

**IN THE HIGH COURT OF THE UNITED REPUBLIC OF TANZANIA
(LAND DIVISION)
AT DAR ES SALAAM**

MISC. LAND APPLICATION NO. 635 OF 2019

(Arising from Land Appeal No. 78 of 2019)

JOHASI KASHURA 1ST APPLICANT

ROSEMARY KATUNZI 2ND APPLICANT

VERSUS

OSCAR MHAGAMA 1ST RESPONDENT

SEKUNDA MHAGAMA 2ND RESPONDENT

RULING

S.M. MAGHIMBI, J:

The application beforehand was filed under the provisions of Section 78(1) (b) and Order XLII Rule 1(1) (b) of the Civil Procedure Code, Cap. 33 R.E. 2002 ("The CPC") and Section 51 (1) (a) of the Courts (Land Disputes Settlement) Act, Cap. 216 R.E 2002. The applicant is seeking review of a Judgment of this Court in Land Appeal No. 78 of 2019 ("The suit") which dismissed the appeal. In his memorandum of review, the applicant filed a total of six grounds of review that:

- i. This Hon Court erred in law and facts by ruling in favor of the respondents where the affidavit deposed by the Oscar Mhagama (respondent) to surrender the house to hear was not considered.
- ii. This Hon Court erred in law and facts by ruling in favor of the respondents whereas the sale agreement between Wilfred Katunzi

and Oscar Mhagama (respondent) which does not disclose the particular house and its boundaries of the house purchased by Oscar Mhagama.

- iii. This Hon Court erred in law and facts by failing to take judicial notice or draw adverse inference about the relevance and admissibility of the 1st respondent's affidavit deposed before the magistrate to surrender the house in dispute to the heirs/beneficiaries.
- iv. This Hon Court erred in law and facts by failing to assess the danger of the respondent (Oscar Mhagama) to the denial of his own facts deposed in his affidavit deposed before Magistrate at Chang'ombe Primary Court.
- v. This Hon Court erred in law and facts by accepting and legalizing sales agreement between Wilfred Katunzi and Oscar Mhagama (respondent) in which the seller is not the owner of the house in dispute.
- vi. That the Hon Court erred in law and facts by failing to identify that the house in dispute was sold/bought before the distribution of the estates of the late Edward Kaule @ Kulwanila in which the seller sold the house in dispute which he has no title to the house in dispute.

The applicants prayed for the suit be set aside and allow the instant review with the following orders:

- a) This Hon Court be pleased to quash and set aside the Judgment delivered on 19/09/2019.
- b) Order the respondents to vacate and surrender disputed house to the heirs/beneficiaries.

- c) Ordering the respondents to pay to the 2nd applicant a sum of one hundred Million Tanzania Shillings as result of suing disputed house illegally.
- d) Cost of this review be borne by the respondents
- e) Any other reliefs as this Hon. Court may deem just to grant.

By an order of this court dated 18/03/2020, the application was ordered to be disposed by way of written submissions by Madame Judge Mango. When the suit came for ruling on 03/08/2020, Hon Judge Mango remitted the file to Judge in charge for re-assignment since the judgment subject of this review was mine. The case therefore reassigned to me in order to compose ruling.

I have gone through the memorandum of review and the parties submissions thereto and found that for reasons I will explain, this is not a fit case for review. To begin with, the applicants have moved this court under the provisions of Order XLII Rule 1(1) (b) of the CPC, the provision is quoted hereunder:

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 or made the order.

The provisions gives three conditions which an application for review may be preferred. First condition is where the decree or order which review is sought for is not appealable, the second condition is discovery of new and important matter not within knowledge at the time the court passed the decree and three is on account of some mistake or error apparent on the face of the record. As for the current application, the decree that the review is sought for is appealable and the right to appeal was explained to the applicants when the judgment was delivered. On the second condition of discovery of new and important matter, the applicants have failed to establish any new and important matter discovered. Instead they are challenging the reasoning of this court on the evidence that was adduced during trial. The third condition is on the error apparent on the face of record, this was well explained in the case of **Chandrakant Joshubhai Patel Vs. Republic (2004) TLR 218** in which the reasoning in **Mulla 14th Edition pp. 2335-36** was adopted when the Court stated:

*"...An **error apparent on the face of the record** must be such as can be seen by one who writes 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 on which there may conceivably be two opinions..."*

A thorough analysis of the adduced reasons and the submissions of the applicants I have not seen any established error apparent on the face of records. All that is there are a lot of arguments on how the court analysed

the evidence to reach to its decision. This established the conceivable two opinions on how the applicants wanted the evidence to be analysed and how the court so did, it is reasoning and not an error apparent on the face of record. The applicants attack the reasoning of the court which can only be determined by a court having appellate jurisdiction over this court, they are not on errors apparent on the face of records. In the same case of **Chandrakant Joshubhai Patel** (Supra) it was further held:

"It is we think, apparent that there is conflict of opinion as to what amounts to an error manifest on the face of record and it is important to bear of this, lest disguised appeals pass off for applications for review. We say so for the well-known reason that no judgment can attain perfection but the most that courts aspire to is substantial justice. There will be errors here and there, inadequacies of this or that kind, and generally no judgment can be beyond criticism. Yet while an appeal may be attempted on the pretext of any error, not every error will justify a review."

See also the case of **Oswald Masatu Mwizarubi Vs. Tanzania Fish Processors Limited, Civil Review Application No. 05 of 2013** where the same position was emphasized. It is for the above reasons that I find this application not to be the one fit for review. What the applicants have raised are not grounds of review but rather the grounds for appeal as the applicants' grounds and their submissions are nothing but an established long drawn process of reasoning on points on which one may conclude that the applicants wants to establish another line of reasoning which may

conceivably result into another verdict/opinion apart from what was reached by this court.

For the aforesaid reasons, I find the application not be fit for review and pursuant to the provisions of Order XLII Rule 4(1) of the CPC, this application is hereby rejected. The respondents shall have their costs.

Dated at Dar es Salaam this 22nd day of December, 2020.


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S.M. MAGHIMBI
JUDGE
