

IN THE HIGH COURT OF THE UNITED REPUBLIC OF TANZANIA

AT TABORA

REVIEW NO. 2 OF 2020

CHELA JAMES GHANAI FIRST APPLICANT

PACT TANZANIA SECOND APPLICANT

VERSUS

DEOGRATIUS NDANU.....RESPONDENT

RULING

KIHWELO, J.

The ruling in this matter was reserved by my late brother Bongole J, who died before composing this decision and therefore the matter has been re-assigned to me.

This is an application for review which was filed by the applicant represented by Apex Attorneys Advocates being aggrieved by the Judgment and Decree of this Court dated 28th February 2020 in Civil Appeal No. 1 of 2019 Hon. Bongole J. Apparently, armed with that application, the respondent, represented by G & S Associates, resisted the application by a number of preliminary objections on points of law as follows:

"1. This application is filed under a non-existing law.

2. This court is not properly moved."

Both the preliminary objections and the application for review were argued through written submissions which were filed simultaneously.

In support of the preliminary objections, it was argued that the application was incompetent for the reason that it was made under section 78 (1)(a) & (b) and Order XXII 1(1)(a) & 4(2)(a) of the Civil Procedure Code Chapter 33 ("the CPC") R.E 2018 which according to Government Notice No. 140 of 28th February 2020 that is the General Laws Revision Notice, 2020 specifically section 2(2) have been replaced and superseded by the 2019 Revised Edition. To bolster his argument, he cited the case of **Ramadhani Lugusha v Tanzania International Container**, Revision No. 212 of 2015 in which the court cited the decision of the Court of Appeal in **Project Manager Es-ko International Inc v Vicent J Ndugumbi**, Civil Appeal No. 22 of 2009 at Tabora (unreported) in which the Court stated that wrong citation of the section, sub-section and paragraphs of the law or non-citation of the law will not move the court to do what it is being asked to do and accordingly renders the application incompetent.

In reply the applicant argued that up until the filing of the written submissions the only thing that was published was the General Laws Revision Notice GN No. 140 of 2020 published on 28th February 2020 which revised 62 laws of Tanzania including the CPC but all the 62 laws were yet to be

published and that these are separate documents all together from the cited GN No. 140 of 2020. He valiantly argued that because the 62 laws are not part and parcel of GN No. 140 of 2020 and are yet to be published that is why the respondent did not attach them. He strongly distinguished the two cited decisions in that none of them related to Government Notice for Revised Laws.

The respondent went on to cite sections 18(1) to (4) of the Laws Revision Act, Cap 4 which relates to distribution of the Revised Edition once published and section 20(1), (2), (3), (4) and (6) of the Laws Revision Act, Cap 4 which relates to judicial notice of the Revised Edition and forcefully argued that while section 18 requires distribution of the revised editions once published, section 20 requires the Honourable Court to take judicial notice of the text of laws of the revised edition, but such judicial notice should be taken upon production of the volume of the revised edition that appears to have been printed by the Government Printer. He argued that the respondent did not produce such copies of the CPC Cap 33 RE 20019.

He further referred to section 3A and 3B of the CPC Cap 33 as amended by sections 5 and 6 of the Written Laws (Miscellaneous Amendments) (No.3) Act, 2018 [Act No. 8 of 2018] which introduced overriding objectives. To back this argument, he cited the cases of **Yakobo Magoiga Gichere v Peninah Yusuph**, Civil Appeal No. 55 of 2017 (unreported) and **Gaspar Peter v Mtwara Urban Water Supply Authority (MTUWASA)** (Civil Appeal No. 35 of 2017 (unreported) which discussed at lengthy the principle of overriding objective.

I have thoroughly and carefully considered the written submissions by the trained minds as well as the raised points of preliminary objections and I am of the considered opinion that the only question before me is whether or not the said points of preliminary objections have any merit at all to warrant dismissal of the application for review before this Court.

It is crystal clear that the intention of the applicant was to move this Court by way of review in order for this Court to correct its apparent error which was inadvertently made by dismissing the appeal instead of allowing it. In so doing the applicant filed an application and referred to the CPC Cap 33 RE 2018 instead of the CPC Cap 33 RE 2019. In the case of **Cropper v Smith** (1884) XXVI Ch. D 700 at page 710 Bowen, L.J had this to say-

"Now, I think it is well established principle that the object of courts is to decide the rights of the parties, and not to punish them for mistakes they make in the conduct of their cases by deciding otherwise than in accordance with their rights.....I know of no kind of error or mistake which, if not fraudulent or intended to overreach, the Court ought not to correct, if it can be done without prejudice to the other party. Courts do not exist for the sake of discipline, but for the sake of deciding matters in controversy, and I do not regard such amendment as a matter of favour or of grace."

It is instructive that the law has to be construed liberally in order to do justice. This is the essence of the Written Laws (Miscellaneous Amendments) (No.3) Act, 2018 [Act No. 8 of 2018] which introduced the overriding objective guiding the courts machinery in the determination of justice to facilitate just, expeditious, proportionate and affordable resolution of the civil disputes governed by this Act.

I am also inspired by the decision in the case of **Saggu v Roadmaster Cycles** (U) Ltd 2002 1EA 258 in which the court held that;

"Where an application omits to cite any law at all, or cites a wrong law, but the jurisdiction to grant the order exists, the irregularity or omission can be ignored and the corrected law inserted."

I must respectfully confess more in sorrow than in fear that I have found the submissions by the respondent unconvincing. In the instant case, the respondent has not in any way been prejudiced by the citation of the CPC Cap 33 R.E 2018 instead of the CPC Cap 33 R.E 2019.

The above said, in conclusion, the preliminary objections stand dismissed.

I will next address the submissions in relation to the application for review.

In support of the application for review the applicant contended that the application is based upon the fact that the Hon. Judge erred in law in that having held that the appellant's reporting of the respondent to the police

and subsequent prosecution was actuated with desire to bring justice and that the respondent was prosecuted with reasonable and probable cause and finally the absence of the two elements makes a failure in the suit of malicious prosecution, was supposed to allow the appeal instead of dismissing the appeal with costs. He went on to cite the provisions of section 78(1) (a) and (b) of the CPC as well as Order XLII 1(1)(a) of the CPC which governs the granting of the application for review.

In buttressing further, his argument the applicant referred to the case of **National Bank of Commerce v Cosmas M. Mukoji** (1986) TLR 127 and strenuously argued that the findings of the Honourable Court at pages 9, 10 and 11 are very clear and articulate without any ambiguity in that the respondent failed to prove malicious prosecution and therefore this Court should judiciously look at the error which is apparent on the face of record and review its decision.

In response, the respondent was fairly brief he contended that the application for review was filed out of total misconception of the judgment of this Court and went further to submit that there was no any error in the judgment by this Court which warrants review. He valiantly argued that the applicants merely misconceived to interpret the judgment of this Court delivered by the late Bongole J.

Upon a careful and thorough perusal of the court records, I am remained with only one issue for my determination and that is whether the instant application for review has any merit.

In my respectful opinion, this issue should not detain me much. The main argument by the applicant which is the basis of the instant application is that the Honourable Court having found that the respondent did not establish malicious prosecution by proving all the elements that constitute malicious prosecution was supposed to allow the appeal and not to dismiss the appeal. I must say that I find considerable merit in the submission by the applicant. For the sake of clarity, I would let part of the judgment of this Court paint the picture;

"That been (sic) said and done, I find no reason to discuss other grounds raised by the appellants because the absence of the above two elements makes a failure(sic) in a suit for Malicious prosecution, the consequence of which, is to dismiss the appeal with costs."

The above is conspicuously clear that Honourable Court found that the respondent did not prove malicious prosecution and hence the appeal brought by the applicants had merit and therefore the ordinary cause was to allow the appeal which had merit and not to dismiss as this Court inadvertently did. It is instructive that this Court by virtue of section 78 and Order XLII 1(1) (a) & 4(2) (a) of the CPC Cap 33 R.E 2019 is empowered to review its own decision on account of some mistake or error apparent on the face of the record and in my view, this is one of the occasions where this Court can exercise its powers under the above cited provision given the apparent error as clearly indicated above.

Consequently, I find merit in this application, the Court in its earlier judgment and decree dated 28th February 2020 ought to have allowed the appeal and not to dismiss the appeal with costs. I correct that mistake now and allow the appeal in Civil Appeal No. 1 of 2019 with costs. However, each party will bear costs of this application since the error was occasioned by the Court. Order accordingly.



P. F. KIHWELO
JUDGE
10/12/2020

Ruling to be delivered by the Deputy Registrar on a date to be fixed.



P. F. KIHWELO
JUDGE
10/12/2020



Date: 17/12/2020

Coram: Hon. B.R. Nyaki, DR

Applicant: Ms. Mariam Masandika, Advocate

Respondent: Ms. Stella Nyaki, Advocate

Bench Clerk: Grace Mkemwa, RMA

Ms. Stella Nyaki – For Ruling, we are ready.

Court: Ruling delivered in the presence of Ms. Mariam Masandika for the Applicants and Ms. Stella Nyaki, for the Respondent.

Right of appeal explained fully.



A handwritten signature in blue ink, appearing to read "B.R. Nyaki", is written above the printed name.

B.R. Nyaki

**DEPUTY REGISTRAR
HIGH COURT – TABORA
17/12/2020**