IN THE HIGH COURT OF TANZANIA

(LAND DIVISION)

AT DAR ES SALAAM

LAND REVIEW NO. 334 OF 2021

(Arising from the decision in Misc. Land Application No. 646/2020 dated 8th June, 2021 by Hon. Maige, J.)

DEOGRATIAS NDEMASI TARIMO ..... APPLICANT

VERSUS

AVIC COASTAL LAND DEVELOPMENT (T) LTD ..... RESPONDENT

RULING

Date of the last order: 05.10.2021

Date of Ruling: 29.10.2021

A.Z.MGEYEKWA, J

The Applicant was aggrieved with the whole decision of this court in Land Case No. 646 of 2020 before Hon. Maige Judge (as he then was) dated 08th June, 2021. On 08th July, 2021 the Applicant lodged this application for review before this court under the provisions of sections

78 (1), (a) (b) and Order XLII Rule 1 (a), and (b) of the Civil Procedure Code, Cap 33 [R.E. 2019].

The submissions was made by way of written submissions in which the applicant was represented by Mr. Benitho L. Mandele, learned counsel whereas the respondent was represented by Mr. Rico Adolf, learned counsel, learned counsel. The applicant submitted grounds of review as follows:-

a) *That impugned decision and order of the High Court are tainted with errors on the face of records in that the trial judge erroneously applied the retrospective effect of the new law by making an order of costs.*

b) *The decision of the High Court is further tainted with errors for not considering the application and effect of Arbitration Act, 2020.*

c) *The order as to costs was erroneously made and did not consider the retrospective effect of the current law (Arbitration Act 2020).*

On his submission the learned counsel for the applicant argued that the decision of this Court in Misc. Land Application No. 646 of 2021 dated 08th June, 2021 before Hon. Maige J, (as he then was) be set aside. The learned counsel for the applicant contended that Hon. Judge delivered his decision based on the new enacted law that is Arbitration Act, No.2 of

2020 which was enacted on 21st February, 2020 but came into operation on 18th January, 2021.

The learned counsel for the applicant contended that the applicant was duty-bound to seek his rights through the old piece of legislation which was in place and that this court erroneously gave orders as to costs against the applicant against the rule that the substantive rights should not be affected by the retrospective action of the law. To fortify his position he cited the case of **Lala Wino v Karatu District Council**, Civil Application No. 132/02/2018 where Hon. Judge Ndika held that:-

> *"in the upshot, having found that the matter has been overridden by the amendment of ... as I have demonstrated above, I am enjoined to strike out the matter, as if hereby do. In furtherance of fairness equity, I make no orders as to costs taking into account that none of the parties has had a hand in the out came of this matter."*

Applying the above holding, Mr. Mandela submitted that the case applies in the recent situation on the matter as the law changed while the applicant had already filed his application before the court. Mr. Mandela went on to submit that the position in the previous law was that the

remedy sought was open for parties to apply the arbitration clause and the same could be revoked by the court when they find difficulties to effect arbitration clause as provided in the old law of Arbitration Act, Cap.15 at section 4.

Mr. Adolf was equally strenuous in his opposition. The learned counsel for the responded contended that the court has no jurisdiction to entertain the application for review on account of errors on point of law and that the whole grounds of review are subject to appeal to the Court of Appeal. Fortifying his submission, he cited the case of **Hydro Sinovike Ngo'Ndya v Rev Patrick Mwalusamba**, Land Review No. 02 of 2019, which ruled out that:-

> *"I am of the considered view that, the omission by the court to award costs when the case is dismissed in their absence for want of prosecution does not form a manifest error apparent on the face of the record. I will agree with the learned counsel for the respondent that the proper channel to take is by filing an appeal to the court of Appeal since this court becomes functus officio."*

Mr. Aldof went on to submit that since the review before this court is on costs granted, he prayed that this court adopt the above wisdom and dismiss the application. The learned counsel for the respondent further submitted that this court did not apply the law retrospectively, but that

the issue of costs is the discretionary of the court as stipulated under section 30 (1) of the Civil Procedure Code Cap.33 [R.E.2019]. it was his view that if a party is aggrieved with how the discretion was exercised then he ought to appeal against such a decision since the applicant's concern does not amount to an error that can be reviewed. Supporting his position, he referred this court to the case of **Lukolo Company Limited v Bank of Africa Limited**, Civil Review No. 14 of 2020 whereas Hon. Masabo held that: -

> *"And as held in National Bank of Kenya Limited Vs Ndungu Njau (Supra), it is not sufficient ground for review that another Judge could have taken a different view of the matter and it is similarly wrong to rely on the mere ground that the court proceeded on an incorrect exposition of the law and reached an erroneous conclusion of law as misconstruing a statute or other provision of law cannot be ground for review. In my considered view, whereas the two grounds raised by the applicant may make good grounds for appeal, they are certainly not good grounds for review. Blessing the review on these two grounds would be tantamount to this court sitting appeal on its judgment which is not legally permissible."*

On the strength of the above submission, the learned counsel beckoned upon this court to find that the correct channel for the applicant was to file the appeal instead of an application for review. He urged this court to dismiss the application.

In his rejoinder, the learned counsel for the applicant maintained his submission in chief. Stressing that it was not proper for this court to make its decision based on section 4 of the Arbitration Act, 1931 (now repealed). Insisting, he argued that the previous position was affected by section 91 (2) and (3) of the Current Arbitration Act. Insisting, he stated that the application for Review is proper, competent, and has merit.

After a careful consideration of the rival submissions from both parties, the point for *determination is whether the applica*tion is meritorious.

I am aware that this Court has jurisdiction to review its own decision in any given case which is aimed at ensuring that a manifest injustice does not go uncorrected. However such manifest injustice is subject to principles as were well explained by the Court of Appeal in the case of **Henry Muyaga v Tanzania Telecommunication Company Ltd,** Civil Appeal No. 02 of 2014:-

"...principles governing the exercise of review as established by case law which include: ***One,*** *the principle underlying a review is that the court would not have acted as it had if all the circumstances had been known. (See* ***ATTILIO vs. MBOWE [1970] HCD N. 3). Two,*** *a judgment of the final court is final and review of such judgment is an exception. (See* ***BLUE LINE ENTERPRISES LTD. vs. THE EAST AFRICAN DEVELOPMENT BANK, (EADB), Civil Application No. 21 of 2012. Three,*** *mere disagreement with the view of the judgment cannot be the ground for invoking review jurisdiction. As long as the point is already dealt with and answered, the parties are not entitled to challenge the impugned decision in the guise that an alternative view is possible under the review jurisdiction. It would be intolerable and most prejudicial to the public interest if cases once decided by the Court could be re-opened and re-heard. (See* ***BLUE LINE ENTERPRISES LTD. vs. EADB*** *(supra) and* ***KAMLESH VARMA v. MAYAWATI AND OTHERS****, Review* ***Application No. 453 of 2012) EAC). Four****, the review should not be utilized as a backdoor method for unsuccessful litigants to reargue their cases.* ***Five,*** *the power of review is normally used for correction of a mistake but not to substitute a view in law (See* ***PETER NG'HOMANGO vs. GERSON A.K. MWANGA and ANOTHER, Civil Application No.***

33 of 2002 (unreported). Six, *the term 'mistake or error on the face of the record' by its very connotation signifies an error which is evident per se from the record of the case and it does not require detailed examination, scrutiny, and clarification of either of the facts or the legal exposition. Thus, if an error is not self-evident and its detection requires a long debate and process of reasoning, it cannot be treated as an error on the face of the record.* ***Seven****, the Court's rejection of one's point of view may be a ground of appeal but not a ground of review under the pretext of not being heard. (****See P 9219 ABDON EDWARD RWEGASIRA VS THE JUDGE ADVOCATE GENERAL, Criminal Application No. 5 of 2011 (unreported).*** ***Eight****, a Court will not sit as a Court of Appeal from its own decisions, nor will it entertain applications for review on the ground that one of the parties in the case conceived himself to be aggrieved by the decision."*

Applying the above authority, in the instant application, I can see that the applicant is challenging the application of the law retrospectively by making orders as to costs. Reading the court records, it would appear to me that this court was aware of both pieces of legislation and the current position of the law and Hon. Maige J. (as he then was) cited both pieces

of legislation in his ruling, yet this court made a decision and ordered costs against the respondent.

To my understanding and guided by the eight principles of review as I have demonstrated above, I find that the applicants' grounds for review are suitable grounds for appeal because mere disagreement with the view of the judgment cannot be the ground for invoking review jurisdiction. As long as the point was already been dealt with by this court, the parties are not entitled to challenge the impugned decision in the guise that an alternative view is possible under the review jurisdiction.

I fully subscribe to the submission of the learned counsel for the respondent that the issue of costs is the discretionary of the court as stipulated under section 30 (1) of the Civil Procedure Code, Cap.33 [R.E.2019]. For ease of reference, I reproduce section 30 (1) of the Civil Procedure Code Cap.33 [R.E.2019] as hereunder:-

> *"30.-(1) Subject to such conditions and limitations as may be prescribed and to the provisions of any law from the time being in force,* ***the costs of, and incidental to, all suits shall be in the discretion of the court and the court shall have full power to determine by whom or out of what property and to what extent such costs are to be paid****, and to give all necessary directions for the purposes aforesaid; and*

the fact The Civil Procedure Code [CAP.33 R.E. 2019] 49 that the court has no jurisdiction to try the suit shall be no bar to the exercise of such powers." [Emphasis added].

Applying the above provision of the law in the instant application, it is clear that the court has discretionary power to order or not order costs. Therefore in case, the applicant was aggrieved with how the discretion was exercised then he ought to appeal against such a decision since the same does not amount to an error that can be reviewed.

It would be intolerable and most prejudicial to the public interest if cases once decided by the Court could be re-opened and re-heard. I come to the finding that the intended challenges cannot be determined by this court, as a result, I proceed to dismiss this application without costs.

Order accordingly.

DATED at Dar es Salaam

A. Z. MGEYEKWA

JUDGE

29.10.2021

Ruling delivered on 29th October, 2021 in the presence of Ms. Rose Sanga, learned counsel for the applicant in the absence of the respondent.

A. Z. MGEYEKWA

JUDGE

29.10.2021