

**IN THE HIGH COURT OF TANZANIA
(COMMERCIAL DIVISION)
AT DAR ES SALAAM**

COMMERCIAL REVIEW NO. 2 OF 2021

(Arising from Commercial Case No. 52 of 2020)

I & M BANK TANZANIA LIMITED APPLICANT

VERSUS

GENERAL MOTORS LIMITED 1ST RESPONDENT

ASIF ALI 2ND RESPONDENT

AISHA ASIF ALI 3RD RESPONDENT

RULING

**K. T. R. Mteule, J
15/11/2021 & 21/1/2022**

This is an application for review filed by the Applicant Bank (I & M BANK TANZANIA LIMITED) seeking for review of this Court's decision in Default Judgment delivered by Hon. Philip J on 18th May 2021. The grounds of review as set out in the Memorandum of Reviews can be paraphrased as follows:-

1. There is a discovery of new and important matters which could not be produced by the Applicant at the time when the default judgment was made in Commercial Case No. 52 of 2020 and such new important matter is a Certificates of sale by public auction which were traced and located from the auctioneer after the Default Judgment was delivered.
2. The default judgment delivered by the court on 18th May 2021 could not take on board the new facts.



3. Commercial Case No. 52 of 2020 proceeded ex-parte the position which justifies ex parte determination of this review.
4. Existence of uncommunicated facts to the court which if communicated could have changed the results in the Default Judgment.

Basing on the grounds pleaded hereinabove the Applicant prays for the following;

1. An Order for review of the Default Judgment of this Court delivered on 18th May, 2021.
2. An order for this Court to vacate its judgment which dismissed Commercial Case No 52 of 2020.
3. An order to allow the Applicant to communicate and procedurally tender before this Honorable Court the Certificate of Sale in respect of Certificate of Title No. 186249/67, Plot No 465, Block "44" Dar es Salaam the then auctioned property of the 3rd Respondent which is a newly discovered evidence.

For the purpose of clarity, I will give a brief background to this review application. In **Commercial Case No 52 of 2020**, the plaintiff who is the instant applicant claimed for payment of **TZS 296,780,000** being the principal amount of outstanding loan balance and interest. This claim originated from an overdraft facility alleged to be advanced by the Plaintiff to the 1st defendants. One of the securities in that facility was a mortgaged property on Plot No. 465 Block 44 Dar es Salaam which was sold to recover the loan and realized TZS 110,000,000 leaving a balance of 296,000,000. The defendants defaulted appearance, consequently, a default judgment was delivered where the suit was dismissed for want of evidence to proof that what was realized from the sale of the mortgaged property was

actually TZS 110,000,000 and not otherwise. After the dismissal of the suit on this ground, the plaintiff therein is back by a way of this application of review trying to bring in grounds to change the results of the dismissed suit.

On 8th September 2021, the Counsel for the Applicant, Maimuna Ismail appeared and prayed for the matter to proceed ex parte basing on the ground that proceedings in the decision sought to be reviewed were conducted ex parte. The court directed that since this matter is a new case, service to the Respondents must be effected. The request to proceed ex-parte was therefore declined unless prove of service is provided. Following the court direction attempts to serve the Respondents commenced and first service failed to locate the Respondents as per the process server's affidavit who confirmed that the Respondent's offices were deserted. Upon the order of the court, a substituted service by publication was done.

Having received from the Applicant the proof of service by publication through the Daily News and Uhuru News Papers both of 23 October 2021, the court ordered the Application to proceed ex-parte by a way of Written Submission. The submissions were timely filed by Hamisa Nkya from Locus Attorneys.

In her submission Ms. Nkya highlighted some legal aspects on whether the law permits the review and under what grounds. According to her opinion, **Section 78 (1) b of the Civil procedure Code Cap 33 R.E 2019** allows this court to review its own decision. She further expounded the procedure applicable in review proceedings by citing **Order XLII, Rule 1 (1) of the Civil Procedure Code Cap 33 of 2019 RE (CPC)** which

provide for the following grounds to be established for review to be allowed. She stated these grounds to be:

- (a) Discovery of new and important matter of evidence which, after the exercise of due diligence, was not within the applicant's knowledge or could not be produced by him at the time the decree was passed, or order made or
- (b) mistake or error apparent on the face of record or
- (c) any sufficient reason, desires to obtain a review of the order made against the Applicant.

Arguing on the grounds of Review, Ms. Nkya submitted that the decision in **Commercial Case No. 52 of 2020** was based on lack of proof to the fact that the security which was sold in public auction realized only TZS 110,000,000 leaving outstanding balance of TZS 296,000,000. According to the Applicant's counsel, the Certificate of Sale was not availed to the Applicant because the Highest Bidders in the Auction were yet to pay the balance to the Applicant. She stated that the certificate was made available to the Applicant after the Decree was issued since it was located after the Judgment was rendered, but obtained after due diligence, thus making it a new information which was not in the possession of the Applicant during the hearing of the **Commercial Case No. 52 of 2020**.

Advocate Ms. Nkya supported her submissions by **Order XL11 Rule 1(1) of the CPC** in its proviso and stated that even with due diligence the applicant could not obtain the Certificate of Sale of C.T 186249/67, Plot 465 Block 44 Dar es Salaam. She prayed for this court be guided by the principle of overriding objective brought by the Miscellaneous Amendment



No. 3 of Act No. 8 of 2018, which requires the Court to deal with cases justly with regard to substantive justice.

Ms. Nkya Advocate cited the Court of Appeal decision in **Mapala v. British Broadcasting Corporation [2002]1 EA 132**. She recited the conditions stated therein for granting of an application for review which are **firstly**, existence of a party that is aggrieved by the decision and **secondly**, a discovery of a new and important matter or evidence which after due diligence was not within the knowledge of the party at the time of judgment or thirdly there was an error apparent on the face of record. According to the counsel, the current application for review is well accommodated by the above Decision of the Court of Appeal.

She finally prayed for the Court takes on board the new evidence of Certificate of Sale in respect of Certificate of Title No. 186249/67, Plot 465 Block 44 Dares Salaam which only realized TZS 110,000,000 in Public Auction leaving TZS 296,000,000 outstanding and allow the Review of Commercial Case No. 52 of 2020 and vacate the order of dismissal of the case.

From the Memorandum of Review and the submissions filed herein, the issue which features for determination is whether the applicant has established sufficient grounds to warrant review of the Decision of this Court.

It is relevant at this point to look at the legal aspects surrounding review applications. I agree with the Applicant's counsel that review applications are guided by the provision of **Order XLII Rule of the CPC**. For the purposes of clarity, I reproduce its contents hereunder. It provides: -

"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.

(2) A party who is not appealing from a decree or order may apply for a review of judgment notwithstanding the pendency of an appeal by some other party except where the ground of such appeal is common to the applicant and the appellant, or when, being respondent, he can present to the appellate court the case on which he applies for the review."

From the above provisions the following are prerequisite factors which should be established to warrant a review of court's own decision.

- (1) There should be a decree or order in which no appeal is allowed, or appeal is allowed but not preferred,
- (2) Upon discovery of new evidence which could not be produced when the order was made or upon discovery of an apparent errors on face of record.
- (3) Upon there be sufficient reasons.



Although there are 4 grounds in which the application is said to be premised, essentially, I can see only one ground featuring in all four grounds. What I construe from the memorandum of review and from the submissions, the application is premised on the ground of discovery of new evidence which could not be produced when the order was made. I will therefore focus on this ground which I believe to be able to cover all the other grounds in the memorandum of review.

It is submitted by the Applicant that after the delivery of the default judgment, the applicant/plaintiff discovered Certificate of Sale of C.T 186249/67, Plot 465 Block 44 Dar es Salaam, which was not supplied to her during the hearing of the suit. As to why the said certificate was not in the applicant's possession or was not availed to her during the hearing of the matter which rendered the impugned decision, the Applicant's counsel stated that the Certificate of Sale was not availed to the Applicant because the Highest Bidders in the Auction were yet to pay the balance to the Applicant and that the certificate was only made available to her after the Decree was issued since it was located after the Judgment was rendered but obtained after due diligence.

I have contemplated the justification advanced by the applicant but so much is desired to create a better understanding of the excuse she is providing. The provision of **Oder XLII Rule 2(2) of the CPC** is clear when an applicant wants to rely on a discovery of a new important matter. The reliance is only permissible *after the exercise of due diligence*, the relied new matter *was not within the applicant's knowledge or could not be produced by him at the time when the decree was passed or order made*. I don't get exactly what caused the failure on the part of the applicant to

access the certificate of sale before the **Commercial Case No. 52 of 2020** was decided.

I subscribe to the views of my learned sister Hon Maghimbi J in **Richard Nicholaus Matiku Versus Barney I.S. Laseko Misc. Land Application No 79 Of 2020 High Court Land Div. (Unreported)**. The Hon Judge had the following to say:

"On the discovery of new and important evidence, the applicant's argument was that the advocate had earlier presented a memorandum of appeal on 13/07/2017 well in time but was not admitted on the advice that it was subject to application for extension of time. On this point, a line of difference must be drawn between what constitute a discovery of new and important evidence and what is an afterthought. In considering a discovery of new and important evidence, the court must be convinced that at the time of hearing of the case, that evidence could not be procured by a party without any undue delay or could not be procured at all. The evidence must then have been procured after the matter was concluded and it is important that this evidence is heard as it will have a direct impact on the findings of the court. With respect, the prior filing of an appeal does not amount to evidence not within applicant's reach or knowledge that could not be procured without unnecessary delay. To the contrary, what Mr. Zake is attempting to present is an afterthought. What I see here is that the applicant is now playing trial and error game. Since he could not convince the court then, he has now, as an afterthought, come back with a new issue which & there is no explanation whatsoever why it could not be tabled to the court during hearing of the application for extension of time. This ground is also dismissed."

In short, the discovered matter should not be an afterthought. The applicant's explanation is not sufficient as to why she was not in possession of documents which were just held by auctioneers who conducted the sale

at the instance of the same applicant. I have considered the submissions from both parties and looked at all the grounds of review. The fact that there is a discovered new fact which could not be produced at the time of hearing is not sufficiently grounded hence cannot suffice a ground to warrant review of the decision of the Court in **Commercial Case No. 52 of 2020**. The issue framed is therefore answered in the negative. This Commercial Review is therefore rejected. It is so ordered.

Dated at Dar es Salaam this 24th Day of September 2021.



K.T.M.
KATARINA T. REVOCATI MTEULE

JUDGE

21/1/2022