IN THE HIGH COURT OF TANZANIA

(COMMERCIAL DIVISION)

AT DAR ES SALAAM

REVIEW NO2 OF 2012

EMMANUEL JAGERO.....1ST APPLICANT

MARINE WORLD LOGISTICS.....2nd APPLICANT

CONTAINER WORLD LOGISTICS.....3RD APPLICANT

BARRETO HAULIERS (T) LIMITED.....4TH APPLICANT

VERSUS

MULTIMODAL TRANSPORT AFRICA LTD .....RESPONDENT

RULING.

BUKUKU, J.

A Memorandum of Review was filed in this court on 13th March 2012. The application has been brought under Section 78 (b) and Order XLII (1) (b) of the Civil Procedure Code, Act Cap 33 R.E 2002, wherein the applicants prays this court to review the ruling and order of this court dated 21st February 2012 on the following grounds;

1. *There is an error apparent on the face of the record that despite the findings that the 2nd, 3rd and 4th Respondents are not part to the contract, the same Honourable Court compelled them to transport the remaining containers to Katesh.*

2. *That the Honourable Court also compelled the 2nd, 3rd and 4th respondents to transport 9 containers while there is a dispute as to the exact number of containers, and the respondents have only 8 containers remaining in their custody, despite the findings by this Honourable Court that the issue of number of containers will be resolved upon production of evidence in the main suit.*

3. *That the Honourable Court compelled the 2nd 3rd and 4th Respondents to return 25 empty containers without any order to compel the Applicant to provide the 2nd 3rd and 4th respondent with the empty containers return instructions, without which it is impossible to comply to the order.*

4. *That the Honourable Court ordered the applicant to deposit Tanzania shillings 25,000,000/= to this court pending determination of the main suit, while the respondent will be entitled to immediate payment for specific performance of the whole balance of T.shs. 42,500,000/= after compliance to the order of the court as to transporting the remained containers.*

From the above set of grounds, the applicants pray before this Honourable court for the following orders;

(a) *To review the order dated 21st February 2012 and declare that the applicants are part of the contract.*

(b) *That the applicants to transport 8 containers in their custody instead of 9 containers, and the Respondent be compelled to hand over empty container delivery instructions.*

(c) *That the Applicants be immediately paid the balance of 42,500,000/= upon delivery of the remaining containers.*

(d) *Costs of this Application be costs in the course.*

On 12th April, 2012 when the matter came for hearing the applicants enjoyed the services of Mr. Wawa, Advocate while the respondent was represented by Mr. Thadei, Advocate, and the application was argued orally.

Submitting in support of the application, Mr. Wawa averred that, there are four grounds of review. The first one is that, there is an error apparent on the face of the record that, despite the finding by the court that the 2nd 3rd and 4th applicants were not parties to the contract, the same court compelled them to transport the remaining containers to Katesh, and also to transport nine containers where as there is a dispute regarding the containers. It is his further averrement that, applicants be

declared as parties to the contract. He further submitted that, had the court gone through the interchange receipt it would appreciate that the 2nd 3rd and 4th applicants are parties to the contract to transport the containers, hence it was an error apparent on the face of the record because the court did not consider the fact and the document. The counsel stressed his point by citing Order XLII Rule 1 (1) (b) of Civil Procedure Code which underlies the ground for review where there is discovery of new facts not within the knowledge or not produced by him at the time when the decree was passed.

Buttressing his point, Mr. Wawa made reference to the case of **Tanganyika Land Agency Ltd and 7 others v Manohar Aggrawal Civil Appeal no 17 of 2008**, in which the court held that the information was self evident and it could not have decided the way it did had the information been taken. Hence he concluded that if the court was to go through the interchange receipt, it will determine that the 2nd 3rd and 4th applicants were parties to the contract and not the 1st applicant alone as alleged.

Submitting with regard to the second ground, Mr. Wawa submitted that while the reasoning and finding of the court was correct, it was by mistake that the court ordered 9 containers be transported instead of 8 containers, hence the applicants were aggrieved by this error and therefore could not execute the order of transporting 9 containers and thus they pray that the order be reviewed by this court.

As for the third ground, Mr. Wawa stated that the respondent has already supplied the applicants with containers return instructions and the containers were returned to the shipping line. This having been complied with this ground has been overtaken by event

Regarding the fourth and last ground, Mr. Wawa submitted that, the applicants are entitled to be paid the whole amount of T.shs. 42, 5000,000 upon returning all containers, and thus it was erroneous for the court to order the respondent to deposit in court T.shs. 25,000,000 until final determination of the main suit. He maintained that, the amount was not in dispute and the respondent admitted the same through affidavit that the balance of T.shs. 42,500,000 will be paid upon delivery of all containers, hence it is the submission of the counsel that the court reviews its decision upon delivery of all containers.

In response, to the above averments, Mr. Thadei, advocate for the respondent submitted that, in determining the first issue, the court was reacting on the issue of whether 2nd,3rd and 4th applicants had a right to demand payment straight from the respondent and the court was of the view that only the 1st applicant had powers to demand the balance from the respondent and not the 2nd to 4th applicants herein because, they had no contract with the respondent. Mr. Tadei surmised that, he does not see an error on the face of the record. With regard to the discovey of new evidence, it is Mr. Tadei's submission that, Order XLII of the CPC talks about mistakes and the document which the counsel for the applicant is

talking about are documents brought by themselves while Order XLII talks of documents not in possession of the party. He averred that, the documents were in the possession and within the knowledge of the applicants. He therefore concluded that the document was not a new discovery and therefore the court should maintain its decision.

Counter submitting the second ground, Mr. Thadei stated that, there was is a dispute as to number of containers. While the respondent maintained that nine containers are supposed to be transported to Singida Katesh, the applicants maintained that they had only eight containers in their possession. He therefore stressed that the court order was correct since in its ruling, the court mentioned that, if the containers were eight or nine, it was an issue of evidence, but then, in the meantime, the applicants are supposed to transport 8 containers as admitted and the one in dispute will be discussed during the main hearing.

Rebutting on the third point regarding the containers return instructions, Mr. Thadei submitted that, the documents were in the hands of the 1st applicant who was the party to the contract and the respondent made an effort after the order of the court to serve the applicants with the documents and there is evidence of service made on March 16, 2012 filed in court. Unfortunately, when they were served to the applicants, the counsel for the applicants did not acknowledge service but said he will deliver the same to applicants. He submitted further that the application for review was filed on 13th March, 2012 and service was done 16th March

2012 hence the act of the applicant not acknowledging service was done purposely, that if this application was filed in good faith then this ground ought not to appear.

Finally, regarding the fourh point on the deposit made by the respondent by order of the court, it is Mr. Tadei's submission that, there is nothing wrong with the order. In his view, the court ordered the deposit of the said amount pending determination of the main suit, and therefore, it was meant for the costs at the end of the suit. According to Mr. Tadei, the money deposited does not touch on the contractual terms of the 1st applicant and the respondent. Mr. Tadei concluded that, the interpretation of the court order by the applicants was wrong, and therefore there is no ground which is backed by law and hence he prayed the court to dismiss the application with costs.

In rejoinder Mr. Wawa submitted that, the 1st applicant is not a party to the contract, rather, as submitted earlier, the 1st applicant was an agent of the respondent. On the issue of the containers, Mr. Wawa insisted that, it is a question of justice and compliance with the courts orders because if the applicants transport 8 instead of 9 containers as ordered by the court it will amount to contempt of court. On the issue of containers return instructions, Mr. Wawa submitted that, having received the document, 17 container were returned to the shipping line, he contended that it is necessary to put in record that the respondent should have not ordered to do so. Finally, as for the fourth ground, Mr. Wawa submitted that it is not

written in the ruling that the T.shs. 25,000,000 was for costs, and that one will see that the reasoning of the court was that the applicant was worried that they will not be paid their money but erroneously court ordered to be paid after determination of the main suit, therefore, it could have been proper if the balance could be paid after the transporting of the containers, Mr. Wawa concluded that the order of the court needs to be reviewed and costs be costs in the course.

Having gone through the submissions by the learned counsels let me now turn to the merits of the application.

The applicants herein have come up with a prayer that this court be pleased to review its orders dated 9th November, 2011. The law governing Review of this nature is found under section 78 (b) and Order XLII (1) (b) of the civil Procedure Code, Cap 33, RE 2002, under which this application has been preferred. The relevant provisions of section 78 provides as follows:

"78 (b)- ***Subject to any conditions and limitations prescribed under section 77, any person considering himself aggrieved 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 reads;

> ***Any person considering himself aggrieved 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 is of this court).***

In the course of making his submission in support of the application for review, the learned counsel for the applicant revisited the principles guiding courts at the stage of making a review as contained in Order XLII Rule 1 (b) of the Civil Procedure Code and submitted that this was a fit case for review. In responding to the submissions of the applicant in opposition, the learned counsel for the respondent also amplified the guiding principles.

Emanating from the above, we can safely deduce the following principles as guiding courts when dealing with review. In essence, O.XLIII of the Civil Procedure lays down the procedure and grounds for making

applications for review. That, (i) it is necessary to show that there is a **party, which is aggrieved** by the decision ; (ii) that there is a **discovery of a new and important matter of evidence** which, after due diligence, was not within the knowledge of the party at the time the judgment and decree was passed and; that there was an **error apparent on the face of the record** or any other **sufficient reason.** This means, the application can be based on any of the three conditions or a combination of them all. This position was stated in the case of ***N.B.C v Cosmas M. Mukoji (1986) T.LR, 27.***

The remedy of review, which is a reconsideration of the judgment by the same court and by the same judge, has been borrowed from the courts of equity. The concept was not known to common law. The remedy has a remarkable resemblance to a writ of error. The basic philosophy inherent in the recognition of the doctrine of review, is acceptance of human fallability. Mistakes or errors must be corrected to prevent miscarriage of justice, since justice is above all. Neither the rules of procedure nor technicalities of law can come in its way. Rectification of an error stems from the fundamental principle that justice is above all. It is exercised to remove an error and not to disturb finality.

The essence of review must ordinarily be to deal with straight forward issues which would not fundamentally and radically change the judgment intended to be reviewed, otherwise, parties would lose direction as to the finality of a decision made by the court. An application for review

will only be allowed on very strong grounds if its effect will not amount to re-hearing the original application a fresh. As a general law, no review can lie where the ground put forth is that an erroneous conclusion was reached in a given case where there was an incorrect exposition of the law. But it can be a ground of review where there appears an error in substantial point of laws so glaring that no two opinions can be made of it.

Let me now, having restated the governing law and principles on review, address myself to the substantive arguments of the counsels for the parties on the issue of review, the subject of this ruling.

The applicants herein have raised four grounds of which they need this court to have its ruling and order reviewed, I will only pay attention to ground No. 1, 2 and 4 since ground 3 relating to the container return instructions have been preempted by the applicants complying with the order of the court.

The first ground is that there is an error apparent on the face of the record that despite the findings by this court the 2nd to 4th applicants are not part of the contract, but the court compelled them to transport the remaining containers to Katesh. According to the records, it is not disputed that, the respondent herein entered into an oral contract with the first applicant to transport 25 containers of bitumen from Dar Es Salaam to Singida/katesh, and the other applicants (2nd to 4th) came in after being

subcontracted by the first applicant. It therefore goes without saying that, the oral contract was between the respondent and the 1st applicant. Under such circumstances, it is obvious that, the issue of the 2nd -4th applicants demanding payment direct from the respondent cannot stand because they were not part of the oral contract. It is only the 1st applicant who can demand payment from the respondent and not the other way round.

As a general law, no review can lie where the ground put forth is that an erroneous conclusion was reached in a given case where there was an incorrect exposition of the law. There is a distinction between a mere decision and an error apparent on the face of the record and where an error on a substantial point of law states one in the face, and there could reasonably be no two opinions, a clear case of error apparent on the face of the record would be made out. An error which has to be established by a long drawn process of reasoning or on points where they may conceivably be two opinions, can hardly be said to be an error apparent on the face of the record. Again, if a view adopted by the court in the original record is plausible one, it cannot be an error apparent on the face of the record even though another view was also possible. Mere error or wrong view is certainly no ground for review although it may be for an appeal.

Mr. Wawa has also raised the issue of the interchange receipt. He wants this court to believe that 2nd -4th applicants were part of the oral contract on the strength of the interchange receipt which established the contractual relationship between the consignee, clearing agent and the

transporting company. With due respect to Mr. Wawa the issue of the interchange receipt was not an issue which was discussed when determining the contractual relationship that was in question before the court. Both the 1st applicant and the respondent agreed on how they entered into the oral contract to have the containers (the subject of the contract) transported to the area of destination. It goes without saying that the court could not have in any way used the interchange receipt as a determining factor to see if the parties entered into the contract, after all the 1st applicant and respondent did not dispute the fact that they entered into the contract. The only issue that featured was whether the respondent entered into a contract with the 2nd to 4th applicant who were subcontracted by the 1st applicant.

Having observed so, it is apparent that, the findings of the court that the 2nd 3rd and 4th applicants are not parties to the contract, is in itself not an error apparent on the face of the record. It is a fact that they were not parties to the oral contract entered into between the 1st applicant and the respondent. For the said reasons, the first ground has no merit.

As already stated, a review is permissible on the ground of discovery by the applicant of some new and important matter or evidence which, after exercise of due diligence, was not within his knowledge or could not be produced by him at the time when the decree was passed. Before an application for review can be granted on this ground, the applicant must establish that, even after exercise of due diligence, such evidence was not

within his knowledge or could not be produced by him before the court at the time when the decree was passed. There must be sufficient evidence of diligence in getting all the evidence available. When such evidence could have been produced had reasonable care and diligence been exercised, such an application for review should be refused. It is trite that, where a review of a judgment is sought by a party on the ground of discovery of fresh evidence, utmost care ought to be exercised by the court in granting it.

With regard to the first ground, for an application for review to succeed, the evidence must not only be new but the applicant must prove that he did not have them in his possession at the time and could not have obtained it despite due diligence. In the instant case at hand, the issue of the interchange document was not new. As correctly submitted by Mr. Tadei, that document was in the possession of the applicants and had not only featured in the joint written statement of defence of the applicants, Marked BRT 2, but also in the counter affidavit. In an application for review on ground of a new and important factor, the said new factor must be one which was not within the knowledge of the applicant after the exercise of due diligence and must have been discovered after the order was passed. It is not for the judge to go beyond the application beyond him. Under such circumstances, It is my considered opinion that, there was no discovery made after the decree has been passed since the document was

in the knowledge and possession of the applicants who submitted the same in court and made a submission out of it.

The second issue was whether there was an error apparent on the face of the record. Mr. Wawa had submitted that, it was an error for the court to compel the 2nd -4th applicants to transport 9 containers while there is a dispute as to the exact number of containers and that the applicants have only 8 containers remaining in their custody. First and foremost, an error apparent on the face of the record, cannot be defined precisely or exhaustively, there being an element of indefiniteness inherent in its very nature, and it must be left to be determined judicially on the facts of each case. (See: **Nyamongo &. Nyamongo V. Kogo; 2001 E.A 174)**. Such error may be one of fact or law. Secondly, an error on the face of the record should be obvious and capable of being seen by one who runs and reads, that is an obvious mistake and not something that can be established by a long drawn process of reasoning on points on which they may conceivably be two points. (Mulla on the Code of Civil Procedure: 15th Edition Vol.III Pg, 2725).

Now, in this particular instance, can it be said that the order of the court to transport 9 containers to Katesh was an error on the face of the record? I say no because, as stated in my ruling, the issue whether there are eight or nine containers is an issue which will be decided in the main suit since it requires evidence. That notwithstanding, the fact that the applicants have in their possession eight containers and not nine, does not

warrant them to defy court orders. The applicants could have easily transported the eight containers in their possession and the remaining container in issue could have been resolved when hearing the main suit. Under such circumstances, It is my humble opinion that, there was no error or mistake in the order of the court.

As already mentioned, an error which has to be established by a long drawn process of reasoning or on points where there may conceivably be two opinions can hardly be an error apparent on the face of the record neither can a view which is adopted by the court in the original record even though another view is also possible: mere or wrong or an erroneous view of evidence or of law is certainly no ground for review. it is my humble opinion that, an erroneous decision on merit or an erroneous view of law or the fact that the court has taken a different view on the question, or that a different conclusion has been arrived, at, are not erroneous on the face of the record. To me, what constitute an error on the face of record is like pronouncement of a judgment without taking into consideration the fact that the law was amended retrospectively, or on the ground of omission to try a material issue in the case, or on the ground that the court decides against a party on matters not in issue, etc.

Having considered so, it is my humble opinion that, there was no error or mistake in the order of the court regarding this point. This point therefore fails.

Finally, we come to the issue of security. It has been submitted that, it was erroneous for this court to order that the respondent deposit in court T.shs 25,000,000/= until final determination of the suit while the applicants are entitled to immediate payment of T.shs. 42,500,000/= upon delivery of the containers. From simple logic this issue need not detain this court much.

I wish at this junction to remind Mr. Wawa, Learned counsel for the respondents that, Rule 1 of Order 25 provides for the taking a security for the costs of the suit. It states that, the court may, at any stage of the suit, order the plaintiff to give security for the payment of the costs of the defendant. This is at the discretion of the court. The object of this rule is to provide for the protection of the defendants, in certain cases where, in the event of success, they may have difficulty in realizing their costs from the plaintiff. It is a discretionary power which can be exercises only in exceptional circumstances, where it is shown that the exercise of power is necessary for the reasonable protection of the interests of the defendants. An order for security of costs may be passed suo motu (of its own motion) or on application of the defendant and must be a reasoned one.

Now, coming back to the issue at hand. In their submission, the applicants had shown concern on the issue of payment in the event they comply with the court order. In order to accommodate their concerns, I

used my discretionary powers and ordered the respondent to deposit in this court an amount approximately half the amount claimed to be deposited as payment of the costs of the defendant, in the event of success. Now, can one say that was erroneous? This order was made to safeguard the interests of the applicants herein.

With due respect, the argument raised by Mr. Wawa that, this court reviews its order and declare the amount that is claimed to be due to be paid to the applicant after delivery of the containers,, unfounded. This is because, these were only interim orders. The main suit is yet to be determined. Now, if the applicants' wants to be paid now, what will remain for this court to determine? It seems the applicants want to see the conclusion of the matter before reaching the hearing of the main suit, forgetting even the respondent has his claims against the first applicant which in a way may affect the other applicants. I am at one with the submissions by the counsel for the respondent in that, wrong interpretation of this court's ruling has led the applicants this far, wisdom dictates that, after the court found the nature of the matter before it, where each party denied being the cause of delay for the fulfillment of the contractual obligations, it was proper for the court to order security for costs in order to cover the end result at the main hearing. In my opinion, what troubles the applicants as submitted by Mr. Wawa, was the omission on the part of the court to indicate in the ruling that the amount of 25,000,000/= was for costs at page 15 of the ruling. The relevant part reads:

"I hereby order the applicant to deposit into this court, pending determination of the main suit, an amount equivalent of T.shs. 25,000,000.00 within two weeks from the date of this ruling".

In my opinion, this needs no interpretation as it clearly indicates that the amount was to be deposited in court pending the determination of the main suit. Obviously, that is why no orders as to costs were made as the costs was to be the costs in the cause. From the foregoing reasons, this ground fail.

In concluding, I wish to submit that, the following observation of **Pathak, J (as he then was)** in the leading case of **Northern India Caterers (Indian) Ltd. v Lt. Governor of Delhi, Air 1980 5c674** are very useful as they lay down the correct principles of law on the power of review and, therefore, are worth quoting:

> "The normal principle is that, a judgment pronounced by the court is final, and departure from the principle is justified only when circumstances of a substantial and compelling character make it necessary to do so. Whatever the nature of the proceeding, it is beyond dispute that the review proceedings cannot be equated with the original hearing of the case, and the finality of the judgment delivered by the court will not be reconsidered except where a

glaring omission or patent mistake or like grave error has crept in earlier by judicial fallibility"

On the whole, it is my humble conclusion that, the applicants have failed to establish that there was discovery of new or important matter or evidence which could not be produced by the applicants at the time when the decree was passed, nor is there any mistake or error apparent on the face of the record, or there may be any other sufficient grounds as enumerated under Order XLII Rule (1) (b) Civil Procedure to warrant a review of the decree passed.

For these reasons aforesaid, the application is hereby dismissed. I will order no costs.

It is accordingly ordered.

A.E BUKUKU

JUDGE

29THE MAY, 2012

Ruling delivered this 29th day of May, 2012 in the presence of Mr. Wawa, Learned Advocate for the Applicants and Mr. Tadei, Learned Advocate for the respondent.

A.E BUKUKU

JUDGE

29THE MAY, 2012

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