IN THE HIGH COURT OF TANZANIA

(COMMERCIAL DIVISION)

AT DAR ES SALAAM

COMMERCIAL REVIEW NO. 6 OF 2020

(Arising from Misc. Commercial Application No. 92 of 2019)

MANTRAC TANZANIA LIMITED ..... APPLICANT

VERSUS

BUKOBA MUNICIPAL COUNCIL ..... 1ST RESPONDENT

INTERCOUNTRY ROAD CONSTRUCTION CO. LTD ..... 2ND RESPONDENT

CHRISTMASS MAHUZA MUMANGI ..... 3RD RESPONDENT

S.L. ISANGI AUCTION MART & COURT BROKERS ..... 4TH RESPONDENT

RULING

K. T. R. Mteule, J

2 August 2021 & 24th September 2021

This is ruling is in respect of an application for review in **Misc. Commercial Application No. 92 of 2019 of 23/6/2020** which allowed objection proceedings filed by Bukoba Municipal Council who is the 1st Respondent in this application.

In summary, the instant applicant, **Mantrac Tanzania Limited** was the 1st Respondent in the above named **Misc. Commercial Application.** This application formed objection proceedings where **Bukoba Municipal Council** objected the attachment of motor grader 140K with Registration

No. T687 CDN in the execution of Decree in **Commercial Case No. 141 of 2017**. In that Commercial Case, **Mantrac Tanzania Limited** sued **Intercountry Road Construction Tanzania Limited** (the 2nd Respondent in this application) as the 1st Defendant and **Chrismas Mahuza Mumangi** (the 3rd Respondent in this application) who was the second defendant in the suit. In the objection proceedings, **Bukoba Municipal Council** protested the attachment claiming that she was never a party to the deed of settlement which led to the decree issued in **Commercial Case No. 141 of 2017** which resulted the attachment of the motor grader which was in her possession. This Commercial case was settled by the parties amicably.

Having heard the application, Hon. Fikirini J as she then was, allowed the application and held that the motor grader was not liable for attachment on the reasons that Bukoba Municipal council managed to establish possession and interest in the attached motor grader in line with **Order XXI Rule 57, 58 and 59 of the Civil Procedure Code, Cap 33 of R.E 2019** (CPC).

Mantrac Tanzania Limited filed this Memorandum of Review under containing 6 grounds asserting that the Hon. Trial Judge made an apparent error on the face of the record basing on the following ground.

1. By relying its reasoning on the fact that the actions of the 1st Respondent's (Bukoba Municipal Council) were propelled by terminated contract between the 1st Respondent, 2nd Respondent and Stanbic Bank after breach by the 2nd respondent while the 2nd Respondent was never a party to the contract.

2. By ruling that the 1st respondent has shown her interest on the subject matter by a clause of a contract which the applicant and the 2nd respondent were never party to that contract.

3. By ruling that the ownership of the machine is not what is in question rather possession of the machine whereas the provision of Order XXI Rule 60 of the Civil Procedure Code (Cap 33 of 2019) clearly speaks of ownership of a property as a determining factor in disallowing the objection proceedings

4. By ruling the Respondent herein was in possession of the subject matter at the date attachment without inquiring as to the manner of the possession

5. By holding that the actions of the 1st Respondent are bonafide with regard to civil Case No. 3 of 2019 pending in Bukoba High Court while there is no court order with regard to attachment of machine which belonged to the applicant

6. By ruling that the applicant should proceed to sue the first respondent for release of the motor grader after holding that the applicant is the legal owner which was sufficient reason to dismiss the objection proceedings.

This application was heard by a way of oral submissions preceded by skeleton arguments as per **Rule 64 of the High Court (Commercial Division) Procedure Rules, 2012, GN 250 of 2012** as amended by the **High (Court Commercial Division) Procedure (Amendment) Rules 2019, GN 107 of 2019.**

During the submission, the counsel for the applicant, Mr. Roman Masumbuko adopted his skeleton arguments filed in court and submitted on the grounds of review seriatim beginning with ground one and two combined together to form one ground that, **the Hon. trial judge made an error on face of record by relying on the fact that the 1st Respondent, Bukoba Municipal Council actions were propelled by terminated contract between the 1st Respondent, 2nd Respondent and Stanbic Bank.** According to Mr. Masumbuko, Intercountry Road Construction (the 2nd Respondent in this application) who was also Judgment Debtor in the suit was never a party to the contract which was **Ann. BMC – 3** in the application.

Mr. Masumbuko referred at page 4 on the 7th line of the second paragraph of the court ruling where it is stated that the 2nd Respondent therein (The applicant in this application) breached the contract in which he was not a party. According to Mr. Masumbuko, it was a confusion in the judgment that the 2nd Respondent therein (the instant applicant) was a Judgment Debtor who breached the contract between Bukoba Municipal Council and Stanbic Bank while the 2nd Respondent was never a party to the contract.

Mr. Masumbuko Advocate as well denied any link between the applicant and the case in **Bukoba, Civil Case No. 3/2019**, also referred by Hon. Fikirini, J. He contends that in that case they a Deed of Settlement was filed and Intercountry was not a party. According to the Mr. Masumbuko Advocate, nothing linking the property with the proceedings in that case.

Submitting on the **third** ground, Mr. Masumbuko there was an error on the face of record in ruling that the ownership of the machine is not what is in question rather possession of the machine whereas the provision of Order

XXI Rule 60 of the Civil Procedure Code (Cap 33 of 2019) clearly speaks of ownership of a property as a determining factor in disallowing the objection proceedings. It is contended by Mr. Masumbuko for the applicant that the finding of the Judge that the ownership is not in question, but the question is on possession is an error as Rule 60 of Order XXI clearly state that if you talk of possession, the judgment debtor must possess as own property and not on account of another person. He submits that since the card of ownership is for Mantrac and that in actual fact it was on the yard of Bukoba Municipal Council because of the case, then Bukoba Municipal Council got the property as a third person as a rented properly. According to Mr. Masumbuko, it was an error for the Hon. Judge to rule at page 14 paragraph 2 of the Ruling that possession takes precedence over ownership.

On the **fourth** ground, that it was an error in finding that the Respondent herein was in possession of the subject matter at the date of attachment without inquiring as to the manner of the possession, Mr. Masumbuko submitted that the Hon. Judge did not inquire on how Bukoba Municipal Council came into possession of that property. He contends that the property belonged to Mantrac and Intercountry.

On the **fifth** ground alleging an error in the holding that the actions of the 1st Respondent are bonafide with regard to civil Case No. 3 of 2019 pending in Bukoba High Court while there is no court order with regard to attachment of machine which belonged to the applicant, Mr. Masumbuko submits that linking the machine with Civil Case No. 3 of 2019 was a big error since neither the applicant nor the Judgment Debtor were party to

that case and neither of the parties in that case had any legal ownership to the property.

Submitting on the **sixth** ground concerning an error in ruling that the applicant should proceed to sue the first respondent for release of the motor grader after holding that the applicant is the legal owner which was sufficient reason to dismiss the objection proceedings, Mr. Masumbuko challenged the court findings that the machine was subject of court proceedings in Civil Case No. 3 of 2019 in the High Court Bukoba and that the Applicant should proceed to sue Bukoba Municipal Council for the release. According to Mr. Masumbuko no order produced in court to show that this property was attached in Bukoba case, therefore suing for release of the property cannot be done because no court order attaching it. According to Mr. Masumbuko, the instant applicant and and the Judgment Debtor were mere lessees.

Mr Masumbuko therefore prayed for the court to find the errors and review its decision of 23/6/2020 and allow execution to proceed so that it can satisfy the Decree in Commercial Case No. 141/2017 where the property is part of that case and otherwise the decree will be rendered nugatory.

In response, **Mr. Mjahid Kamugisha Advocate for the 1st Respondent** adopted the 1st respondent skeleton argument and list of additional documents to as part his submission. He stated that the applicant's counsel has contravened **Order XLII Rule 1 (1) (b) of the CPC** which provides the conditions for review to include:

(1) There has to be a decree in which no appeal is allowed,

(2) There is discovery of new evidence which could not be produced when the order was made.

(3) There must be errors on face of record.

(4) There must be sufficient reasons.

According to Mr. Kamugisha, the counsel for the 1st Respondent, if you go through these conditions, and compare with the filed memorandum of review, the applicant has failed to establish apparent error on the face of record in all the grounds.

Although Mr. Kamugisha agreed on having an apparent error on the face of record at page no. 4 in the last paragraph of the Ruling of Hon. Judge which was repeated at page 9 and page 14, he asked the court to consider it as a slip of pen, where the Hon Judge, instead of writing the contract between Bukoba Municipal Council and NCL wrote 2nd respondent's name. According to Mr. Kamugisha, this error does not go to the roots of justice since the applicant has not shown how they occasioned injustice. To support his contention, Mr. Kamugisha referred to the case of **Daniel Rogati Hema versus Said Khalid Luvanda and 11 others, Civil Review No. 7 of 2019 High Court of Tanzania (Dar es Salaam Registry) page 11** where the Court cited with approval the Court of Appeal case, **Karim Kiara vs. The Republic, Criminal Application No. 04 of 200**7 and held that the applicant must state that such error resulted into injustice. In his view, this error never occasioned injustice.

It is submitted by Mr. Kamugisha that the counsel for Applicant has failed to establish new evidence on important matter while the law is clear that review can be allowed if there is discovery of any new evidence. According

to him, the learned applicant's counsel wants to misconceive the law of review by agitating arguments that have been already considered. He considers the attempt to be an appeal through a back door entry which is not allowed in the spirit of **Damian Ruhele vs Republic, Criminal Appeal No. 4 of 2013 Court of Appeal at page 8,** where Musa, JA held that the court does not sit as a Court of Appeal for its own decision.

It is further submitted by Mr. Kamugisha Advocate for the 1st Respondent that the applicant's council misconceived Order XXI Rule 58 as Hon, Fikirini, J in **Misc. Commercial Case no. 92/2019**, got satisfied **Bukoba Municipal Council** had interest in the property and it was in its possession since 2018 hence allowing the objection because Bukoba Municipal Council's interest.

According to the Mr. Kamugisha, the mentioning of Order 21 Rule 60 is not relevant but a mere minor error which is justifiable as held in **Chandrakant, Joshby Patel vs R, 2009 TRR 218** where it was held that a mere error of law is not a ground for review. This was cited with approved in **Misc. Commercial Review No. 1 of 2018, Bulyanhulu Goldmine Ltd &2 others vs ISSA Limited & another** page 10.

It was concluded by the 1st Respondent counsel that there are no errors in the Ruling to warrant this review application but an abuse of Order XLII of the CPC. He prayed for the application to be dismissed with costs.

Mr. Masumbuko made a rejoinder claiming that the 1st respondent's counsel did not respond to the contents of the review except ground no. 1. He maintained that had the Judge directed her mind to this fact that the 2nd Respondent was not a party to the contract as admitted by the counsel for the 1st Respondent, the decision would have been different. It is

contended by Mr. Masumbuko that the fact that the possession of the machine by Bukoba Municipal Council was illegal, alone is enough to allow the review as the issue of possession is what determined the ruling. He contended that the whole judgment was to change if the issue of possession would have been properly construed.

Mr. Masumbuko denied having violated Order XLII of the CPC though he agreed with the principles in the cases cited. He finally submitted that the Judge did not properly investigate the facts, she applied wrong facts in the right principles. He finally prayed for the application to be granted and the court to be allow all the prayers with costs.

It is pertinent to point out that the law of review is guided by the provision of **Order XLII Rule of the CPC** under which this application is brought. To make it clear, I will reproduce its contents hereunder:

> *"1.-(1) 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 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.

(2) A party who is not appealing from a decree or order may apply for a review of judgment notwithstanding the pendency of an appeal by some other party except where the ground of such appeal is common to the applicant and the appellant, or when, being respondent, he can present to the appellate court the case on which he applies for the review."

From the above provisions the following are prerequisite factor which should be there in conducting a review

(1) There has to be a decree or order in which no appeal is allowed, or appeal is allowed but not preferred,

(2) Upon discovery of new evidence which could not be produced when the order was made or upon discovery of an apparent errors on face of record.

(3) Upon there be sufficient reasons.

My Brother **Hon. Dr. Nangela J** has exercised an extensive exploration to expound on the interpretation of the above provision. I will reproduce in extenso what he gathered in his ruling in **Afriq Engineering & Construction Co. Ltd vs Registered Trustees of the Diocese of Central Tanganyika (Commercial Review No.03 of 2020) [2020] TZHC Com D 49; (04 May 2020)**

" ..... ***Second,*** *it is also trite law, that, review is not an appeal in disguise whereby an erroneous decision can be*

reheard and corrected (See Ngasa s/o Nhabi v Republic (supra)). See also the Case of James Kabalo Mapalala v British Broadcasting Corporation,[2004] TLR 143.

Third, *where an application for review is based on the ground that there is an error on the face of record, the error complained about must be apparent, eye-striking or self-evident and not one which needs to detain a person through a long process of reasoning on points where there may be two opinions. See* ***Bulyanhulu Gold Mine Ltd & 2 Others v Isa Limited & Another, Misc. Commercial Review No. 01 of 2018, (unreported)****. See also the case of* ***East African Development Bank v Blueline Enterprises Tanzania Ltd, Civil Appl. No.47 of 2010, (unreported)****. In the East* ***African Development Bank case*** *(supra), the Court of Appeal cited with approval the case of* ***Chandrakant Joshubhai 'Patel v Republic [2004] TLR 218,*** *that adopted a reasoning in* ***MULLA, 14th Edn, pp. 2335-2336*** *thus:*

> *"An error apparent on the face of 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 reasoning on points which may conceivably be Page 19 of 36 two opinions... A mere error of law is not a ground of review....That a decision is erroneous in law, is no ground for ordering review.... It can be said of an error that 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."

***Fourth**, the error apparent on the face of record must also have occasioned an injustice, and the applicant must prove, very clearly, that, such manifest error occasioned an injustice to him. See the case of **Kiara v Republic, Criminal Application No.4 of 2007 unreported).** In this case, the Court of Appeal, citing its own decision in **Tanzania Transcontinental Co. Ltd v Design Partnership Ltd,Civil Appl. No.762 of 1996 (unreported)**, went ahead to state, further, that:*

"... the Court's power of review ought to be exercised sparingly and only in the most deserving cases, bearing in mind the demand of the public policy for finality of litigation and for the certainty of the law as declared by the highest court of the land."

By going through the provisions of Section 78 (1) (b) and Order XLII Rule 1 (1) (b) of the CPC and the principles expounded by Hon. Nangela, J, I see 3 important aspects which are to be considered in exercising review powers.

(1)Review is not an appeal to correct erroneous decision

(2)An apparent error on the face of record is such so evident which cannot create two opinions

(3)An apparent error on the face of record must occasion injustice and it must be so proved.

I have considered the submissions from both parties and looked at all the grounds of review from the first one to the sixth, it is not in dispute that there is an order which is sought to be reviewed. This application is based on what the applicant has stated to be discovery of an apparent error on the face of the record. The respondent although admits an error on the face of record identified on the consolidated grounds 1 & 2, he contends that the said error has not occasioned any injustice and therefore it cannot warrant review of the decision of the court. This Court is therefore bound to find out as to whether there are sufficient grounds established to warrant review of the decision of this court in **Miscellaneous Commercial Application No. 92 of 2019 dated 23 Day of June 2020 by Fikirini J (as she then was)** and specifically, the issues are:

(1) is whether there is apparent error on the face of the record which could not be discovered when the matter was being heard.

(2) If there is an error of the face of record, whether there is a prove that such an error occasioned injustice.

In the consolidated grounds No. 1 and 2, the applicant claims that there is an apparent error on the face of record for the Ruling requested to be reviewed having identified the second Respondent as a party to the contract which was breached. This fact is not disputed as it is admitted by Mr. Kamugisha for the Respondent that there was an apparent error on the face of record where it was wrongly indicated that the 2nd Respondent was a party to the contract which was the subject matter in Commercial Case No. 141 of 2017 while it was actually not the situation. This confusion created an impression that the 2nd respondent was a judgment debtor,

which is not a reality. At this point the applicant has successful established existence of apparent error on the face of record in grounds No. 1 and 2.

In the **third ground**, the applicant considers the holding that ownership of the machine is not what is in question rather possession of the machine as an apparent error on the face of record. According to the applicant, whereas the provision of Order XXI Rule 60 of the Civil Procedure Code (Cap 33 of 2019) clearly speaks of ownership of a property as a determining factor in disallowing the objection proceedings the Hon. Judge disregarded this and came up with view that what matters is possession.

It is true, at page 14 and 15 of the Ruling, it shows that the Hon. Judge came up with the view that the motor grader was to be released since at the time of attachment it was in the possession of Bukoba Municipal council. The Hon Judge was guided by Section Order XXI Rule 59 of the Civil Procedure Code. In my view, this is not an error but a decision deliberately reached with reasoning convinced by the cited provision of the law. I am inclined to be guided by the decision cited by Mr. Kamugisha, **Chandrakant, Joshby Patel** (supra) where it was stated:

> *"A mere error of law is not a ground of review.... That a decision is erroneous in law, is no ground for ordering review...."*

From these words, the opinion of a judge guided by law is not an error which can be challenged by review. Equally this cannot be an error which could not be discovered during the pendency of the trial in the meaning of Order XLII Rule 1 (1) of the CPC but a premeditated opinion of the judge

which guided her position. I find that this ground has not established an error on the face of the record.

On **fourth** ground that the Hon Judge did not inquire on how Bukoba Municipal Council came into possession of the property, Mr. Masumbuko considered it to be apparent error on the face of record. Mr. Masumbuko stated that throughout the Ruling of the judge, nowhere is it stated how the objector came to possess the property. The definition of apparent error on the face of record adopted in **Chandrakant, Joshby Patel** cited in **Afriq Engineering & Construction Co. Ltd (supra)** states:

> *"An error apparent on the face of record must be such as can be seen by one who runs and reads"*

As found in ground 3, again this was not a fact which could not be discovered when the Hon Judge was preparing the Ruling. It is not so revealed in the ruling or during the hearing. Being guided by the decisions in **Afriq Engineering & Construction Co. Ltd (supra)** and all the authorities cited therein, the alleged lack of explanation in the ruling on how the possession was proved, does not stand the test of reviewable error because I don't see any error apparent on the face of record. It's not easy for one to notice this as an error while running and reading. This court is not placed in a position to review this holding of a judge as it is not an appellate court.

The fifth and the sixths grounds both challenged the holding of the Judge which was arrived after a premeditated finding. With the same reasons given for ground four and three, these were not an error on the face of record but a conclusion by a judge guided by her considered reasoning.

Reviewing a conclusion of a judge is not what is envisaged by review rather should be a subject of appeal by an aggrieved party.

Having found an error in the consolidated 1st and 2nd grounds, one issue need to be looked at as to whether the error has occasioned any injustice. The gist of the final decision of the judge to release the attached motor grader was guided by a reasoning of the judge. The decision was not based on the involvement of Bukoba Municipal council in the breached contract, but on her interest where the said machine was rented and possessed by her. (See pages 12 & 13 of the Ruling). The Hon Judge considered as to whether at the date of attachment the applicant had some interest and or whether she had possessed the property. She stated that, there was no dispute that the equipment belonged to Mantrac who rented it out to the INTERCOUNTRY AND CHRISTMAS MUHANGI. At pg 13 & 14 she concluded that it was evident that the applicant was in possession on her own account. It is established by the Court of Appeal (See **Kiara v Republic, Criminal Application No.4 of2007 (unreported)**, that, such an error must also have occasioned an injustice to an applicant and that, the applicant must prove that such manifest error occasioned an injustice to him. I can't find a direct link of applicant's submission to any proved occasioned injustice due to this particular error.

In my view, the confusion caused by attributing the applicant to the breached contract could not have in any circumstance changed the fact that Bukoba Municipal Council was in possession of the attached property which was the Centre of the reasoning on what the Hon. Judge decided. In my view, with or without the error, the Hon. Judge would still have arrived

at the decision she arrived. On this account, I find no injustice occasioned by the error.

It is therefore my finding that no apparent error on the face of record has been sufficiently demonstrated from grounds three to six. It is my further finding that although there has been an error established in the consolidated grounds No. 1 and 2, such an error has not occasioned injustice. I therefore find that there has been no sufficient ground established to warrant review of Commercial Application No 92 of 2019. Consequently, this application for review is hereby rejected. The costs of this application is granted to the respondent. Order accordingly.

Dated at Dar es Salaam this 24th Day of September 2021

KATARINA T. REVOCATI MTEULE

JUDGE

24/9/2021