IN THE COURT OF APPEAL OF TANZANIA
AT DAR ES SALAAM

(CORAM: MSOFFE, J.A., KIMARO, J.A., And MBAROUK, J.A.)

CIVIL APPLICATION NO. 23 OF 2005

1. EFFICIENT INTERNATIONAL FREIGHT LTD
2. DR. GIDEON HOSEA KAUNDA.....} APPLICANTS

VERSUS

OFFICE DU THE DU BURUNDI..... RESPONDENT

(Application from the Judgment of the Court of Appeal of Tanzania at Dar es Salaam)

(Ramadhani, J.A., Mroso, J.A., And Msoffe, J.A.)

dated 4th day of February, 2005

in

Civil Appeal No. 5 of 2004

RULING OF THE COURT

13 & 27 May, 2011

MSOFFE, J.A.:

At the hearing of this application, we invoked the provisions of Rule 63(2) of the Tanzania Court of Appeal Rules, 2009 (the Rules) and proceeded in the absence of the respondent after we were satisfied that substituted service by publication was effected in the *Daily News* and *Majira* newspapers, vide; this Court's Order dated 19/2/2010.

In its contents and demands this application seeks a review of this Court's Judgment in **Efficient International Freight Ltd and Another v Office du the du Burundi,** Civil Appeal No. 5 of 2004 (unreported) where in its *ratio decidendi* this Court upheld the High Court (Luanda, J. as he then was) that the first applicant, being a stranger to the contract between Office du the du Burundi and Specialized International Freight (PTY), could not enforce rights accruing therefrom.

The law governing this Court's power of review is now settled. In terms of Rule 66 (1) of the Rules, this Court may review its judgment or order 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.

As to what constitutes *"a manifest error,"* as per paragraph (a) above, this Court in **Chandrakant Joshubhai Patel v Republic**, Criminal Application No. 8 of 2002 (unreported) had occasion to observe or point out that:-

> *..... It must be obvious, self-evident, etc., but not something that can be established by a long drawn process of learned argument.*

Generally speaking, in a review it is expected that the Court should not sit on appeal against its own judgment in the same proceedings. In this sense, the Court should not attempt to go to the merits of the case because by doing so that would actually mean reopening the appeal. We have deemed it necessary to restate this position because inspite of this Court's warning or observation in **Dr. Aman Walid Kabourou v The**

Attorney General and Another, Civil Application No. 70 of 1999 (unreported) on unnecessary applications for review, of late the tendency has been for some parties to file applications for review in the hope of trying their luck. In **Kabourou's** case (supra) this Court stated:-

> *We shall therefore in future not look kindly to applications for review which in reality only amount to trying one's luck. This approach has a tendency of unnecessarily taking up the Court's valuable time and even raising false hopes in the minds of clients. Counsel have therefore a duty to refrain from doing the above two things. They should have the courage and honesty to tell their clients the true position. Unless of course the intention is merely to buy time which in our view is worse.*

Further to the above, we also wish to observe by way of emphasis that a review is not a stage or step in the appeal process or structure. We say so

because, yet again, of late it is apparent that some parties appear to think that once aggrieved by the outcome of an appeal there is always an automatic right of a review. As already alluded to, a review is only available in the circumstances shown above. A review is not available as an automatic remedy to an aggrieved appellant.

Mr. Deogratias Baburifato, a Principal Officer to the 1st applicant Company, appeared on behalf of both applicants. In the process he also filed a written submission in support of the application. In the submission we can discern two points that may fall within the ambit of a review: a manifest error and the right to be heard. We will address these two points only because they are covered by the provisions of Rule 66(1) (a) and (b) of the Rules.

In our reading and understanding of the written submission, it occurs to us that Mr. Baburifato appears to be saying that there was an error in law by the High Court and this Court in not articulating properly the privity

rule. To this end, at page 5 of the written submission Mr. Baburifato stated the law on privity rule thus:-

> *A third party to a contract is a person who is not a party to the contract and has not provided consideration for the contract but has an interest in its performance. There has been a long established rule, that only the parties to a contract could incur rights and obligations under it. Described as the doctrine of privity, this principle meant that third parties could neither sue nor be sued under a contract.*

Then he went on to cite the English Contracts (Rights of Third Parties) Act 1999 to the effect that third parties can enforce contractual terms "in certain situations". So, as we shall demonstrate hereunder, Mr. Baburifato was of the view that there were "certain situations" in this matter under which the 1st applicant had the right to enforce the contract.

To start with, we do not think that the above so called error is the sort of manifest error envisaged under Rule 66 (1) (a) of the Rules read together with this Court's decision in **Patel's** case (supra). The alleged error is not obvious, self-evident etc. If it were to be established it is one which would need to be argued by a long process of learned argument. That would not be in line with the spirit contemplated by **Patel's** case (supra). Notwithstanding this general proposition, when we asked Mr. Baburifato to tell us whether there were "*certain situations*" under which the 1st applicant could enforce the contract in this case his response was that it was possible because the said applicant was in a joint venture with Specialized International Freight (PTY). With respect, without being drawn into the merits of the appeal subject of this application, we will state outright here that the mere mention in the agreement that the 1st applicant was a member of a joint venture did not give the 1st applicant an automatic right in the enforcement of the contract in which it was not party to.

Having said so, we are also aware that Mr. Baburifato submitted that the 1st applicant could enforce the contract as "*a principal*" to the "*agent*" meaning that the 1st applicant was a "principal" to the Specialized

International Freight (PTY). Yet again, this point has no basis because we do not read anything in the contract to suggest that there was the alleged principal and agent relationship. At any rate, all these are matters which were not raised in the appeal subject of this application.

On the breach of the right to be heard, Mr. Baburifato alleges that Luanda, J. did not give the 1st applicant the right to be heard in the application for stay of arbitration proceedings. Furthermore, that the applicant's application for setting aside the *exparte* order for staying the arbitration proceedings was ignored by the judge. Yet again, with respect, this point is being raised for the first time in this application. It was not taken up in the appeal. Anyhow, even if the point had been raised we do not see how it could have affected or dislodged the general proposition of the law invoked by both the High Court and this Court that the 1st applicant, being a stranger, had no right to enforce rights accruing under the agreement between Office du the du Burundi and Specialized International Freight (PTY).

When all is said and done, we are of the view that this is an example of one of those unnecessary applications for review we pointed out above. The application is not only futile but is a waste of the Court's valuable time. Needless to say, there has to be an end to litigation.

We hereby dismiss the application. We make no order as to costs because there was no appearance or presentation of any sort by the respondent.

DATED at **DAR ES SALAAM** this 17th day of May, 2011.

J.H. MSOFFE
JUSTICE OF APPEAL

N.P. KIMARO
JUSTICE OF APPEAL

M.S. MBAROUK
JUSTICE OF APPEAL

I certify that this is a true copy of the original

J.S. MGETTA
DEPUTY REGISTRAR