

IN THE HIGH COURT OF THE UNITED REPUBLIC OF TANZANIA

(LAND DIVISION)

AT DAR ES SALAAM

APPLICATION FOR REVIEW NO.777 OF 2022

(Arising from the decision of this Court in Land Reference No. 26 of 2022

delivered on 30th November 2022)

DUNCAN SHILLY NKYA.....1ST APPLICANT

KIWANGO SECURITY CO.LTD.....2ND APPLICANT

VERSUS

OYSTERBAY HOSPITAL CO.LTD.....RESPONDENT

RULING

23rd March, 2023 & 30th March,2023

L.HEMED, J.

Previously, the applicants herein had instituted Reference No.26 of 2022 as a way to challenge the decision of the Deputy Registrar in Execution No. 26 of 2022. Following the preliminary objection that was raised by the respondents, this Court, on 30th November, 2022, delivered a ruling dismissing the entire Reference No.26 of 2022 on the ground that it had no jurisdiction to entertain it as it emanates from the decision of the Registrar or Deputy Registrar in execution proceedings.

On 02nd day of December 2022, the applicants rushed back, knocking the gates of this Court, now armed with a Memorandum of Review trying to challenge the said Ruling on the following ground: -

"1. That, the Honourable Judge unfortunately skipped to see that on the face of records the laws cited on the chamber summons, affidavit and authorities on record were sufficient enough to overrule the preliminary objection raised by the respondent."

The applicants had the prayer that this Court should take into consideration the application for review of the impugned decision dated 30th November 2022 on errors apparently on the face of record and thus make the following orders:

"(a) That the Honourable Court be pleased to call for records of Land Reference No.26 of 2022 and review its decision dated 30th November, 2022 containing errors on the face of records and

thereafter vacate its decision and set aside its order dated 30th November, 2022.

(b) That after setting aside its order, this Honourable Court be pleased to order the application for Reference No.26 of 2022 be heard on merits.

(c) Costs of this Application be paid by the Respondent.

(d) Any other relief(s)....”

After having gone through the Memorandum of Review and the Ruling subject for review, this Court *Suo Moto*, directed the counsel for the parties to address the Court on whether it is *functus officio* to determine the said application for review or not. The counsel for the parties addressed the Court by way of written submissions. Mr. Nickson Ludovick learned advocate, addressed on behalf of the applicant while Mr. Ashiru Hussein Lugwisa learned advocate stood for the respondents.

Mr. Ludovic asserted that this Court is not *functus officio* because in our jurisprudence Judges and Magistrates can review their own decisions provided that the Applicant points out that there are errors apparent on the

face of records. He cited Order XLII Rule 1(1)(a)(b), 2 and 3 and section 78(1)(a)(b) and section 95 of the Civil Procedure Code Cap 33 R.E 2019. He also cited the decision in **Transport Equipment Limited v. Devram P. Valambhia** [1998] T.L.R 89, **Tanzania Transcontinental Trading Company v. Design Partineship LTD** [1999] TLR 258 and **Hyroid Sivonike Ng'ondya v. Rev. Patrick Mwalusamba and others**, Land Review No.2 of 2019.

According to him, the legal circumstances in which the Court can invoke its jurisdiction to review the case are;

"i. There is a party who is aggrieved by the decision.

ii. There is a discovery of new and important matter of evidence which after due diligence was not within the knowledge of the part at the time the judgment and the decree was passed.

iii. Finally, there was an error on apparent on the face of the record or any other sufficient reason."

He mentioned that, the conditions stated by the Court of Appeal of Tanzania in the case of **John Kishekya vs Attorney General**, Civil

Application No.480/03 under which the Court can review its own decisions are: -

- i. That the decision was based on manifest error on the face of the record resulting in the circumstances.*
- ii. A party was wrongly deprived of an opportunity to be heard.*
- iii. The Court has no jurisdiction to entertain the case or*
- iv. The judgment was produced illegally or by fraud or perjury.*

He concluded by stating that this Court is not *functus officio* to review its own decision.

In reply thereof it was stated that this application is frivolous, vexatious and brought in *mala fide*. Simply to put, the application for review is abusive of the Court process. The Court is *functus officio*. It was submitted that in the application for reference, the applicants were challenging the decision of the Deputy Registrar who issued an eviction

order against them on the 31st October 2022. But they were not successful as the Court dismissed the said application for lack of jurisdiction. The applicants were to appeal to the Court of Appeal of Tanzania, instead of appealing they have approached this Court purporting to ask for review.

The counsel for the respondents was of the view that this tantamount to asking the Court to reconsider its decision for the second time or bite. He submitted that, applying for review, the applicants are definitely abusing the Court process and derailing the course of justice. It was further submitted that the applicants are deliberately logging these unmeritorious applications simply to delay justice and buy some time. The counsel for the applicants prayed for this Court to dismiss the application with costs.

In his rejoinder submissions, the learned advocate for the applicant reiterated his submissions in chief and uttered that the Court is not *functus officio* to determine the application for review.

Having gone through the submissions made by the counsel for both parties, it is my turn to determine whether this Court can proceed to determine the current application. It should be noted that on 30th

November 2022, this Court dismissed Reference No.26 of 2022 which was lodged by the applicant herein in an attempt to challenge the execution order of the Deputy Registrar in Execution No.26 of 2022. The reason for dismissing the said Reference was that this Court has no jurisdiction to determine the matter as the High Court cannot seek opinion from itself. The ground for review stated in the Memorandum of Review is to the effect thus:-

"1. ...the Honourable Judge unfortunately skipped to see that on the face of records the laws cited on the chamber summons, affidavit and authorities on record were sufficient enough to overrule the preliminary Objection raised by the respondent."

Basing on the ground herein above, there is no gainsaying that the same is not a ground for review, rather a ground of appeal. In the said ruling which the applicant want this Court to review, this Court interpreted the law that this Court cannot entertain review, appeal, or reference emanating from the decision of the registrar or deputy registrar in execution proceedings. It is my firm view that the alleged errors of interpretation of the law cannot

be corrected by way of review to the same Court. Errors of interpretation of the law are not errors on the face of record, they are fundamental ones. The court alleged to have committed errors of interpretation of the law becomes *functus officio* to make correction of the same.

I am aware of the conditions for review laid down by the Court of Appeal of Tanzania in **John Kishekya vs Attorney General**, (*supra*) that the decision was based on manifest error on the face of the record; a party was wrongly deprived of an opportunity to be heard; the Court has no jurisdiction to entertain the case; or the judgment was produced illegally or by fraud or perjury. However, all the aforesaid conditions do not fit squarely within the ruling which the applicants are looking for review.

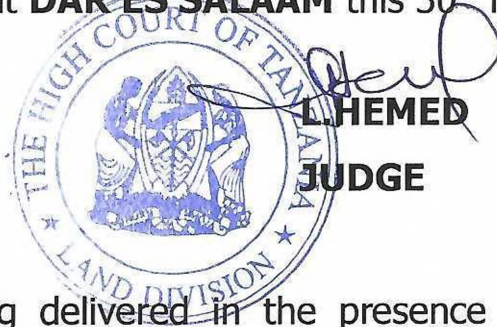
I am confident to state that the applicant is attempting to mislead the Court to assume powers which it does not have, hence *ultra vires*. For I am firm to hold that the application for review at hand is an appeal in camouflage, where the applicant is trying to move this court to re hear the matter and correct the alleged errors in the impugned ruling. I am not prepared to do so. I do subscribe to the position stated in **Lakhamshi Brothers LTD vs Raja and Sons** [1966] 1 EA 313 that: -

"In a review, Court should not sit on appeal against its own Judgment in the same proceedings. In a review, the Court has inherent jurisdiction to recall its Judgment in order to give effect to its manifest intention on what clearly would have been intention of the Court had some matter not been inadvertently omitted."

From the decision of **Lakhamshi Brothers Ltd** (*supra*), I am of the considered view that review is by no means an appeal or a revision in disguise whereby an alleged erroneous decision is reheard and corrected. I am of the firm view that, the alleged *error to skip the laws cited on the chamber summons, affidavit and authorities on record*, does not form a manifest error apparent on the face of record. This Court is *functus officio* to entertain the application at hand. The way I see the application at hand, it is an abuse of Court process.

In the upshot, I find the entire application devoid of merits and I hereby proceed to dismiss it with costs. It is so ordered.

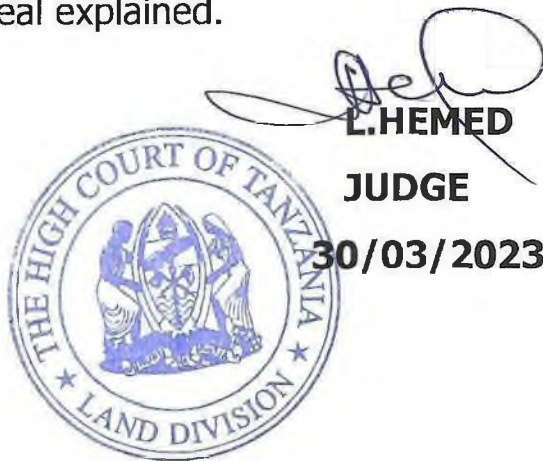
DATED at DAR ES SALAAM this 30th March, 2023.



**L. HEMED
JUDGE**

COURT: Ruling delivered in the presence of Mr. Paul Elias, advocate, holding brief of Mr. Ludovic Nickson advocate for the applicants and Mr. Ashiru Lugwisa, advocate for the respondents this 30th March, 2023.

Right of appeal explained.



**L. HEMED
JUDGE**

30/03/2023