IN THE HIGH COURT OF THE UNITED REPUBLIC OF TANZANIA

(LAND DIVISION)

AT DAR ES SALAAM

MISC. LAND APPLICATION NO. 187 OF 2022

YAHAYA ATHUMANI .....1ST APPLICANT

RASHID ALLY .....2ND APPLICANT

VERSUS

HELLENA ADAM ELISHA .....RESPONDENT

R U L I N G

Date of last Order:21/09/2022
Date of Ruling:23/09/2022

K. D. MHINA, J.

This Application was brought under Sections 78s, 95, 96, and 97; Order XLII Rule 1(i), a, b (2), (3) of the Civil Procedure Act [Cap. 33 R. E. 2019] (the CPC) and Section 2 and 5 Part II of the Judicature and Application of Laws Act [Cap. 358 R. E. 2019].

The Applicants are applying for a Review of the decision of this Court in Land Case No. 5 of 2010, dated 6th June 2016.

The Applicants have highlighted the errors in the Application as follows: -

1. *The Court mistakenly and apparently erred in Law and facts on the face of records, proceedings, and pleadings and indeed misdirected in*

its decision to grant orders with wrong, defective, and different parties with different and wrong names;

2. *That Court mistakenly, on the face of records, erred in Law and facts in delivering a fatal and defective decision with a different citation or titles contrary to the Law, or in other words, the Court mistakenly erred in law and facts on the face of records in not discovering that the decision or Judgment and decree have different names of the parties which are different from the records, proceeding, and pleadings;*

3. *The Court mistakenly and apparently erred in Law and facts in not discovering the decision in Land Case No. 5 of 2010 is per in curium ambiguous, defective, contradictory, unlawful, and incapable of appeal and implementation in laws it refers and reflects different individuals or parties to be original case;*

4. *The Court mistakenly erred in law and facts in determining Land Case No. 5 of 2010 in disregard and forgetfulness of the law and procedure applicable in Legal Practice*

Before embarking on the merits or demerits of the Application, I find it essential to give brief facts giving rise to the present application. In this Court, the respondent sued the Applicants in Land Case No. 5 of 2010 for recovery of a landed property described as Plot No. 368, Mikocheni Medium Density, Dar es Salaam under Certificate of Title No. 34239.

At the end of the trial, this Court entered a Judgment in favor of the Respondent and further ordered the Applicants to deliver vacant possession of a plot in dispute.

Undaunted and believing that there were errors, on the face of the record, the applicants approached this Court, but this time by way of Review.

At the hearing of this Application Mr. Juma Mtatiro, learned Counsel, represented the Applicants, while Mrs. Nakazael Lukio Tenga and Mr. Hamisi Mfinanga, both learned counsel, represented the Respondent.

When invited to submit on the grounds for review, Mr. Mtatiro argued that there was an apparent error on the Judgment and Decree in Land Case No. 5 of 2010 regarding the names of the Applicants. The names in the Judgment and Decree, i.e., Yahaya Shabani and Rashid Juma, were not the names of the Applicants and were unknown. The two names were not in the original proceedings. At the trial, the pleadings, and other documents of the Court, the Applicants' names were Yahaya Athuman and Rashid Ally.

He further submitted that by Section 96 97and Order 42 Rule 1(1) (a), (b), and (2) of the CPC, this Court at any time, by application or on its own

motion, may correct, amend, rectify its own Judgment, Decree, and Orders in the event of any mistake in the proceeding, Judgment or Order.

Regarding order 42 of the CPC, Mr. Mtatiro submitted that the order gives power to this Court to review its Judgment by correcting, rectifying, or amending the Judgment. Therefore, because the Judgment and Decree contain the names of the applicants that differ from those that appeared in pleadings and proceedings, this Court is entitled to review its Judgment. To bolster his position, he cited **James Mapalala Vs. British Broadcasting Corporation** (2004) TLR 143.

He further argued that names are an essential matter which could carry out the party's rights, which wrongly implicated or may defeat the rights of a party to claim his relief.

He concluded by submitting that errors arising from the decision of this Court should be rectified and corrected to reflect the Court's pleadings and proceedings. In the counterclaim and written statement of defense, the names of the applicants were clearly indicated.

In response, Mrs. Tenga strongly resisted the application by arguing that the application had not met the threshold enshrined under Order 42 Rule 1 (1) (a) (b) and 2 of the CPC. The thresholds are;

One, there must be an order or decree from which an appeal is allowed but from which no appeal has been preferred.

Two, there must be an order or decree in which no appeal is allowed. Though allowable, conditions under that order must be complied with for the review to succeed.

She further argued that, in this application, the applicants initiated the process of appeal against the decision in Land Case No. 5 of 2010 by lodging a notice of appeal at the Court of Appeal on 16th June 2016. However, the notice was struck out on 11th November 2021 for failure to take the necessary steps.

In this issue, she concluded by submitting that; the apparent errors mentioned were out of the scope of review for failure to comply with the provision of Law.

On the other hand, Mrs. Tenga submitted that the Courts had already sorted out the issue of applicants' names. She mentioned the following decisions which the matter was sorted: -

One, in **Hellena Adam Elisha@ Hellen Silas Masui vs. Yahaya Shabani, and another**, Civil Application No. 118/01 of 2019 (Tanzlii), when the Court was dealing with the application to strike out the notice sorted out and pronounced a decision in respect of the names of the applicants.

Two, in Civil Case No. 371 of 1995 before the Resident Magistrate Court of Dar es Salaam at Kisutu, and

Three, in the Judgment of this Court, sought to be reviewed, the disputes on the names of the applicants were sorted out.

In conclusion, she submitted that the issue of names does not fall under the pre-conditions of review under Order 42 Rule 1 of the CPC, as there was no apparent error on the decision sought to be reviewed. She cemented that position by citing the **Grand Alliance Ltd vs. Wilfred Lucas Tarimo and four others,** Civil Application No. 229 of 2020.

In a brief rejoinder, Mr. Mtatiro submitted that the issue of names is an apparent error easily to be seen; equally, the identity of the parties to the

case is fundamental. He further submitted that it was true there was a Notice of Appeal, which the Court of Appeal struck out, but that notice had nothing to do with this application for review.

Furthermore, the decision to strike out the notice is now subject to review at the Court of Appeal (Civil Application No. 602 of/01/2021).

Further, he argued that the application for review possesses all requirements that need this Court to rectify the issue of names. On the cited decisions of **The Grand Alliance Ltd (supra),** he submitted that the decision is on appeal and execution, therefore distinguishable so that it cannot apply to the application at hand.

In conclusion, he submitted that the application is within the ambit of the law governing Review and that it is a fit case to correct the errors in respect of the applicants' names to comply with the pleadings.

Having examined the application and the oral submission advanced by the learned counsel for the parties, I am now in a position to decide whether the applicants' ground advanced are adequate to justify the review.

Before proceeding with the merits or demerits of the application, it should be noted that in his submission to support the application for review,

Mr. Mtatiro argued on the issue of applicants' names only. The issue is connected to grounds 1, 2, and 3 of the Memorandum of review. Therefore, technically he abandoned ground No. 4 because he did not submit anything to clarify and support it.

In the application at hand, our written and case laws give guidelines on the factors to be considered in applications for review.

Order 42 Rule 1 (1) (a) and (b) of the CPC empowers this Court to review its own decision. It states as follows: -

> *"1. (i) 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 discovering of new and important matter or evidence which after the exercise of due diligence, was not within his acknowledge or could not be produced by him at the time when the decree was passed or order made, 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. [Emphasis provided]***

This provision of Law is the same as Rule 66 (1) of the Court of Appeal Rules 2009 (as amended) on the aspect that what is supposed to be reviewed is a judgment or order. I said so because of the Court of Appeal decisions I cited in this application on the same subject matter.

Apart from the statute, the case laws also developed some critical factors to consider in the application for review.

In the **Grand Alliance Ltd** (Supra), the Court of Appeal of Tanzania provides a guideline on the scope of the application for review. On page 14, it held that:-

> *"It should be emphasized that the scope of our mandate in the instant application is limited within the impugned decision. In review, the Court has no powers to venture into any other record beyond the impugned decision".*

The Court of Appeal of Tanzania set out other conditions for review in **Executive Director Golden Sands Hotel Ltd Zanzibar vs. Attorney General of Zanzibar and another**, Civil Application No. 4 of 2016 (Tanzlii) it held that:-

"It is clear that the Court has power and unfettered description to review its own decision, but the said power and discretion should be exercised within the ***specific benchmarks." [Emphasis provided]***

Those benchmarks were elaborated in the same case of **Executive Director Golden Sands Hotel Ltd Zanzibar** (Supra) while quoting **Minani Evarist V. R,** Criminal Application No. 5 of 12 (Unreported) that:-

"The Court.....should not by any means open to revisiting the evidence and re-hear the appeal."

Again in **Executive Director Golden Sands Hotel Ltd Zanzibar** (Supra), while quoting **Tanganyika Land Agency Ltd and seven others vs. Manohar Lal Agrawal,** Civil Application No. 17 of 2008 (unreported), it was held that:-

"A review is by no means an appeal in disguise whereby an erroneous decision is reheard and corrected but lies only for patent error without engagement in elaborated argument to establish it."

Another benchmark is elaborated in **Jayantukamar Chandubhai Patel@ Jectu Patel and three others vs. The Attorney General and two others,** Civil Application No. 151 of 2016; the Court held that:

"A mere error of law is not a ground of review.....an error that is apparent on the face of the record when it is obvious and self-evidence and does not require and elaborate argument to be established".

In **Jitesh Jayantilal Landwa & another vs. Dhirajilal Walji Ladwa and two others,** Civil Application No. 41 /16 of 2021 (Tanzlii), the Court of Appeal of Tanzania defined the term apparent error as:-

"Such an error must be so glaring and conspicuous as to require no interpretations nor a long debate and process of reasoning or fierce arguments so as to be detected".

I cited those benchmarks as a "litmus paper" to test whether the grounds for review and the submission advanced by Mr. Mtatiro could pass the test.

From the above benchmarks and having gone through the Judgment and submissions, Mr. Mtatiro's grounds for review and submission are not fall within the ambit of the criteria for review; the reasons are as follows: -

One, Mr. Mtatiro invited this Court to re-visit the proceedings and pleadings and proceed to identify the error in the application for review; only the Judgment or order is supposed to be re-visited.

Therefore, the scope and limit of review are only on the impugned decision, i.e., a judgment as for as this application is concerned. The boundaries do not allow to go beyond judgment and order.

Two defendants at the trial were Yahaya Shabani and Rashid Juma, and nowhere did they deny or object to those names in the Judgment. According to the Judgment, there was no such problem with the applicants' names.

Three, no apparent error was indicated in the Judgment and proved by the applicants as per the requirements of the law, i.e., Order 42 Rule 1 (b) of the CPC. In the judgment, the names of the applicants were mentioned without any controversy.

Therefore, allowing such an issue to arise at the review stage invites long debates or fierce arguments. This is contrary to what was enunciated in **Jitesh Jayantilal Landwa & another.**

The argument by Mr. Mtatiro falls short of being considered an error apparent on the record; thus, re-opening such an issue at the review stage is to sit on appeal of this Court's own decision contrary to the spirit of Order 42 Rule 1(1) of the CPC.

Again, Mrs. Tenga raised another vital issue in this application. She submitted that the case of the Applicants' names was already sorted and decided in **Hellena Adam Elisha@ Hellen Silas Masui (Supra),** where the Court of Appeal observed that: -

"In this matter, when the respondents lost in the High Court, in Land Case No. 5 of 2010, Mr. Mtatiro lodged a Notice with the following title: -

" ***YAHAYA ATHUMAN.....1ST APPELLANT***

RASHID ALLY.....2ND APPELLANT

VERSUS

HELENA ADAM ELISHA.....1ST RESPONDENT

HELEN SILAS MASUI.....2ND RESPONDENT

We will refer to this title as caption A. However, this application was lodged, it did not bear the same caption or title; instead, it was titled:

"HELENA ADAM ELISHA@HELLEN SILAS MASUI.....APPLICANT

VERSUS

YAHAYA SHABANI.....1ST RESPONDENT

RASHID JUMA .....2ND RESPONDENT

The latter title is the caption not only to this application but also to the proceedings, Judgment and decree sought to be challenged. This will be referred to as caption B.

The Court went on to state:

".....To us, the appellants in the Notice of Appeal with caption A are the same people as the Respondents in this Application. The new names in the Notice of Appeal were an introduction of the respondent's advocate in the aftermath of the Judgment in Land Case No. 5 of 2010 and not the Applicant or her advocates".

In the circumstances, the argument raised by Mr. Mtatiro in his submission that the application, which the Court of Appeal struck out, has nothing to do with this application is misconceived. This is because, as rightly submitted by Mrs. Tenga that: -

One, the issue of the names of the Applicants was already sorted out by the Court of Appeal. In that decision, the Court of Appeal concluded that Yahaya Athumani and Rashid Ally were the same people as Yahaya Shabani and Rashid Juma.

Two, this Court has no power to review the matter already decided by the Court of Appeal.

For the reasons above, I find no merit in this application and dismiss it with costs.

It is so ordered.

K. D. MHINA

JUDGE

23/09/2022