

**IN THE HIGH COURT OF TANZANIA**

**(LAND DIVISION)**

**AT DAR ES SALAAM**

**MISC. LAND CASE APPLICATION NO. 735 OF 2020**

*(Arising out of the decision of this Honourable Court in Misc. Land Application  
No. 301 of 2020 made by Hon. Maige, J on 11<sup>th</sup> December, 2020)*

**MELKIZEDECK FANUEL KILEO ..... 1<sup>ST</sup> APPLICANT**

**JANETH JOSPEH KILEO ..... 2<sup>ND</sup> APPLICANT**

**VERSUS**

**HAWA SAIDI KIMWELI (as administrator of the  
Estate of the late Nicholas Mlekwa) ..... RESPONDENT**

**RULING**

Date of last order: 10<sup>th</sup> August, 2021

Date of Ruling: 17<sup>th</sup> August, 2021

**A.Z. MGEYEKWA**

The applicant filed the Memorandum of Review on 21<sup>st</sup> December, 2020 in respect to Misc. Land Application No.301 of 2020 made by Hon. Maige, J. The Review is brought under Order XLII Rule (1), (a) and section 78 (1) (a) and (b) of the Civil Procedure Code Act, Cap 33 [R.E 2019]. The applicant raised the following grounds for Review:-

- 1. That there is an error apparent on the face of the record in that this honourable Court ruled out that the Applicants sought for copies of judgment, decree and proceedings on the 20<sup>th</sup> May, 2020 i.e. a difference of more than 53 days in between whereas in actual fact the Applicants sought for the said copies of judgment, decree and proceedings on the same date when this Court delivered its Judgment i.e. on the 27<sup>th</sup> March, 2020 as also stated in the Applicants Affidavit supporting the Application for extension of time and that what the Applicants did on the 20<sup>th</sup> May, 2020 was merely to remind for the same. Copies of the respective Ruling of the Court and the APPLICANTS Letter dated 27<sup>th</sup> March, 2020 requesting for copies of judgment, decree and decree and proceedings and the reminder letter dated 20<sup>th</sup> May, 2020 are hereto annexed and Marked as MCA1.*
- 2. That there is an error apparent in the face of the record in that the Court failed to consider that what the Applicants did on the 20<sup>th</sup> May, 2020 was to write to this Court for reminder to be supplied with the said copies of judgment, decree and proceedings after they had failed to get the same despite applying it on the 27<sup>th</sup> March, 2020 and that it was on the very same date the Trial Judge signed the Judgement and supplied it to the Applicants who promptly on the 22/05/2020 submitted their application for extension of time in this Court.*

3. *That there is an error apparent in the face of the record in that the Court failed to consider that the Trial Court delayed in typing the impugned Judgment, decree and proceedings and supplied the same to the Applicants in time due to COVID – 19 DISEASE which was by then facing our Country from earlier April, 2020 up to June, 2020.*
4. *That there is an error apparent in the face of the record in that the Court failed to rule out that at the time the Applicants were supplied with a certified copy of Judgment i.e. on the 20<sup>th</sup> May, 2020 the prescribed statutory period for the Applicants to lodge their application for leave to appeal to Court of Appeal of Tanzania had already lapsed, thus amount to reasonable cause warranting the Court to extend the sought time for the Applicants to lodge their application for leave to appeal.*

When the matter was called for mention on 21<sup>st</sup> June, 2021, the applicant and the respondent appeared in person, unrepresented. by the Court order the preliminary objection was argued by way of written submissions whereas, the respondent filed his submission in chief on 06<sup>th</sup> May, 2021 and the applicant filed his reply on 125<sup>th</sup> May, 2021 and the appellant filed a rejoinder on 08<sup>th</sup> June, 2021.

In arguing for the preliminary objection, Ms. Hawa Kimweli was brief but focused. The learned counsel for the respondent contended that the

application is bad in law for failure to raise grounds of review. He went on to state that the application is filed under Order XLII Rule 1 (1) (a), (b), 4 (2), and section 78 (1) (a) and (b) of the Civil Procedure Act, Cap. 33 [R.E 2021]. It was his view that the grounds advanced falls outside the scope of the grounds for review.

Ms. Kimweli went on to submit that this court needs to consider the grounds for review that are based on the discovery of new evidence which could not be produced during the hearing of the matter. She added that grounds of review that are based on account of mistakes or error apparent on the face of records. The learned counsel for the respondent went on to state that the grounds raised by the applicants all rely on error on the face of the records without showing errors that are worthy of review. Ms. Kimweli submitted that the applicant's grounds for review are rather proper grounds for appeal. She urged this court not to entertain them. To tighten the nuts and bolts of his submission, Ms. Kimweli seeks refuge in the of **Chandrakat Joshubai Patel v R** [2004] TLR 218 and **Lukolo Company Limited v Bank of Africa Limited**, Civil Review No.14 of 2020.

The learned counsel for the applicant continued to submit that it is trite law that review must not be used as an alternative to appeal. To buttress her position she referred this court to the cases of **Lakamshi Brothers**

**Ltd R raja and Sons (1961) 1 ES 313 and James Kabalo Mapalala v British Broadcasting Corporation [2004] TLR 143.**

On the strength of the above submission, she urged this court not to entertain the applicant's grounds of review since the applicant has failed to show clear error on the record and for failure to file an appeal within time.

In reply, the learned counsel for the applicants strongly opposed the submission made by the learned counsel for the respondents. He argued that Ms. Kimweli's submissions are not based on point of law. He insisted that the applicant's grounds are grounds for review since the same relates to the discovery of new evidence or fact. To support his position he referred this court to the third ground of review and submitted that the delay in typing the impugned Judgment, decree, and proceedings and supply the same to the applicant within time was due to COVID 19 from April, 2020 to June, 2020. Stressing, Mr. Mahay argued that the purported preliminary objection does not meet the criteria of being a pure point of law, the same is devoid. Fortifying, his position he cited the cases of **Aidan Wilbard Makamla v Bemele and Another**, Misc. Land Case No. 2010 HC Land Division at Dar es Salaam (unreported). Hon. Mwembegele, J (as he then was) cited the case of **Citi Bank Limited v TTCL and 3 Others**, Civil Application No.64 of 2003 (unreported) in which the Court of

Appeal of Tanzania quoted with approval the landmark case of **Mukisa Biscuit Manufacturing Co. Ltd v West End Distributor Ltd** (1969) E.A 696, held that:-

*" So far I am aware, a preliminary objection consists of a point of law which has been pleaded or which arise by clear implication a=out of the preliminary out of the pleadings and which if argued as a preliminary point may dispose of the suit. Examples are an objection to the jurisdiction of the court, or a plea of limitation or a submission that the parties are bound by the contract giving rise to the suit to refer the dispute or arbitration..."*

The learned counsel for the applicant quoted the holding of this case in length which I am not going to reproduce all. Mr. Mahay urged this court to be guided by the decisions of the Court of Appeal of Tanzania in the case of **Soitambu Village Council v The Tanzania Breweries Ltd, Tanzania Conservation Ltd**, Civil Appeal No. 105 of 2011 at Arusha. He claimed that the cited cases are relevant to the instant preliminary objection since the respondent has invited this court to investigate the facts or rather grounds of review enshrined in the Memorandum of Review. Mr. Mahay distinguished the cited cases by the respondent.

On the strength of the above argumentation, Mr. Mahay beckoned upon this court to overrule the preliminary objection in its entirety with costs and allow the Application for Review to proceed on merits.

In her short rejoinder, the learned counsel for the respondent reiterated her submission in chief and insisted that a review is not to challenge the merits of a decision instead it is intended to address irregularities of a decision or proceedings which caused injustice to a party. Fortifying her position, she cited the case of **Charles Barnabas v Republic**, Criminal Application No. 13 of 2009 (unreported).

She continued to submit that the applicants' grounds fit within the grounds for appeal thus the applicant negligently delayed to exercise their appeal right and wants to misuse the current proceedings to apply appeal grounds in the review. To support his argumentation she referred this court to the case of **Halmashauri ya Kijiji cha Vilima Vitatu & Another v Udaqhwenqa Bayay & Others**, Civil Application No. 16 of 2013 CAT at Arusha (unreported). Stressing, Ms. Kimweli submitted that the preliminary objection is purely on point of law and its effect is dismissing the Application for Review in its entirety.

In conclusion, Ms. Kimweli beckoned upon this court to find that the application is devoid of merit for failure of the applicants to raise grounds for review. He urged this court to dismiss the application with costs.

Having gone through the court records and parties' submissions, before determining the application for review on merit. I will proceed to determine the point of law raised by the learned counsel for the respondent that the entire application is bad in law for failure to raise grounds of review. In determining the preliminary objection I will address the issue *of whether the grounds raised by the applicant are fit for review?*

Without wasting the time of the court, I fully subscribe to the learned counsel for the respondent's submission that the grounds raised by the applicant are not fit for review. The applicant has brought his application under Order XLII Rule 1 (1) (a), (b), 4 (2), and section 78 (1) (a) and (b) of the Civil Procedure Act, Cap. 33 [R.E 2021], these provisions of law moves this court to determine an application for review, however, the applicant's grounds for review fall outside the scope of the grounds for review. For an application for review to stand, it has to squarely fall within the circumstances encompassed under Order XLII Rule 1 of the Civil Procedure Code Cap.33 which reads:-

*“ 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.”*

Applying the above provision of law, I have found that the ground of review does not relate to an error or mistake discovered by the parties instead the applicant has raised grounds that requires this court to re-determining the evidence in the record while this court has already gone through court records, analysed the evidence and came up with a decision. As rightly pointed out by the learned counsel for the applicant that the grounds raised by the applicants all rely on the error on the face of the records. The wording error on the face of the record was used by the applicant as a formality without showing the exact error instead the reason cannot move this court to correct the decision which was already been delivered by this court.

The law requires that where an application for review is based on the ground that there is an error on the face of the 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. This was held in the cases of **Bulyanhulu Gold Mine Ltd & 2 Others v Isa Limited & Another**, Misc. Commercial Review No.01 of 2018, (unreported) and **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**, the Court held that:-

*"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 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."*

Additionally, 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. The learned counsel for the applicant did not prove how the delay in receiving the typing of the

impugned Judgment, decree, and proceedings and supply affected the applicants. In the case of **Tanzania Transcontinental Co. Ltd v Design Partnership Ltd**, Civil Application. No.762 of 1996 (unreported), the Court of Appeal of Tanzania observed 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 the finality of litigation and for the certainty of the law as declared by the highest court of the land."*

Guided by the above authorities, I find that the applicants are inviting this court to reopen the determination of the case while it is already *functus officio*. It is noteworthy that a review is not an appeal in disguise whereby an erroneous decision can be reheard and corrected. Thus, the purported grounds for review that appear in the Memorandum of Appeal may be taken up in an appeal. The Applicant should not turn this Court to an appellate court where he can seek a rehearing of the already heard and determined facts.. In the case of **Mrs. Yonnie Virginia Ruth Chopra v Mrs. Lake Duluti Estate Ltd**, Civil Application No.17 of 2013 and in the case of **Halais Pro-Chemic v Wella AG** [1996] TLR 269, the Court held that:-

*"The principle of revisional powers conferred on the court is not meant to be used as an alternative to the appellate jurisdiction of the court."*

Applying the above holding of the court, I am certain that this court is not moved to use its revisional jurisdiction where the applicant may invoke her rights of appeal to the court. Consequently, the applicant's grounds are devoid of merits. That being the position of the law then this application cannot stand.

In the upshot, I find that the Application for Review, and the grounds upon which it is premised, is devoid of merits, therefore, I proceed to dismiss the applicant's application in its entirety. Each party to bear its costs.

Order accordingly.


Dated at Dar es Salaam this date 17<sup>th</sup> August, 2021.



  
A.Z.MGEYEKWA  
JUDGE  
17.08.2021

Ruling delivered on 17<sup>th</sup> August, 2021 in the present of the respondent.



  
A.Z.MGEYEKWA  
JUDGE  
17.08.2021

Right to appeal fully explained.