IN THE COURT OF APPEAL OF TANZANIA

AT DAR ES SALAAM

(CORAM: MWARIJA, J.A., KOROSSO, J.A., And FIKIRINI, J.A.)

CIVIL APPLICATION NO. 265/01 OF 2019

WASWARD WILSON MAPANDE ..... APPLICANT

VERSUS

FIRST NATIONAL BANK TANZANIA LIMITED ..... RESPONDENT

(An Application for Review from the Decision of the Court of Appeal of Tanzania at Dar es Salaam)

(Mwarija, Mwangesi, and Kitusi, JJA.)

dated the 27th day of June, 2019
in
Civil Appeal No. 20 of 2016

.....

RULING OF THE COURT

2nd & 15th November, 2021

KOROSSO, J.A.:

Wasward Wilson Mapande, the applicant filed the instant application pursuant to Rules 48 (1) and 66(1)(a), (d) and (6) of the Tanzania Court of Appeal Rules, 2009 as amended (the Rules) to move the Court to review its own decision (Mwarija, J.A., Mwangesi, J.A., and Mwandambo, J.A.) in Civil Appeal No. 20 of 2016 of 27/06/2019. The application is supported by an affidavit sworn by the applicant.

The application is predicated on two grounds found in the notice of motion and reproduced states that:

> *"In the judgment, the Court committed a manifest error on the face of the record which has resulted into miscarriage of justice as the issue of jurisdiction of the trial court was not finally and conclusively determined, especially, taking into account that jurisdiction is always an issue and can be raised at any stage even on appeal and parties cannot consent or compromise on jurisdiction. Further that there is a general legal important principle of law to the general public manifest on the face of the record as to whether after breach in different credit facilities, which facilities were secured by distinct legal mortgages, the mortgagee is mandatorily required to issue distinct notices of default or/and demand notices before enforcing the rights under mortgage such as institution of suits."*

The above is also reflected in the applicant's affidavit supporting the notice of motion in paragraphs 11 and 12.

The respondent countered the applicant's assertions and averments found in the notice of motion and the supporting affidavit through an affidavit in reply sworn by Innocent Mushi, learned Advocate authorized to represent the respondent.

In the decision sought to be reviewed, apart from upholding the judgment of the High Court and dismissing the appeal, the Court had rejected the applicant's prayer to reconsider the preliminary objection points he raised in the High Court that included one challenging its jurisdiction to adjudicate the case before it in Commercial Case No. 75 of 2014 (Maige, J.). The applicant faulted the High Court for not finally and conclusively determining the preliminary objection points raised and upon considering the record before it, the Court was satisfied that the High Court did determine the preliminary objection by dismissing it on 1/10/2014.

When the application was called for hearing, the applicant who fended for himself appeared in person, while the respondent had the services of Mr. Innocent Felix Mushi, learned counsel.

In arguing the application, the applicant adopted the notice of motion, the supporting affidavit and the written submission so that they form part of his overall submission and urged the Court to find that there was a manifest error on the face of the record for reason that the Court failed to appreciate the fact that the preliminary points of objections raised by the applicant in the High Court were not conclusively determined and thus rendering the decision erroneous. In

the written submission, the applicant contended that although he was aware that there is no judgment which can attain perfection and there will be errors here and there and that not every error justifies a call for review, nor is a review an appeal in disguise but the application before the Court outlines patent errors in the judgment of the Court which resulted into miscarriage of justice as set out in the notice of motion and the affidavit supporting it in the context of Rule 66(1)(a) of the Rules.

The applicant argued that first, he had raised an objection questioning the jurisdiction of the trial court which was not fully determined and was only mentioned in the judgment despite the fact that such an objection can be raised at any stage even on appeal. To reinforce his argument the cases of **Desai vs Warsama** [1967] 1EA 351, **Allarakhia vs Aga Khan** [1969] 1EA 163 and **TRA vs Kotra Co. Ltd,** Civil Appeal No. 12 of 2009 (unreported) were cited. The applicant was also aggrieved by the fact that the trial court and the Court, understanding that he was a layperson and unrepresented, did not provide any guidance related to process of determination of the objections which he had raised. He argued that even though the judgment entered in the High Court partly favoured the respondent's claims in the sum granted, no reasons were provided why the trial court

judgment entered partially favoured him. He cited the case of **Roshan Meghee and Co. Ltd vs Commissioner General Tanzania Revenue Authority** [2017] TLS LR 482 to bolster his argument. The applicant urged the Court to grant the application as sought with costs.

Mr. Mushi on the other hand, began by adopting the affidavit in reply deposed by the counsel for the respondent and the written submission lodged on 16/9/2019 and urged the Court to consider them as part of the oral submissions. He then proceeded to oppose the application and urged the Court to dismiss it for being untenable, arguing that the grounds fronted by the applicant failed to meet the yardsticks founded in Rule 66 (1) (a) and (d) of the Rules for which the application is founded. He had the following reasons in support of his argument; **one**, the advanced grounds are mere assertions and no apparent error or omission in the record has been shown to warrant an order of review of the impugned judgment. **Two**, the counsel submitted that the issue of jurisdiction was clearly dealt with and determined by the Court as found at page 7 of the impugned judgment and thus cannot be entertained as grounds for review in the instant application. He urged the Court to be alive to the conditions or circumstances envisaged in a review application especially when reliance is that there is

an error manifest on the face of the record. He also castigated the cited cases urging the Court to find them distinguishable and irrelevant to the prayer sought.

On the second ground of review, the counsel for the respondent implored us not to consider the ground for reason that it was not within the ambit of the conditions set in such an application under Rule 66(1) of the Rules. He contended further as found in the written submissions that the matter disputed at the trial court was based on contract and the decision reflected this as the crux of the matter. He argued that taking that into account, the complaint has no relevance and implored the Court to refrain from considering the cited cases arguing that they added no value to the unmeritorious ground. Mr. Mushi ended his submissions contending that the applicant has failed to meet the conditions set for review set by the law and prayed that the application be dismissed with costs.

In rejoinder, the applicant reiterated his earlier submissions and introduced another concern that he was not heard on the preliminary objection raised and beseeched the Court to grant the application with costs.

Having heard the submissions, considered both oral and written submissions and referred to authorities from the applicant and the counsel for the respondent, lets start by examination of the law which was presented to move the Court in determination of this application. It is pertinent to be reminded that the Court's mandate to review its own decision under section 4(4) of the Appellate Jurisdiction Act, Cap 141 RE 2002, now 2019 (the AJA) is pursuant to Rule 66(1) of the Rules which provide thus:

> *"66(1) The Court may review its judgment or order, but no application for review shall be entertained except on the following grounds:*
>
> *(a) the decision was based on a manifest error on the face of the record resulting in the miscarriage of justice/or*
>
> *(b) a party was wrongly deprived of an opportunity to be heard;*
>
> *(c) the court's decision is a nullity/or*
>
> *(d) The court had no jurisdiction to entertain the case/or*
>
> *(e) The judgment was procured illegally or by fraud or perjury."*

A careful examination of the above provision reveals that for the mandate of review to be exercised, the person seeking it must fulfil the set-out parameters. In the instant application, the notice of motion and supporting affidavit shows that the grounds upon which the review is sought are Rule 66(1)(a) and (d) of the Rules. In essence, what the applicant is relying on in this application, is that the decision of this Court to be reviewed is engrained with **one**, a manifest error on the face of the record that has resulted in miscarriage of justice and **two**, that the court had no jurisdiction to entertain the case.

On the concern number one, we find no need to go through a lengthy discussion on what the phrase; "manifest error on the face of the record" is, since it is well settled through various decisions of the Court, including; **Chandrakant Joshubhai Patel vs Republic** [2004] T.L.R 218, **Ghati Mwita vs Republic**, Criminal Application No. 3 of 2013, **Suddy Mshana @Kasala vs Republic**, Criminal Application No. 2/09 of 2018 and **Omari Mussa @Akwishi and 2 Others vs Republlc**, Consolidated Criminal Application Nos. 117, 118 and 119/07 of 2018 (all unreported). We are also inspired by how the phrase "mistake or error on the face of the record" was expounded in MULLA,

Commentary on the Indian Code of Civil Procedure, 1908, 14th edition at pp 2335-6, discussing this matter stated:

> *"... on the term 'mistake or error on the face of the record' by its very connotation signifies an error which is evident pers se from the record of the case and does not require detailed examination, scrutiny and elaboration either of the facts or the legal position. If an error is not self-evident and detection thereof requires a long debate and process of reasoning, it cannot be treated as an error on the face of the record. To put it differently, I must be such as can be seen by one who runs and reads."*

The above excerpt was cited in the case of **Chandrakant Joshubai Patel** (supra) having quoted with approval and essentially it emphasizes the fact that an error must b such that it can be seen by a person running and not one which can only be established by a long-drawn process of reasoning on points on which there may invariably be two opinions. In **Seif Mohamed El-Abadan vs Republic**, Criminal Application No. 8/12 of 2020 (unreported), we stated that:

> *"It has also been stressed that an error on the face of the record resulting into the impugned decision and an erroneous decision are not one*

and the same. If established, the former warrants a review but the latter does not it being the law that an erroneous decision is amenable to appeal and not a review."

At this juncture, we will move to consider the grounds of review raised by the applicant in light of the stated legal principles. In ground number one the applicant faults the Court arguing that there is a manifest error on the face of the record as the issue of jurisdiction of the trial court was not finally and conclusively determined. Can this be said to fall under Rule 66(1)(a) of the Rules? We think not, since in essence, what the applicant is doing is expressing dissatisfaction with the Court for not considering and finally determining the objection raised on jurisdiction.

In the impugned judgment at page 7, the preliminary objection is discussed, and we find it pertinent to reproduce the relevant part:

"... However, the appellant sought to be heard on a point of law he impressed upon us to be necessary, for it touched on the trial court's jurisdiction. The appellant's contention was predicated on page 67 of the record of appeal whereby the appellant had raised a notice of preliminary objections one of which being lack of

jurisdiction. According to the appellant, the trial court did not determine the said preliminary objection(s) and so it was appropriate for this Court to consider it. Upon a brief dialogue with the appellant and having perused the trial court's original record, we declined to accede to the appellant's invitation, for it became apparent that contrary to his assertion, the trial court dismissed the preliminary objections on 1st October 2014. Otherwise, as observed earlier on, the appellant had nothing substantive to add on his written submissions other than urging us to allow his appeal by reason of the trial court's alleged error in entertaining the suit regardless of the fact that the respondent had not issues a statutory notice on both credit facilities..."

Our scrutiny of the above excerpt shows that the Court provided an opportunity for the applicant to be heard on a point of law he fronted, had a dialogue with him, and had time to peruse through the record. Upon being satisfied that the concern raised, that the objections were not determined was misconceived since they were satisfied from the record that the Court did determine the same, the matter was not taken forward. Therefore, in essence, the complaint by the applicant is dissatisfaction with how the Court decided on the concern he raised and

he essentially inviting us to re-evaluate the holding of this Court on the point of law he raised at the start of hearing of the appeal and not that there is an error which can be discerned from the record.

As highlighted hereinabove, a manifest error must be obvious, self -evident and not something that can be established by a long-drawn process. Agreeing to the applicant's prayer will mean revisiting the record of the trial court and re-evaluating what transpired in court there, which is not the role of the Court in a review. In **Charles Barnabas vs Republic**, Criminal Application No. 13 of 2009 (unreported), we held that:

> *"... 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"*

Taking into account what is before us, we are of the view that the applicant has not demonstrated that his complaint is an error manifest on the face of the record but that he holds a different opinion from what the Court found which cannot be a basis for reviewing a decision of the Court as alluded to hereinabove.

Regarding ground two that there is a general principle of law manifest on face of record as to whether after the breach in different credit facilities secured under separate mortgages, can be determined without issuance of notices of default. According to the notice of motion and the affidavit supporting it, it is grounded under Rule 66(1)(d) on matters related to jurisdiction. Suffice to say, this ground need not take much of our time, since it was a ground of appeal in the impugned decision as can be seen at page 6 of the judgment where the grounds of appeal were reproduced and grounds 1 and 2 states:

> *"1. That the Honourable judge erred in law and facts by entering judgment in favour of the respondent herein without taking into consideration that issuance of statutory notice was paramount in mortgage transactions and instead treated the suit based on contract and not mortgage per se;*
>
> *2. That, the Honourable Judge erred in law and fact when he decided the case n a single suit whereas there were two independent mortgages that were guided by different contracts."*

In **Abdi Adam Chakuu vs Republic**, Criminal Application No. 2 of 2012 (unreported), where in an application for review the Court was

called upon to review the decision of the Court, on a ground that is similar to a ground of appeal which the impugned decision dealt with, we said:

> *"There is no doubt from the grounds of review that the applicant is challenging the merits of the judgment of the Court that had earlier dismissed the appeal. This Court has always taken a position that; grounds of appeal cannot be relied upon as grounds of review."*

Again, in **Charles Barnabas vs Republic** (supra) the Court held:

> *"... 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... **One**, a review is not an appeal. It is not "a second bite", so to speak..."*

Clearly, the Court deliberated thoroughly on the two grounds of appeal relevant to ground two of the instant application at pages 7-14 and determined them, thus, the applicant dissatisfied with the holding, cannot come back in disguise, like a second bite to seek remedy on matters already determined. Thus, this ground does not also fall within the ambit of the requirements envisaged for review.

In the end, considering the foregoing, as rightly submitted by the counsel for the respondent, the instant application is devoid of merit. As a result, we are constrained to dismiss it with costs as we hereby do. Order Accordingly.

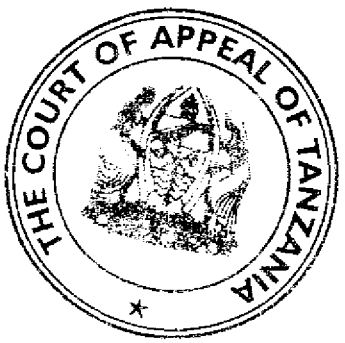
DATED at **DAR ES SALAAM** this 11th day of November, 2021.

A. G. MWARIJA
JUSTICE OF APPEAL

W. B. KOROSSO
JUSTICE OF APPEAL

P. S. FIKIRINI
JUSTICE OF APPEAL

The ruling delivered this 15th day of November, 2021 in the presence of applicant in person and Mr. Innocent Mushi, learned counsel for the respondent is hereby certified as a true copy of the original.



S. J. KAINDA
DEPUTY REGISTRAR
COURT OF APPEAL