IN THE HIGH COURT OF THE UNITED REPUBLIC OF TANZANIA

(LAND DIVISION)

AT DAR ES SALAAM

LAND REVIEW NO. 324 OF 2021

ABDULKADIR ELINAZI RASHID & 135 OTHERS ..... APPLICANTS

VERSUS

THE HONOURABLE ATTORNEY GENERAL ..... 1ST RESPONDENT

BOARD OF TRUSTEES,

NATIONAL SOCIAL SECURITY FUND ..... 2ND RESPONDENT

Date of last Order: 08/03/2022

Date of Ruling: 03/06/2022

RULING

I. ARUFANI, J

This ruling is for the application filed in this court by the applicants urging the court to review the ruling and order of the court delivered on 25th June, 2021 by Hon. DR. Z. D. Mango, J in Miscellaneous Land Application No. 540 of 2020.

The background of the matter is to the effect that, the applicants filed in this court the application mentioned hereinabove urging the court to revoke an arbitration clause provided under clause 10.1 of the Hire Purchase Agreement entered between the applicants and the second respondent. The applicants prayed also for an order of maintenance of status quo pending hearing and determination of the intended suit and costs of the suit. The application was opposed by the notice of preliminary

objection filed in the court by the respondents containing the points of law listed hereunder: -

i) *That the court lacks jurisdiction to entertain the matter on the ground of sanctity of the contract.*

ii) *The application is untenable for being vexatious, frivolous and abuse of court process.*

After hearing the counsel for the parties in respect of the raised points of preliminary objection the trial judge sustained the preliminary objections and dismissed the application for want of jurisdiction to grant the reliefs sought. The applicants were aggrieved by the ruling and order of the court and filed in this court the present application urging the court to review the said ruling and order of the court under section 78 (1) (a) and (b) read together with Order XLII Rule 1 (a) and (b) of the Civil Procedure Code, Cap 33 R.E 2019. The application of the applicants is based on the grounds listed hereunder: -

a) *That the ruling is tainted with erroneous reasoning and finding that the hire purchase Agreement contained a valid and enforceable arbitration clause hence failed to find that the alleged arbitration clause was invalid and unenforceable.*

b) *That the impugned ruling and order of the court are tainted with errors on the face of records in that the trial judge overlooked the matter over which she was to decide, which was over preliminary objections on points of law, and instead,*

decided on the petition on merit without affording the parties the right to be heard over the substantive petition.

While the applicants were represented in the application at hand by Mr. Benitho L. Mandele, learned advocate the respondents were represented by different State Attorneys and one of them being Mr. Stanley Mahenge who drew and filed in the court the written submission of the respondents in reply to the written submission of the applicants in respect of the application filed in the court by the applicants.

The counsel for the applicants stated in his submission in chief that, the arbitration clause which they were urging the court to revoke from the Hire Purchase Agreement was unenforceable, therefore invalid. He quoted the said clause in his submission which read as follows: -

"Any dispute and controversies arising out of otherwise relating to this agreement shall, in the first instance be settled amicably between the parties and failing such amicable settlement, the parties shall resort to Arbitration which shall be conducted in accordance with the Arbitration Act, Cap 15 R.E 2002."

The counsel for the applicants argued that, the above clause is devoid of any quality necessary for arbitration so to be called. He stated that the arbitration clause does not provide for the number of arbitrators, nor for procedure to be followed in appointing of such arbitrator(s). Besides, the clause did not specify the arbitration organ or institution to be used. He

submitted that all those deficiency renders the alleged arbitration clause unenforceable hence invalid. He stated that all attempts to have the matter be resolved by arbitration ended in vain as the respondent was reluctant or refused to appoint an arbitrator and to submit to arbitration process. He based on the stated grounds to pray the court to find the Hire Purchase Agreement contains an unenforceable and invalid arbitration clause.

In his reply the learned State Attorney cited section 78 (1) (b) and Order XLII Rule 1 (b) of the Civil Procedure Act in his submission and stated that, according to the wording of the proviso to Order XLII Rule 1 of the above-mentioned law there are two grounds upon which review can be made. He stated there must be an error apparent on the face of record and or discovery of new fact or evidence.

He argued that, in an application for review the court is asked to correct error which is apparent on the face of record. To support his argument, he referred the court to the case of **Mussa Hamisi Mkanga & Two Others V. Godbless Jonathan Lema & Another**, Civil Appeal No. 21 of 2013, CAT at DSM (unreported) where it was stated the purpose of review is to correct or amend errors which has been inadvertently committed and which if not amended will result into miscarriage of justice. He also referred the court to the case of **Lukolo Company Limited V.**

Bank of Africa Limited, Civil Review No. 14 of 2020, HC DSM Registry (unreported) where the factors to be considered in application for review of a judgment or order of the court was extensively discussed.

He stated that, basing on the position of the law stated hereinabove the issue to determine in this matter is whether the two grounds raised by the applicants fit for the purpose of review by this court. He submitted that, the grounds raised by the applicants are misconceived, misplaced and the same cannot be determined by way of review. He stated in relation to the first ground that, if the applicants think the ruling of the court is tainted with erroneous reasoning the appropriate remedy was to appeal to the Court of Appeal and not to apply for review of the ruling of the court.

He referred the court to the case of **Omary Makunja V. R**, Criminal Application No. 22 of 2014, CAT at DSM (unreported) where the court was persuaded by the Indian decision made in the case of **M/S Thunga Bhadra 5 Industries Ltd V. The Government of Andra Pradesh**, AIR 1964 SC 1372 where it was stated 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.

The learned State Attorney stated in relation to the second ground that, the same is misconceived for being good as a ground of appeal which

requires elaborated argument to substantiate the same. He stated that, the said ground is devoid of merit to support a review. He submitted that, the court decided the matters relating to preliminary objection after affording the parties with right to be heard and not otherwise. He submitted further that, there is no error apparent on the face of record worth of being determined by this court and prays the application be dismissed with costs.

After considering the submission from the counsel for the parties the court has found that, as rightly stated by the learned State Attorney the issue to determine in this application is whether the two grounds raised by the applicants in the present application fit for the purpose of review by this court. As the application is made under section 78 (1) (a) and (b) of the Civil Procedure Code, the court has gone through the cited provision of the law and find it states clearly that, any person who is considered aggrieved by a decree or order from which appeal is allowed but no appeal has been taken or where no appeal is allowed may apply for review of the judgment or order of the court and the court may make such order thereon as it thinks fit.

The court has found that, as rightly argued by the counsel for the respondents the criteria or factors to be considered in determination of application for review are provided under Order XLII Rule 1 (b) of the Civil

Procedure Code cited in the application of the applicants which states as follows: -

> *"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."* [Emphasis added].

From the wording of the above quoted provision of the law and specifically the bolded part it is crystal clear that, for an application for review to be granted the applicant is required to establish either of the three grounds or factors. One, it must be established there is a discovery of new and important matter or evidence which after the exercise of due diligence was not withing the knowledge of the applicant or could not be produced by him at the time when the decree was passed or the order was made. Two, where it is established that there is some mistake or

error apparent on the face of the record and, three, there is any other sufficient reason for the court to review its decree or order made.

The above stated grounds or factors for review of a judgment or ruling of the court have been expounded by courts in number of cases. One of those cases is the case of **National Bank of Kenya Limited V. Ndungu Njau**, [1997] eKLR cited in the case of **Lukolo Company Limited** (supra) where it was stated that: -

> *"... 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 statutes or other provision of law cannot be a ground for review."*

While being guided by the grounds or factors to be considered in determining application for review of a judgment or an order of the court stated in the above cited law and cases, the court has gone through the grounds of review filed in this court by the applicants. The court has found the applicants have stated in the first ground of review that, the ruling of the court is tainted with erroneous reasoning and finding that the Hire

Purchase Agreement contained a valid and enforceable arbitration clause. The court has found it is stated in the second ground of review that the honourable judge overlooked the matter over which she was to decide, and instead decided the petition on merit without affording the parties the right to be heard over the substantive petition.

After going through the impugned ruling of the court, the court has failed to see anywhere the court made a finding that the parties' Hire Purchase Agreement contained a valid and enforceable arbitration clause as alleged in the first ground of review. To the contrary the court has found the decision of the court to dismiss the applicants' application was based on preliminary objections raised by the respondents that the court had no jurisdiction to entertain the matter. The court has failed to see anywhere the honourable judge decided the issue of validity or enforceability of the impugned arbitration clause contained in the parties' Hire Purchase Agreement which was the gist of Miscellaneous Application No. 540 of 2020 filed in the court by the applicants.

The court has arrived to the above finding after seeing that, the applicants were urging the court to revoke the impugned arbitration clause of the parties' Hire Purchase Agreement on the grounds stated in the submission of the counsel for the applicant that, the clause does not provide for number of arbitrators to be involved in their arbitration, nor

procedures for appointing such arbitrators and does not specify the organ or institution which would have been used in their arbitration.

To the view of this court the counsel for the applicants was required to show the apparent error committed by the court in its ruling which upheld the points of preliminary objection raised by the respondents and dismissed the application for want of jurisdiction instead of showing deficiencies or difficulties which are in the arbitration clause of the parties' Hire Purchase Agreement which the applicants were urging to be revoked by the court.

The court has also considered the further allegation by the counsel for the applicants that the honourable judge decided the petition on merit without affording parties right to be heard over the substantive petition but failed to see any grain of truth in the said allegation. To the contrary the court has found the decision of the court was based on the issue of jurisdiction of the court to entertain the applicants' application raised by the respondents and the court found it had no jurisdiction to grant the relief sought in the application and dismissed the application.

The question as to what is an apparent error on the face of record for supporting an application for review was discussed in detail in the case of **Chandrakant Patel V. R**, [1994] TLR 2018 where the excerpt from **Mulla**, (14th Edition), Pages 2335 – 36 which articulated what constituted

an error apparent on the face of record was quoted. It was stated in the cited book that: -

> *"An error apparent on the face of the record must be such as can be seen by one, runs and reads, that is, an obvious and patent mistake and not something which can be established by a long-drawn process of reason on points on which there may conceivably be two opinions."*

That shows the error alleged is in an impugned judgment or decision must be obvious and do not need long and matured argument to establish the same so as to establish there is error on the impugned judgment or decision. It must also be known that the purpose of review is not to challenge the merit of the impugned decision but to urge the court to correct the error or mistake which is apparent on the face of the record. The stated view of this court is getting support from the case of **Charles Barnabas V. R**, Criminal Application No. 13 of 2009 cited in the case of **Lukolo Company Limited** (supra) where it was that: -

> *"... a review is not to challenge the merits of a decision. A review is intended to address irregularities of a decision or proceedings which have caused injustice to a party. ... a review is not an appeal. It is not "a second bite so to speak."*

The above quoted excerpt is similar to what was stated in the case **M/S Thunga Bhadra S. Industries Ltd** cited in the case of **Omary Makunga** cited in the submission of the respondent where it was stated

a review is by no means an appeal in disguise whereby an erroneous decision is reheard and corrected but lies only for patent error in the impugned judgment or order.

Since the applicant has failed to establish any irregularity or error on the face of the impugned decision of this court which is seeking to be reviewed, the court has found there is no justifiable reason to grant the application. Consequently, the application filed in this court by the applicant urging the court to review its ruling and order dated 25th June, 2021 is hereby dismissed in its entirety for being devoid of merit. It is so ordered.

Dated at Dar es Salaam this 3rd day of June, 2022.

I. Arufani
Judge
03/06/2022

Court:

Ruling delivered today 3rd day of June, 2022 in the presence of Ms. Rose Sanga, learned Advocate for the applicants and in the presence of Mr. Stanley Mahenge, learned State Attorney for the respondents. Right of appeal is fully explained to the counsel for the parties.

THE HIGH COURT OF TANZANIA
LAND DIVISION

I. Arufani
Judge
03/06/2022