IN THE HIGH COURT OF THE UNITED REPUBLIC OF TANZANIA

(LAND DIVISION)

AT DAR ES SALAAM

CONSOLIDATE MISC. APPLICATIONS NO. 222 & NO. 239 of 2022

FURAHINI JOSEPH LEMA ..... 1ST APPLICANT

RAWASI SECURITY SERVICES LIMITED ..... 2ND APPLICANT

KCB BANK TANZANIA LIMITED ..... 3RD APPLICANT

MEM AUCTION MART & GENERAL
BROKERS LIMITED ..... 4TH APPLICANT

VERSUS

RAYMOND FOCUS MLAY..... 1ST RESPONDENT

DOOREEN HURUMA MAWOLE also known as
DOREEN ALBERT TEMU ..... 2ND RESPONDENT

EVANS GENERAL TRADERS ..... 3RD RESPONDENT

RULING

Date of Last Order: 03.06.2022

Date of Ruling: 08.06.2022

A.Z.MGEYEKWA, J

The applicants have brought this application against the respondent praying that his court be pleased to review and/or set aside its ruling and orders issued on 25th April, 2022.

The 1st and 2nd applicants' application is brought under section 78 (1) (b), (3) and Order XLII Rule 1 (1) (a), (b), and Rule 5 of the Civil Procedure Act Cap. 33 [R.E 2019]. The 3rd and 4th applicants' application is brought under 78 (1) (b) and Order XLII Rule 1 (1) (b) of the Civil Procedure Act Cap. 33 [R.E 2019].

When the matter was called for hearing on 3rd March, 2022, the 1st and 2nd applicants were represented by Mr. Godwin Mwapongo, learned counsel. The 3rd and 4th applicants enjoyed the legal service of Ms. Regina Kihumba, learned counsel. The 1st respondent had enjoyed the legal service of Mr. Ndanu Emmanuel, learned counsel. The 2nd and 3rd respondents did not show appearance while they were aware that the matter was scheduled for hearing. Therefore, this court proceeded with hearing the application *exparte* against them.

The applicants in their affidavits stated that the court in it is ruling discharged the temporary injunction issued on 25th April, 2022 on an apparent error on the face of the record which could have made this court rule otherwise.

In his submission, Mr. Mwapongo contended that the applicants have filed an application for review and that there are some errors featured in the application. He went on to submit that the court has ordered eviction

of the 1st Defendant while there was an order of the court for restraining his eviction in Misc. Land Application No. 498 of 2021 dated 25th April, 2022, and the *exparte* order was not adhered to. He argued that the record shows that the applicant bought the suit premises on 16th September, 2021, and the order was issued on 17th September, 2021 a day after his eviction, thus, in his view, the applicants could not have breached the order of the court which was not in regard to the matter which was not existing. He referred this court to page 13 of the impugned application and stated that the court recorded that the applicant was already been evicted thus the property was in the hands of the respondent in the said application.

Mr. Mwapongo went on to argue that this court used the words status quo ante which means something being discussed while the 1st respondent was not on the premises and that is the reason why they failed to reinforce the court order. He claimed that the 1st respondent in his application did not pray for status quo ante rather he complained that he was threatened. It was his further submission that this court on page 15 of the impugned Ruling stated that the court has no evidence to prove the illegality disposition but the issue of ownership was not considered. He lamented that the 1st respondent in exparte hearing did not inform this

court that the 1st respondent was already been evicted from the suit premises thus this court acted on lies. He claimed that this court entered into an error apparent on the face of the record.

Mr. Mwapomgo continued to submit that the contest on the applicants' counter affidavit was not considered while he was in occupation of the suit land. Insisting he forcefully contended that ordering the 5th respondent to vacate the suit premises means the court entered into the determination of the main suit. He contended that this court recognized the rights of the applicant while the same was required to be determined in the main case. He added that the court stated that the 5th respondent to stay in the suit premises was illegal from the date of 17th September, 2020 while the applicants were in possession of the suit land. He referred this court to pages 17 and 18 of the impugned ruling.

Mr. Mwapongo continued to argue that the court has stated that the 1st respondent is studying while the same was not featured in the record. He referred this court to pages 19 and 20 of the impugned ruling. The learned counsel for the 1st and 2nd applicants contended that this court issued a relief that was not prayed for. Supporting his submission he cited the cases of **Malchiadas Mwenda v Gizzile Mbaga & Others**, Civil

Appeal No. 57 of 2018, and **James Funke Ngwagilo v AG**, Civil Appeal No. 67 of 2001.

In conclusion, Mr. Mwapongo urged this court to grant the 1st and 2nd applicants' applications and set aside the orders made on 25th May, 2022 with costs.

Ms. Regina, learned counsel for the 3rd and 4th applicants was brief. She argued that the 3rd and 4th applicants have filed an application for review that this court granted what or went beyond what was prayed by the 1st respondent in the application of Temporary Injunction. She referred this court to the case of Dr. Abraham Israel Muro v NIMR &AG, Civil Appeal No.68 of 2020. She argued that the 1st respondent did not pray for eviction. Thus, it was her submission that the court granted more than what it was requested to be granted.

In conclusion, the learned counsel for the 3rd and 4th applicants prayed for this court to grant the application and set aside the orders of the court with costs borne by the 1st respondent.

In response, Mr. Ndanu submitted that the application for review No. 239 of 2020 is an afterthought since the 3rd and 4th applicants did not file a counter affidavit to challenge the application and never filed a submission to challenge the application. It was his submission that it is

not proper for them to come before this court and complain that they were aggrieved. Mr. Ndanu went on to submit that generally, the consolidated applications are not maintainable before this court.

Mr. Ndanu contended that the applicants in Application No. 222 of 2022 have moved this court under section 78 (3) of the Civil Procedure Code Cap.33, he stated that section 78 (2) of the Civil Procedure Code Cap.33 restrict review application in interlocutory orders. He went on to state that the conditions are set under section 78 (3) of the Civil Procedure Code Cap.33 and the 1st respondent was not a mortgagee or mortgagor hence the application could not have been brought under section 78 (3) of the Civil Procedure Code Cap.33.

Mr. Ndanu contended that the submissions made were as if they were submitting on an appeal. He argued that Mr. Mwapongo has challenged many issues in the ruling of this court as if the review is an alternative to an appeal. The learned counsel for the 1st respondent contended that a review application is not an alternative to an appeal. He referred this court to the submission made by Mr. Mwapongo that he referred this court to page 13 of the ruling of this court while the court was referring to the parties' submissions. Mr. Ndanu went on to argue that Mr. Mwapongo claimed that the 1st respondent has misled the court while the 1st

respondent in his affidavit narrated how he was invaded and evicted. He faulted Mr. Mwapongo by stating that this court on page 16 considered the applicant's affidavit only while the 1st and 2nd applicants did not contest that there was a triable issue. He added that whether evidence on record was not considered is a fit ground for appeal. Mr. Ndanu submitted that the 1st respondent in his affidavit stated that he was in possession of the suit property. He referred this court to paragraphs 16, 17, 18, and 19 of the 1st respondent affidavit, he narrated how he was illegally evicted.

The learned counsel for the 1st respondent went on to submit that the court defined the meaning of status quo ante which means the applicant in the said application was in possession before the dispute. It was his view that the court was correct to order them to vacate the suit premises. He added that in his affidavit the 1st respondent prayed for any other reliefs this court may think fit to grant. He distinguished the cited cases by stating that the reliefs prayed were in regard to the main suit and not interlocutory applications. Mr. Ndanu added that in application it is upon the court's discretion. He valiantly argued that the application is baseless and the same delays the hearing of the case.

In conclusion, Mr. Ndanu beckoned upon this court to dismiss the review with costs.

In his rejoinder, Mr. Mwapongo argued that Mr. Ndanu's act of raising a preliminary objection out the door be disregarded. He argued that saying these are grounds for appeal is a misconception. He went on to argue that the applicants have pointed out the mistakes made by this court. Mr. Mwampogo reiterated his submission in chief and prayed for this court to consider their submissions and prayers. He urged this court to correct the orders accordingly.

Ms. Regina reiterated her submission in chief. She submitted that although the 2nd and 3rd applicants did not lodge a counter-affidavit but the application did not include the prayer to vacate any party. It was her view that this court can grant any order but it is required to exercise its power judiciously. Ending, she urged this court to grant their application with costs.

Before embarking on the merit of the case. I find it is important to address the objections raised by Mr. Ndanu. Concerning the issue of proper citation of the law, this matter cannot be entertained at this juncture the same was required to be raised before hearing. Mr. Ndanu is also claiming that the 3rd and 4th applicants did not object the application

for temporary injunction thus they have no right to file their review application. In my view, they have the right to challenge the said order. I am saying so because as long as the 3rd and 4th applicants are dissatisfied with the order of this court.

Back on the wagon, after hearing the submissions made by the learned counsels for the parties, I wish to state at the outset that in the exercise of its powers of review, the Court is guided by the laid down principles which emanate from various decisions of the courts such as the East African Court of Justice (Appellate Division at Arusha) in the case **of Angella Amudo v The Secretary-General of the East African Community**, Civil Application No. 4 of 2015 (unreported). In that case, the following principles were stated:-

> *"(a) The principle underlying a review is that the court would not have acted as it had if all the circumstances had been known....*
>
> *(b) There are definite limits to the exercise of the power of review. The review jurisdiction is not by way of an appeal. The purpose of the review is not to provide a back door method for unsuccessful litigants to re-argue their cases. Seeking the re-appraisal of the entire evidence on record for finding the error, would amount to the exercise of appellate jurisdiction which is not permissible....*

(c) The power of review is limited in scope and is normally used for correction of a mistake but not to substitute a view in law. This is because no judgment however elaborate it may be can satisfy each of the parties involved to the full extent...

(d) A judgment of the final court is final and review of such judgment is an exception.

(e) In review jurisdiction; mere disagreement with the view of the judgment cannot be ground for invoking the same. As long as the point is already dealt with and answered, the parties are not entitled to challenge the impugned judgment in the guise that an alternative view is possible under the review jurisdiction....

(f) There is a dear distinction regarding the effect of an error on the face of the record and an erroneous view of the evidence or law. An erroneous view justifies an appeal. Therefore, the power of review may not be exercised on the ground that the decision was erroneous on merit...

(g) It will not be sufficient ground for review that another judge would have taken a different view. Nor can it be a ground for review that the court preceded on incorrect exposition of the law...,

(h) ***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*. 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) The term 'mistake or error on the face of the record' by its very connotation signifies an error that is evident per se from the record of the case and does not require detailed examination; scrutiny and elaboration either of the facts or the legal position. If an error is not self-evident and detection thereof requires a long debate and process for reasoning, it cannot be treated as an error on the face of the record. ***To put it differently, it must be such as can be seen by one who runs and reads****..." [Emphasis added].*

Equally, Review is governed by Order XLII (1), (b) of the Civil Procedure Code Cap.33 which was cited by both learned counsel and illustrated the grounds for review as follows:-

(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 applicants have claimed that there is an error apparent on the face of the record as expounded in their grounds of review and they believed that there are sufficient grounds for this court to review its earlier orders as prayed one of them being that this court issued a relief which was not prayed by the 1st respondent and other grounds are based on the analysis of evidence such as the definition of *status quo ante*. On this side, the respondent strongly opposed the application for the main reason that the application does not constitute an error apparent on the face of the record', thus, the same does not merit the prayer for review.

Certainly, from these facts and submissions, I am called upon to determine whether the grounds manifest an apparent error on the face of the record and to warrant the prayer for review, 'manifest error on the face of the record' as a ground for review has been broadly canvased in a plethora of authorities from the Court of Appeal.

The Court of Appeal of Tanzania in the case of **Vitatu and Another v Bayay and Others**, Civil Application No. 16 of 2013 (unreported). In this case, it was held that: -

> *".... The decision of the Court of Appeal of Kenya in National Bank of Kenya Limited v Ndungu Njau [1997] eKLR can as well provide us with a persuasive guide when it stated:-*
>
> > *"...A review may be granted whenever the court considers that it is necessary to correct an apparent error or omission on the part of the court.* ***The error or omission must be self-evident and should not require an elaborate argument to be established. It will not be a sufficient ground for review that another Judge could have taken a different view of the matter. Nor can it be a ground for review that the court proceeded on an incorrect exposition of the law and reached an erroneous conclusion of law. Misconstruing a statute or other provision of law cannot be a ground for review.****" [Emphasis added].*

All these authorities provide a nuanced exposition of what constitutes a manifest error on the face of the record. When the above exposition is applied to the grounds of review expounded in both the memorandum of

review and the submission thereto, it becomes apparent, as argued by Mr. Ndanu, that the applicants have failed to demonstrate that the ruling sought to be reviewed was based on a manifest error on the face of the record. In my respectful view, the said grounds for review are fit grounds for appeal. This 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.

It is trite law that the Court's review jurisdiction is not intended to be used to challenge the merits of a decision. That legal position was underscored in the case of Julius **Rukambura v Issack Ntwa Mwakajila & Another**, Civil 27 Application No. 3 of 2004 (unreported). In that case, the Court had this to say:-

> "**The fact that the applicant may have been unhappy with the decision or even that the Court was wrong in holding such view cannot provide a basis for review, although had there been a higher appellate tribunal the applicant might want to appeal against that decision.**" [Emphasis added].

From the matters which have been raised and the supporting submission, there is no gainsaying that the learned advocates for the applicants are challenging the findings of the Court. And there is no

gainsaying that the matters raised on grounds of the review do not fall within the scope of Order XLII (1), (b) of the Civil Procedure Code Cap.33 [R.E 2019]. It appears the applicant intends to "appeal" against the aforesaid decision through the back door since our legal system has no provision for that avenue.

On the basis of the foregoing, I am of the settled view that the applicants have not satisfied the required threshold for review of a decision of the Court based on the above-cited provisions of the law and authorities. In the event, I find the application to be devoid of merit and hereby dismissed. Costs to follow the event.

Order accordingly.

DATED at Dar es Salaam this 9th June, 2022.

A.Z.MGEYEKWA

JUDGE

09.06.2022

Ruling delivered on 9th June, 2022 in the presence of Mr. Godwin Mwapongo, learned counsel for the 1st and 2nd applicants, Ms. Regina Kiumba, learned counsel for the 3rd and 4th applicants and Mr. Ndanu Emmanuel, learned counsel for the 1st respondent.

A.Z.MGEYEKWA

JUDGE

09.06.2022