IN THE HIGH COURT OF TANZANIA

COMMERCIAL DIVISION

AT DAR ES SALAAM

COMMERCIAL REVIEW NO. 8 OF 2018

(Originating from Commercial Case No. 90 of 2013)

(COUNTER-CLAIM)

EDINA JOHN MGENI *alias* JESCA D. JOHN.....APPLICANT

Versus

NATIONAL BANK OF COMMERCE.....1st RESPONDENT

MBEYA CEMENT.....2nd RESPONDENT

Last Order: 12th Dec, 2019

Date of Ruling: 27th Feb, 2020

RULING

FIKIRINI, J.

This application for review has been made under Order XLII Rules 1 & 3 of the Civil Procedure Code, Cap. 33 R.E. 2002 (the CPC). The applicant, Edina John Mgeni alias Jesca D. John raised two grounds for review in respect of the judgment delivered on 23rd July, 2018 in Commercial Case No. 90 of 2013. The grounds were:

1. That, the trial rightly held on page 13 of the judgment that the sum of Tzs. 580,397,800.00 (which sum the 2nd defendant had denied in its defence ad in paragraph 11 of its witness statement that it was not deposited in its account by the 1st defendant) was actually deposited in the 2nd defendant account by the 1st defendant, however the Court did not make any order as to its repayment to the plaintiff.
2. That, the trial Court Judge did not distinguish the two claims that were raised by the plaintiff in the counter-claim, i.e. claims for overpayments, which claims the plaintiff failed to substantiate and claims for the deposits of the cheques worth Tzs. 580,379,800.00, which deposits were effected by the 1st defendant into the 2nd defendant's account, but denied by the 2nd defendant.

Parties were ordered to file written submissions. Mr. Godwin Muganyizi filed written submission in support of the applicant while Ms. Queen Allen filed one on behalf of the 1st respondent and Mr. Emmanuel William Kessy filed the same for the 2nd respondent. In their brief submissions counsels submitted for and against the application.

It was Mr. Muganyizi's submission relying on the **East African Development Bank v Blueline Enterprises Tanzania Ltd, Civil Application No. 47 of 2010, CAT** cited with approval the case of **Chandrakant Joshubhai Patel v R (2004)**

T.L.R. 218, both subscribing to reasoning in **Mulla 14th Ed. Pp. 2335-36** on the criteria for a review, that the review in the circumstances of this suit is deserved. His assertion was based on one (1) mistake or error apparent of the face of the record, that the applicant was claiming for her money from the cheques the 2nd respondent, Mbeya Cement, declined to have been deposited in their account and the 1st respondent, National Bank of Commerce (the NBC) claiming they were deposited in the 2nd respondent's account. Citing a number of cheques deposits payee being the 2nd respondent and several portions of the trial Court judgment's such as page 11, 12 and 21 in her favour, yet dismissing relief sought in the counter-claim as against the 2nd respondent.

It was the applicant's submission that it was a mistake the judge made without knowledge of putting both claims under the same category and dismissed the counter-claim, the mistake or error she would not have ordinarily done since she could have been contradicting herself. The Court after having concluded that the money was in actual fact deposited into the 2nd respondent's account despite the 2nd respondent refuting the claim, the Court ought to have ordered the 2nd respondent to repay the applicant Tzs. 580,397,800/- the claim the applicant was able to prove. Grant of the application was prayed to be with costs.

The second was dropped.

Contesting the application both counsels for the respondents relying on the case of **OTTU on Behalf of P/L/ Assenga and 106 Others v AMI Tanzania Limited, Civil Application No. 20 of 2014, CAT at DSM (unreported)** (copy attached), which ascertained elements to be considered in dealing with an application for review. They both objected that the applicant's grounds raised did not fall under the purview of review but rather grounds of appeal in disguise.

Ms. Allen further in expounding on her part of the submission argued that upon instruction by the applicant the 1st respondent deposited money into the 2nd respondent's account. With that in place, it was obvious the applicant had no any claim against the 1st respondent, she contended. As for the counter claim it was the applicant's claim that the 1st respondent did not transfer a sum of Tzs. 580,397,800/= into the 2nd respondent's account, the claim which the Court found to be meritless as reflected at page 19 of its judgment, concluding that the said amount was in actual fact deposited in the 2nd respondent's account. Due to the unfolding of how the transfers of money were effected the Court could neither order the 1st respondent nor the 2nd respondent to pay the applicant. This was based on the fact that the Court found the applicant had no claim against the 1st respondent in respect of the claimed amount and there was no prayer to order the 2nd respondent to repay the said amount.

On the second ground that the trial Judge failed to distinguish the two claim, she submitted that the Judge clearly distinguished the two. And that was why the issue of over payment was found to be devoid of merits for lack of evidence, meaning the applicant failed to prove her claim. What was stated on pages 19-20 of the judgment was the Court's findings that the applicant failed to prove that the 2nd respondent failed to supply cement in respect of the money deposited in the 2nd respondent's account.

On the strength of her submission, she considered the application for review devoid of merits and pray for its dismissal with costs.

The High Court is vested with powers to determine application for reviews under Order XLII R 1 & 3 of the CPC. The criteria illustrated in the **East African Development Bank** (supra), borrowing from **Mulla on the Civil Procedure Code,** are the ones applicable in the High Court when entertaining an application for review. Therefore, the Court entertaining review or a party bringing such application must be aware of the criteria lest they consider the exercise as another form of lodging appeal. This has been underscored in the case of **Charles Barnabas V R, Criminal Appeal No. 13 of 2009, CAT (unreported):**

> *"...review is not to challenge the merits of a decision. A review is intended to address irregularity of a decision or*

proceedings which have caused injustice to a party……"

The Court went further and pointed out that:

> *"**One**, review is not an appeal. It is not a "second Bite," so to speak. As it is, it appears the applicant intends to "appeal" against the aforesaid decision through the back door. **Two,** application for review must be based on obvious **error, self evident etc, etc, but not something that can be established by a long drawn process of learned argument."*** [Emphasis mine]

Examining the present application in light of what has been stated in the two cited cases, it is now this Court's duty to determine as to whether this application is meritorious or not.

Close scrutiny of the applicant's complaint in my view do not amount to an error apparent on the face of record or mistake which could be easily corrected as envisioned by the applicant and provided by the law. In the present situation there is no way the claimed error or mistake pointed out in this application for review can be dealt with, without long drawn process of learned argument. Thorough reading of the judgment its totality, it is evident that the exercise will entail more

than what the applicant imagined. And once process comprised more than just correcting the error or mistake apparent on the face of record, the application ceases to be an application for review and turns to likely be an appeal, which this Court cannot entertain being a decision of a judge with concurrent jurisdiction as the one before whom this application is placed.

In light of the above I find this application devoid of merit and proceed to dismiss it with costs. It is so ordered.

P.S.FIKIRINI

JUDGE

27th FEBRUARY, 2020