8 instead of paragraph 8(a) of his affidavit in Misc. Civil

Application no. 18 of 2023, which is capable of supporting his application for leave, is an error apparent on the face of record, hence sufficient ground for reviewing the impugned ruling. He therefore reiterated his submission in chief and invited the Court not to uphold respondents' reply for want of merit instead grant the application as prayed.

I have carefully and passionately considered the contending arguments from both parties and revisited the impugned ruling and the cited authorities. There is no dispute that this application is competently before the Court regardless of the claimed typo by the applicant in citing the enabling provisions as rule 1(1)(a) of Cap. 33, RE 2019 in-stead of rule 1(1)(b) of the same Code, since wrong citation of enabling provisions is not fatal in as long as the Court has the requisite jurisdiction to entertain the matter. I so find as section 78(1)(a) of the CPC conferring jurisdiction to this Court to entertain review applications is also cited by the applicant. Having so settled the issue of jurisdiction of the Court, I now wish from the outset and without any demur to endorse the binding principle of law to this Court as obtained in the case of **Leila Mringo and Others** (supra) referred by Ms. Shengena that, review is by no means an appeal in disguise as under the provisions of section 78(1)(a) of the CPC, it will only be preferred by the party aggrieved

with the decree or order of the Court against the judgment of the same Court when no appeal is allowed against the said decision or is allowed but has not been preferred for justifiable cause. As to the circumstances under which the Court can review its own decision the settled law as adumbrated in the case of **Dervam Valambhia** (supra) is that, where there is manifest error on the face of record resulted miscarriage of justice or where the decision was reached by fraud or where the party was wrongly deprived of the right to be heard. See also the case of **Chandrakant Joshubhai Patel** (supra).

With the above settled principles in mind the issue for determination in this matter now is, whether there is justifiable ground advanced by the applicant calling for review of the impugned decision. While Ms. Shengena is of the submission that, there is no any advanced ground by the applicant leading to miscarriage of justice, applicant is of the contrary view arguing that, expunging some of paragraphs in his affidavit in support of the application in Misc. Civil Application No. 18 of 2023 by referring them by their numerical numbers only without letters including paragraph 8 carrying letters (a) and (b) affected him, as the ground stated in paragraph 8(a) of the said affidavit was sufficient enough to support his application. For easy of reference and argument in this ruling it is incumbent that I reproduce the said paragraph

8(a) founded under the title "**Part 3. Prima Facie or Arguable appeal (i.e. Disturbing features from the Ruling and or the proceedings)**" as I hereunder do:

> *8. (a) The verification clause of 2nd Respondent's affidavit in reply deponed by **ERICK PAUL BAKILANA** states that the information in all paragraphs numbered (1,2,3,4,5 and 6) in the affidavit is information received from another person named **ASHA SECHONGE**, but there is no affidavit filed by **ASHA SECHONGE**.*

Upon investigation of the above paragraph and the impugned ruling at page of 13, it is to the satisfaction of this Court and therefore of the agreement with the applicant's submission that, when expunging paragraph 8 together with other paragraphs from the applicant's affidavit the Court did not cite or specify letters such as (a) and (b), an error which no doubt is manifest on the face of record. I, however distance myself from his submission that, the said paragraph was/is sufficient enough to support his application for leave to appeal to the Court of Appeal in Misc. Civil Application No. 18 of 2023, instead endorse Ms. Shengena's proposition that, the complained of error did not cause any miscarriage of justice to the appellant as by any mean the

said paragraph 8(a) of the applicant's affidavit even if not misquoted could have not supported his application as he would convincingly want this Court to believe. I hold that view as this Court in the impugned ruling at page 11 before expunging the paragraphs from the applicant's affidavit was satisfied that the contents of paragraphs 8 – 10 of the said affidavit in totality among others were contravening not only the law but also practice of the Court for being placed under the title **Part 3** as cited above, leave alone carrying of arguments which is prohibited by law. It would be expected of paragraph 8(a) for instance as cited above to state or demonstrate errors manifest in the impugned ruling instead of referring to the contents of the verification clause of the 2nd respondent's affidavit which is purely arguments as the affidavit being a kind of superior evidence cannot contain arguments. See the case of **Mustapha Raphael Vs. East Africa Gold Mines Ltd**, Civil Application No. 40 of 1998 (CAT-unreported). As the said paragraph 8 with its letter (a) found under Part 3 of the affidavit and in contravention of Court's practice could not have supported applicant's application for leave to appeal, I do not see as to how mere reference by this Court of numerical number in its ruling without letters (a) and (b) would have resulted into miscarriage of justice on the applicant's part. As there was no miscarriage of

justice resulted from the error referred above I make the findings that, there is no justifiable ground advanced by the applicant to warrant this Court exercise its review powers. Assuming for the sake of argument this application is meritorious and is granted which is not the fact, still I would hold the application for leave to appeal in which the applicant is pressing for would be of no value given the recent development of the requisites for appeal purpose after amendment of the Appellate Jurisdiction Act in that, leave to appeal to the Court of Appeal is no longer a requirement. See also the case of **Petro Robert Myavilwa Vs. Zera Myavilwaand Another**, Civil Application No. 117/06 of 2022 (CAT) Tanzlii.

In view of the above this application is wanting in merit and the same is hereby dismissed.

Each party to bear own costs.

Order accordingly

Dated at Dodoma this 08th March, 2024.

E. E. KAKOLAKI
JUGDE
08/03/2024.

The Ruling has been delivered at Dodoma today on 08th day of March, 2024, via video conference in the presence the applicant in person, Ms. Jesca J. Shengena, Principal State Attorney and Mr. Erick Bakilan, State Attorney for the Respondents appearing from Dar es salaam High Court Sub-Registry and Ms. Doris Sisya, Court clerk.

E. E. KAKOLAKI
JUGDE
08/03/2024.