IN THE HIGH COURT OF TANZANIA

(DAR ES SALAAM DISTRICT REGISTRY)

AT DAR ES SALAAM

CIVIL REVIEW NO. 6 OF 2021

(From Misc. Civil Application No. 670 of 2018)

TERRESTRIAL TANZANIA LIMITED.....APPELLANT

VERSUS

TANZANIA ZAMBIA RAILWAY AUTHORITY.....RESPONDENT

RULING

Last order: 10/3/2022
Date of Ruling: 1/4/2022

MASABO, J.:-

On 20th June 2019, I delivered a ruling dismissing Misc. Civil Application No. 670 of 2018 vide which the applicant herein had prayed for a leave for enlargement of time within which file a memorandum for review of the decision of this court in Civil Case No. 117 of 2008 which had disgruntled her. Displeased by the dismissal order, she has come back with a memorandum for review filed under section 78(a) and Order XLII rule 1(a) of the Civil Procedure Code, [Cap 33 RE 2019]. In this memorandum he has set the following ground for review:

1. The Honourble Court erred in law and in fact in refusing the application for extension of time to apply for review on the basis of magnitude of the time that had lapsed without taking into account the fact that, most of the delay was attributable to the court itself as the court file could not be traced.

Hearing of the review proceeded *ex parte* after the respondent and his counsel defaulted appearance on the date scheduled for hearing. Addressing the court, Mr. Job Kerario, the learned counsel for the applicant, submitted that the court erroneously dismissed the application for extension of time as the finding that the inordinate delay was occasioned by the applicant's negligence overlooked the deposition that the delay was occasioned by the court's failure to supply the applicant with the copy of the decree and judgment and that after obtaining the said copies, he filed an application for extension of time.

I have carefully considered the submissions made by the learned counsel. To begin with, section 78 (1) (a) and Order XLII rule 1(a) of the Civil Procedure Code, [Cap 33 RE 2019] under which the present application has been preferred provides as follows:

78.-(1) Subject to any conditions and limitations prescribed under section 77, any person considering himself aggrieved-

(a) by decree or order from which an appeal is allowed by this Code but from which no appeal has been preferred;

(b) n/a

may apply for a review of judgment to the court which passed the decree or made the order, and the court may make such order thereon as it thinks fit.

Order XLII rule 1(a)

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;

(b) n/a

and who, from the discovery of new and important matter or evidence which, after the exercise of due diligence, was no 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.

These provisions have been extensively litigated and the parameters within which a review can be exercised are fairly settled. In **James Kabalo Mapalala v. British Broadcasting Corporation** [2004] TLR 143, the Court of Appeal of Tanzania held that:

> It is hardly necessary to point out that in an application for review, the judge is not sitting as an appellate Court. In that situation, if the judge is satisfied that the tests for review laid down under Order XLII, rule I are met, it is expected of him to grant the application by effecting the relevant and necessary rectification and corrections sought in the judgment which in warranting circumstances, may be varied as a result of the new and important matters discovered. Otherwise, the judgment is not quashed in a review application. On the other hand, if the judge is satisfied that there is no sufficient ground to justify a review, the application is rejected by dismissing it.

Also relevant is the judgment of the Court of Appeal in **Charles Barnabas vs. Republic**, Criminal Application No. 13 of 2009, CAT (unreported). In this case, the Court while determining its review mandate, stated 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. ....., a review is not an appeal. It is not "a second bite so to speak."

In the present application, the ground for review set out in the memorandum for review and the submission made by the learned counsel, presuppose that the application is predicated on existence of a manifest error in the ruling. The question that follows is what constitutes a manifest error and whether there exists a manifest error in the ruling challenged by the applicant. Luckily, this is not an unchartered territory. In **Vitatu and Another v Bayay and Others**, Civil Application No. 16 of 2013 (unreported), the Court of Appeal held that:

> a manifest error for purposes of grounding an application for review must be an error that is obvious, self-evident, etc., but not something that can be established by a long-drawn process of learned argument: **Chandrakant Joshughai Patel v. Republic**, [2004] TLR 218. The

decision of the Court of Appeal of Kenya in **National Bank of Kenya Limited v Ndungu Njau** [1997] eKLR can as well provide us with a persuasive guide when it stated:

> "...A review may be granted whenever the court considers that it is necessary to correct an apparent error or omission on the part of the court. The error or omission must be self-evident and should not require an elaborate argument to be established. It will not be a sufficient ground for review that another Judge could have taken a different view of the matter. Nor can it be a ground for review that the court proceeded on an incorrect exposition of the law and reached an erroneous conclusion of law. Misconstruing a statute or other provision of law cannot be a ground for review."

Also, in **Attorney General vs Mwahezi Mohamed & Others**, Civil Application 314 of 2020 (unreported), the Court having cited with approval its previous decisions in Chandrakant **Joshubhai Patel** (supra), **Tanganyika Land Agency Limitedand 7 Others v. Manohar Lai Aggrwal**, Civil Application No. 17 of 2008, **Maulidi Fakihi Mohamed @Mashauri v. Republic**, Criminal Application No. 120/07 of 2018 and **Nguza Vikings @ Babu Seya and Another v. Republic,** Criminal Appeal No. 5 of 2010 (all unreported), emphatically stated that,.

> ..... the term "manifest error on the face of record" signifies an error which is evident from the record and it does not require scrutiny, arguments and/or clarification either of facts, evidence or legal exposition. In other words, a "manifest error on the face of record" also signifies a plain error.

Thus guided, I have carefully examined the application to discern the manifest error if any. In this endevoured, I have observed that, from the ground set out in the memorandum of review and the submission made by the learned counsel, it is crystal clear that the applicant has failed the test articulated in the authorities above as the error if any cannot be established in the absence of a long-drawn process of learned argument. As it could be seen from the ground for review and the submission by the applicant's counsel, the applicant is persuading this court to go back to affidavit he filed in support of the chamber summons in Misc. Application No. 670 of 2018, re-evaluate the evidence he adduced through this affidavit and form a fresh opinion on whether or not the applicant contributed to the delay.

I respectfully decline this invitation because in doing so, the court will assume the risk of seating as an appellate court against its decision. As the impugned ruling will demonstrate, the applicant had invited the court to

invoke the provision of section 19(5) of the Law of Limitation Act [Cap 89 RE 2019] and after a thorough consideration, the court declined to invoke this provision after it found the applicant to have contributed to the delay. In my settled view, it would be lucidly wrong for this court to re-open and re-asses the evidence. It need not be over emphasized that, as held in **Attorney General vs Mwahezi Mohamed & Others** (supra) and other cases above cited, a final decision of a court once pronounced, it cannot be appealed against under the umbrella of review. Under the premises, the review fails and is dismissed for want of merit.

Dated at Dar es Salaam this 1st April 2022.

X

Signed by: J.L.MASABO

J.L. MASABO

JUDGE