IN THE HIGH COURT OF THE UNITED REPUBLIC OF TANZANIA

LABOUR DIVISION

AT DAR ES SALAAM

MISC. APPLICATION NO. 433 OF 2018

BETWEEN

JOSEPH MAGATA ..... APPLICANT

VERSUS

VODACOM (T) LIMITED ..... RESPONDENT

RULING

S.M. MAGHIMBI, J.

The applicant herein was dissatisfied with the decision of this Court (Hon. Nyerere, J (as she then was) in Revision No. 466 of 2016, dated 8/12/2017 ("the decision"). In the decision, the court revised the award of the Commission for Mediation and Arbitration for Kinondoni ("CMA") in Labor Dispute No. CMA/DSM/KIN/R.264/15/619 and held that the termination of the applicant herein was substantively fair. In what the applicant termed as not being satisfied with the decision and an error apparent on the face of record, he has lodged this application on the following grounds:

1. That there are errors apparent on the face of the record of the Judgment which needs to be corrected by this Honourable Court by virtue of being the Court of record.
2. That, having been moved by counsel for the respondent, the Honourable Judge erred in not considering the fact that, as applicant employment was terminated on the 25th day of March, 2015, applicant (employee) could not be absent from work on the 26th day of March, 2015 and the 27th day of March, 2015.
3. That, having been moved by counsel for the respondent, the Honourable Judge erred in not considering the fact that, the alleged absenteeism was not more than five (5) days.
4. That, having been moved by counsel for the respondent, the Honourable Judge erred in not considering the fact that, applicant was not alleged of absenteeism according to charge sheet which applicant responded on the 27th day of February, 2015.
5. That, having been moved by counsel for the respondent, the Honourable Judge erred in not considering claim number seven (7) under paragraph (4)(a) of Part B of CMA Form No. 1

6. That, having been moved by counsel for the respondent, the Honourable Judge erred in not considering the fact that, "Hearing Form" signed by the applicant and other disciplinary hearing committee members on the 25th day of March, 2015 does not conclude the 5th day of March 2015 as the material date of abseentism.
7. That, having been moved by counsel for the respondent, the Honourable Judge erred in not considering the fact that, "Hearing Form" signed by the applicant and other disciplinary hearing committee members on the 25th day of March, 2015 does not conclude the 5th day of March 2015 does not include the "visit to physician" and "vehicle Breakdown" as material facts for abseentism.
8. That, having been moved by counsel for the respondent, the Honourable Judge erred in not considering the fact that at arbitration stage, respondent failed to testify facts and dates connected with the alleged abseentism.
9. That, having been moved by counsel for the respondent, the Honourable Judge erred in not considering the fact that,

determination of termination procedure issues were not among respondent's prayers of the determined revision.

10. That, having been moved by counsel for the respondent to revise procedural issues, the Honorable Judge erred in fact in not considering applicant's testimony on procedural issues.

The application was disposed by way of written submissions. The applicant was represented by Mr. Deogratius Godfrey, learned advocate while the respondent was represented by Mr. Juvenlis Ngowi, learned advocate. Both parties filed their submissions according to the order of this Court. My appreciation to the learned Advocates for their lengthy, detailed and well researched submissions which I will take on board in due course. My determination of this application will start with an issue raised by Mr. Ngowi in his reply submissions as it goes to the root of the legality of this application in relation to the jurisdiction of this court under the principles set down by the law and precedents. Mr. Ngowi challenged the validity of this application on the ground that this review application does not qualify as review, rather, it is an appeal in disguise.

In his submissions, Mr. Ngowi generally established that all purported grounds for Review do not qualify the matter to be a Review Application

but an appeal in disguise. He argued that an application for review must be based on an error apparent on the face of the record, citing the case of ***Attilio Vs. Mbowe [1970] H.C.D 3*** where it was held that:

> *"Review involves correction of an error which was either apparent on the face of the record or had been clear because of subsequently discovered circumstances"*

He then submitted that looking at all grounds of Review filed in the Memorandum of Review and as submitted by the Applicant, the alleged errors are not on the face of record, if at all there is any error. That what is complained by the Applicant needs evidence and arguments to substantiate the position which the Applicant wants this court to take and therefore the same does not amount to an error apparent on the face of record. Regarding what amounts to an error apparent on the face of record, Mr. Ngowi cited the decision of the High Court (Land Division) in **Misc. Land Application No. 635 of 2019 between Johasi Kashura & Another Vs. Oscar Mhagama & Another [2020] TZHCLandD 3928 (22 December 2020)**; where at page 4 of the typed Ruling the court quoted with approval a passage from **MULLA, Commentary on the**

Indian Code of Civil Procedure, 1908, 14th Edition pp. 2335 -36 where it was held:

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

He then submitted that looking at all grounds of Review and submissions by the Applicant, it is obvious that there are no new discovered facts nor error on the face of record established.

In reply while making his rejoinder submissions, Mr. Godfrey challenged what he called Mr. Ngowi's invented new prayer objecting the grounds of review for a reason that they are grounds of appeal subject to Court of Appeal. He argued that his prayer is targeting to reduce this hearing into another preliminary objection and that there are laws of limitation and the famous phrase which says there must be finality on each litigation. That these grounds of review were part of the record of appeal when we lodged this case at the Court of Appeal and if the respondent had such a view on the grounds, then he misused his opportunity at the Court of Appeal to

lodge that new ground and even many other new grounds to affirm the decision of this Court. That the opportunity was offered to him by Rule 100(1) of the **Tanzania Court of Appeal Rules, 2009**

He then pointed out that the Court of Appeal ordered this review to be heard on merits, as which we are now. To this court's dismay, instead of making submissions on whether the grounds stated in the memorandum review where that of appeal in disguise, Mr. Godfrey reiterated his submission in chief challenging the substance of the judgment of this court. I will therefore proceed to determine the issue raised by Mr. Ngowi as it goes to the root of jurisdiction of this court.

Starting with first ground of review that there are errors apparent on the face of record which needs to be corrected by this Honourable Court by virtue of being the Court of record. The applicable law in moving the court to review its decision, is Rule 27(2) (a) (b) & (c) of the Labor Court Rule, G.N. No. 106/2007 ("the Rules"). It is important that the provisions abovementioned are reproduced:

"27. (2) Any person considering himself aggrieved by a judgment, decree or order from which-

(a) an appeal is allowed, but from which no appeal has been preferred; or .

(b) no appeal is allowed, and who, ***from the discovery of any 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 judgment or 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 judgment, decree or order made against him,*

(c) may apply for a review of for a review of the judgment, decree or order to the Court."

Having the provision in mind, I then turned to the preamble of the applicant's memorandum of review where the applicant wrote:

"The applicant herein above ***being dissatisfied with the judgment and order*** *of the High Court, Labor Division at Dar-es-salaam, in Revision No. 466/2016 delivered on the 8th day of December, 2017 b Honorable Judge A.C. Nyerere and* ***having noted apparent error errors on the face of the record which***

caused miscarriage of justice, *is hereby seeking Review of the said decision"*

The catching phrases in this preamble are that the applicant is not satisfied with the decision of this court and has ***noted apparent error errors on the face of the record*** and that the errors caused ***miscarriage of justice.*** I will start with the first phrase, that the applicant has noted errors apparent on the face of records, a phrase which implies that the review application was filed pursuant to Rule 27(2). It is pertinent to note that in this case, the decision which is a subject of review is an appealable one hence falls under Rule 27(2)(a). However, in his memorandum, as I have pointed out earlier in the catching phrase, the applicant has pointed out an apparent error on the face of the record which caused miscarriage of justice, meaning that the Court is moved under Rule 27(2)(b) of the Rules. The issue is whether there is the alleged apparent error on the face of the records to qualify the matter to be reviewed or whether this is an appeal in disguise. In determining this issue, it is important to analyse the situations under which the court can review its own decision. Luckily there are numerous decisions of this court and the Court of Appeal where the issue has been addressed.

In the case of **Mirumbe Elias @ Mwita Vs. Republic, Criminal Application No. 5/2015** (unreported), the Court of Appeal sitting at Mwanza, while dealing with an application for review under Rule 66(1) of the Court of Appeal Rules, emphasized that the power of the Court to review its decision is limited in scope. Citing several other decisions, the court then elaborated principles which are to be looked upon to see whether review is the proper action under the circumstances. The Court held:

"From the wording of rule 66(1) of Rules, it is clear that the review is limited in scope to grounds stated thereunder. This is also reflected in the principles governing the exercise of review as established by case law, in our jurisdiction and from various jurisdictions. These are ***ONE,*** *the principle underlying a review is that* ***the court would not have acted as it had, if all 5 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,*** *in review*

jurisdiction, ***mere disagreement with the view of the judgment cannot be the ground for the 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 (See BLUE LINE ENTERPRISES LTD. vs. THE EAST AFRICAN DEVELOPMENT BANK, (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* ***to unsuccessful litigants to re-argue their case.*** *Seeking the re-appraisal of the entire evidence on record for finding the error, is tantamount to the exercise of appellate jurisdiction which is not permissible (See MEERA BHANJA vs. NIRMALA KUMARI CHOUDURY (1955) ISCC India),* ***FIVE, 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*** *(See PETER NG'HOMANGO vs. GERSON A.K. MWANGA and ANOTHER, Civil Application No. 33 of 2002 (unreported) and DEVENDER PAL SINGH v. 6 STATE, N.C.T. of New Delhi and Another, Review Petitions No.*

497, 620, 627 of 2002 (India Supreme Court). ***SIX,*** *the term* ***"mistake or error on the face of the record"*** *by its very connotation* ***signifies an error which is evident perse from the record*** *of the case and* ***it does not require detailed examination,*** *scrutiny and clarification either of the facts or the legal exposition. 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 record. In other words, it must be such as can be seen by one who runs and reads: MULLA, Commentary on the Indian Code of Civil Procedure, 1908, 14th edition at pp 2335-6, STATE OF GUJARAT vs. CONSUMER EDUCATION AND RESEARCH CENTRE (1981) a Guj. 233 STATE OF WEST BENGAL AND OTHERS vs. KAMAL SENGUPTA AND ANOTHER, (2008) 8SCC 612 and CHANDRAKAT JOSHUBHAI PATEL VS REPUBLIC, Criminal Appeal No. 3 of 2013 (unreported).* ***SEVEN,*** *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. (See BLUE LINE ENTERPRISES LTD. vs. EADB (supra) and AUTODESK INC. v. DYASON (No. 2) (1993) HCA 6 (Australia)"

From the above principles, it is now to see whether the application at hand meets the requirements laid down, since the first ground was determined in determining the applicable laws and making a finding that there are no errors apparent on the face of record, I will move to the remaining grounds of review.

The second ground of Review is that the Court was misled by the Respondent's counsel on termination date and date of absenteeism and that the Court upheld what the Applicant refers as Respondent's misleading submissions instead of Applicant's response. The third ground attacks the reasoning of this court in not considering the fact that, the alleged absenteeism was not for more than five (5) days. In these two grounds, the applicant is moving the court to make a finding that at page 13 (line 10) of its judgment, this Court upheld respondent's misleading submissions instead of the applicant's response and the Notice of Termination (exhibit D4) which speaks for itself that respondent terminated

applicant employment on 25/3/2015. He argued that the mandatory requirement to rely on the Notice of Termination is restated under Section 41(3)(ii) of Employment and Labour Relation Act, Cap. 366 R.E 2019. Mr. Godfrey also termed the judgment as a nullity because this Court had no jurisdiction to determine applicant whereabouts on 26/3/2015 and 27/3/2015 since he was not an employee of the respondent then justifying that if the court decision is a nullity, such decision is reviewed by the same court. He supported his submissions by citing the decision of the Court of Appeal in the case of **Transport Equipment Limited Vs. Devram P. Valambhia [1998] T.L.R. 89.**

Now looking at the above grounds and the advanced arguments, Mr. Godfrey is moving this same court to error its findings by agreeing with him that the alleged absenteeism was not of more than five (5) days while this court had already determined that it was for more than 5 days. He is also faulting the court in not finding that the Notice of Termination (exhibit D4) terminated applicant employment on 25/3/2015. All these are not error apparent on the face of records; rather they are attacks to the reasoning of the court and the applicant is moving this court to sit as a court of appeal to revise its own findings.

As for the fourth ground of Review which consolidated ground 5,6,7 and 8, the Applicant is alleging that the Judge erred in not considering the fact that applicant was not accused of absenteeism according to charge sheet which the Applicant responded on 27th February, 2015. He is also challenging the consideration of the visit to the physician on 04-06th February 2015 and the inexistence of a disciplinary hearing report. Again, in all these grounds the applicant is challenging the reasoning of the Court and the omission to consider some facts which he finds to be material and the evidence that was adduced during arbitration. All these establish that there are two positions to be taken and by these lengthy lines of arguments, the applicant wants this court to take his position.

In ground 9 of Review which was consolidated with ground 10, the applicant alleges that the Judge erred in not considering the fact that determination of termination procedure issues were not among respondent's prayers of determination. This ground is again inviting this court to make a determination whether this very court was right or wrong in making determination on the issue of termination procedure while it was not among respondent's prayers for determination.

As correctly argued by Mr. Ngowi, the grounds do not establish any error apparent on the face of the record, the statement just show that there were two sets of facts on which the High Court had to decide which is correct and which was wrong and in making a decision, the court was convinced by the position of the respondent's counsel. The fact that the applicant's argument did not sail through cannot be said to amount to an error apparent on the face of the record. The determination of the grounds of revision and issues raised therein was solely based on the re-evaluation of evidence and making findings and it is exactly that what the applicant has moved this court to review and make a finding that this will meet his desires.

In the case of **Mantra Tanzania Limited Vs. Joaquim P. Bonaventure (Civil Application 385 of 2020) [2021] TZCA 347 (03 August 2021),** while dealing with an application for review of its own decision, the Court of Appeal (Madame Justice Levira J.A) had this to say:

> *"We wish to state right away that this ground of review is misconceived. With respect,* ***it is our considered view that the applicant is trying to challenge the decision of the Court***

instead of indicating the purported error *forgetting that this is a review and not an appeal." (Emphasis is mine)*

On how a review should be looked at in line with the requirements of the law, the court further held:

"The law is settled that ***any error complained of must be obvious and patent mistake*** *and* ***not something which can be established by a long drawn process of reasoning*** *or arguing on points which there may conceivably be two opinions...." (Emphasis is mine).*

As for the review at hand, what the applicant is seeking is for me to review the evidence adduced at the CMA and the reasoning of this court in revision to make a finding that will favor his desires. He is moving the court to make a finding that the previous judge erred in not considering the facts/evidence adduced by the applicant during arbitration and make a new finding altogether, the basis being what the applicant believes to be the right finding. Unfortunately I do not have that jurisdiction to re-evaluate evidence that had already been decided on by my sister Judge of this same court. In the cited case of ***Hemed Husein & 5 Others versus***

Nyembela Gandawega, Misc. Civil Application No. 66 of 2003, (Unreported) this Court, at page 5 of the typed Ruling, had this to say;

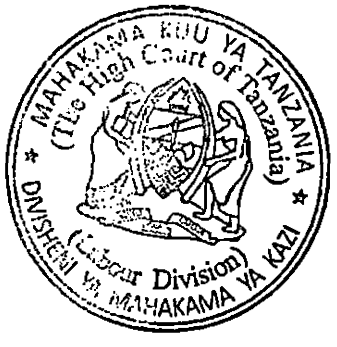
"One judge cannot set aside an order made by another judge of the same court, although it may be wrong."

Looking at all his submissions, I did not see anywhere that Mr. Godfrey established an error apparent on the face of records, therefore I entirely agree with Mr. Ngowi that the application beforehand is an appeal in disguise. There is no ground advanced by the applicant to warrant the review of the earlier decision of this same court. Not only are the grounds advanced not meeting the principles established to review an application, but the applicant has not even advanced a single error on the face of records to justify reviewing the Judgment. The grounds of revision and the prayers therein seek to re-open, re-hearing and analysis of the evidence in line with the grounds of revision to come up with a different findings from what has already been determined by the Court, an act which in my strong view, is just an abuse of the court process. All that I have observed in this review application is that the applicant is trying to challenge the decision of this Court instead of indicating the purported error while this is not an appeal. If I am to yield to his intentions, then I will find myself to have

usurped the power of appeal, something which I do not have over the decision of my Sister Judge of this same court.

In view of what I have determined above, the application is without merits and I accordingly, dismiss it.

Dated at Dar es Salaam this 27th June, 2022.



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S.M. MAGHIMBI
JUDGE