IN THE COURT OF APPEAL OF TANZANIA

AT MBEYA

(CORAM: MWAMBEGELE, J.A., KOROSSO, J.A. And RUMANYIKA, J.A.)

CIVIL APPLICATION NO. 644/06 OF 2021

AUSTACK ALPHONCE MUSHI ..... APPLICANT

VERSUS

BANK OF AFRICA TANZANIA LTD ..... 1ST RESPONDENT

MABUNDA AUCTION MART CO. LTD ..... 2ND RESPONDENT

(Application for review against the decision of the Court of Appeal of Tanzania at Mbeya)

(Ndika, Sehel and Kente, JJ.A)

dated the 25th day of September, 2021
in
Civil Appeal No. 373 of 2020

.....

RULING OF THE COURT

26th & 29th September, 2022

KOROSSO, J.A.:

In this application, Austack Alphonce Mushi, the applicant, is asking this Court to review its previous decision in **Austack Alphonce Mushi v. Bank of Africa Tanzania Ltd. and Another**, Civil Appeal No. 373 of 2020 (unreported) where the applicant's appeal was dismissed for want in merit. In that appeal, the applicant was challenging the decision of the High Court at Mbeya in Land Case No. 15 of 2015 where he had sued the respondents claiming for the declaration that the intended sale of the land on Plot No. 1541 Block M at Forest Area and Plot No. 191 Block T situated

at Mwanjelwa area in Mbeya (the suit land) was premature as the applicant was in ongoing negotiations to pay the outstanding loan balance. His other claims included general and special damages allegedly resulting from the wrongful acts of the 1st respondent breaching the loan agreement. The suit was dismissed for want of *locus standi* on the part of the applicant.

The application before us is by way of notice of motion made under the provisions of Rule 66 (1) (a) of the Tanzania Court of Appeal Rules, 2009 (the Rules) supported by an affidavit avowed by Mr. Justinian Mushokorwa, learned Advocate who was at the time acting as the counsel for the applicant. Suffice it to note that at the inception of the hearing of the application on 26/9/2022, the Court granted Mr. Mushokorwa's application to be discharged from representing the applicant for lack of proper instructions. There was no affidavit in reply filed by the respondent to resist the application.

The application was argued in the presence of the applicant who entered appearance in person, fending for himself, while Dr. Tasco Luambano, learned Advocate, represented the respondent.

When called upon to amplify his application, the applicant prayed to adopt the notice of motion and the supporting affidavit and that we

consider the contents therein which he claimed expounded on the gist of the application and the grounds founding the application. He thus urged us to grant the reliefs sought with costs.

Mr. Luambano commenced his submission by imploring us to record that the respondent's opposition to the application despite having failed to duly file the affidavit in reply. Subsequently, he sought and was granted leave to address the Court on points of law only. He then pointed out that the two matters for consideration are; **one,** that the notice of motion and supporting affidavit do not comply with the requirements envisaged in Rule 66 (1) (a) of the Rules. Expounding on this, he contended that the Court has in previous decisions given directions on conditions requisite for grant of an application for review and cited the case of **Shami Shaha v. Ibrahim Haji Selemani and 2 Others**, Civil Application No. 163/17 of 2019 (unreported) that discussed the benchmarks for exercising the Court's jurisdiction in an application for review in terms of Rule 66(1)(a) of the Rules. These include outlining the presence of a manifest error on the face of the judgment sought to be reviewed resulting in miscarriage of justice. **Two**, the fact that upon applying the said tests to the instant application, the alleged manifest error cannot be detected on the face of the record as envisaged by Rule 66 (1)(a) of the Rules. He argued that

the affidavit supporting the notice of motion has not presented an explanation of the alleged errors of law manifesting miscarriage of justice. According to him, in such circumstances, the Court cannot proceed to review its decision and pointed out that the Court is not mandated to reassess the evidence already deliberated on by the Court on appeal. The learned counsel concluded by praying that the application be dismissed with costs, for lack of merit.

The applicant's rejoinder was to reiterate the contents of his application found in the notice of motion and supporting affidavit and to reaffirm the fact that the application was not an appeal in disguise but an application for review. He urged the Court to find that there is a manifest error on the face of the Judgment of the Court on appeal that has prejudiced his rights. He implored us to grant the application as prayed.

We have dispassionately considered the contents of the application before us and the submissions of both the applicant and the learned counsel for the respondent for and against the application. Our understanding is that what is before the Court for determination is whether there is a manifest error on the face of the record as envisaged in Rule 66 (1) (a) of the Rules, to warrant this Court to review its decision.

The mandate for the Court to review its decision is provided by section 4(4) of the Appellate Jurisdiction Act, Cap 141 R.E 2002, now R.E. 2019 (the AJA). The principles governing review have been developed through case law and codified in Rule 66(1) (a) to (e) of the Rules which stipulates that:

> *"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."*

In our previous decisions, we have endeavoured to define the phrase "manifest error on the face of the record' interpreting the phase as can be discerned from our decisions in the case of **Chandrakant Joshubai Patel v. Republic** [2004] TLR 2018, **George Mwanyingili v. The Director of Public Prosecutions**, Criminal Application No. 27/6

of 2019 and **Elia Kasalile and 17 Others v. Institute of Social Work**, Civil Application No. 187/18 of 2018 (both unreported). In **Chandrakant Joshubai Patel** (supra), the Court quoted an excerpt in **MULLA: The Code of Civil Procedure**, 14th Edition, on pages 2335-6 on what amounts to "a manifest error on the face of the record that:

> *"An error apparent on the face of the record must be such as can be seen by one who runs and reads, that is, an obvious and patent mistake and not something which can be established by a long-drawn process of reasoning on points on which there may conceivably two opinions... A mere error of law is not a ground for review under this rule. That a decision is erroneous in law is no ground for ordering review... It can be said of an error that is apparent on the face of the record when it is obvious and self-evident and does not require an elaborate argument to be established..."*

We subscribe to the passage above which we are of the view clearly extrapolates what a manifest error on the face of the record is to warrant the Court to exercise its review mandate within the confines of Rule 66 (1) of the Rules. On our part, we can say that an error on the face of the record essentially envisages a plain error that is obvious, discernible, and

substantial. It must be important and occasioned injustice to the party seeking the review.

The instant application is grounded on the contention that centres on paragraph (a) of Rule 66 (1) of the Rules. As stated before, Rule 66 (1) (a) is concerned with a decision with a manifest error on the face of the record resulting in a miscarriage of justice. In the notice of motion and affidavit in support before us, the complaint is that the error is on the face of the record of Civil Appeal No. 373 of 2020 decided by this Court on 25/9/2021 and has resulted in miscarriage of justice to the applicant. However, our perusal of the notice of motion and its supporting affidavit has not been able to see any averment or statement providing a description or detail of the said error. There being nothing expounded in the notice of motion on the apparent error, we find it pertinent to reproduce an excerpt from paragraph 2 of the affidavit in support of the notice of motion relied by the applicant there being nothing in the notice of motion:

> "*The court having appreciated that the applicant was a guarantor of the loan taken by his company* ***(Masaleni Linner Ltd Company)*** *and the applicant having signed the loan agreement* ***(exh. P1)*** *found at page 10 of the record) the honourable Court made a manifest error on the*

face of the record to hold that the applicant was not privy to the loan agreement, hence a stranger who it held could only sue upon a guarantee contract (p.10 second paragraph), while in fact seen at law the two contracts being inseparable..."

Plainly, when the impugned judgment is revisited, what has been expounded by the applicant as a manifest error is the finding of the Court at page 12 of the typed judgment, after having analyzed the submissions of both sides in the appeal. Thus, the applicant in the cited paragraph has only presented his dissatisfaction with the said holding of the Court. This is clearly discerned from the wording in the last part of the 2nd paragraph of the affidavit where it is averred thus:

"The Court also was wrong not to fault the trial judge for having not invoked the provisions of ***Order 1 rule 10*** *of the* ***Civil Procedure Code (CPC) Cap 33 R.E. 2019*** *on the ground that the applicant omission to implead a necessary party (MLCL) was not bonafide."*

The above statement is clearly in the language of grounds of appeal, showing dissatisfaction with the holding of the Court. Since the Court dealt with the appeal, undoubtedly the applicant is inviting the Court to revisit its findings. It appears to us that undertaking the invitation by the

applicant will entail rehearing the grievances, which we cannot accept since as amply demonstrated, we have no jurisdiction to do so.

In the case of **Minani Evarist v. Republic**, Criminal Application No. 5 of 2012 (unreported) the Court while interpreting the applicability of Rule 66 (1) of the Rules stated that: -

> *"We are settled in our minds that the language of Rule 66 (1) is very clear and needs no interpolations. The Court has unfettered discretion to review its judgment or order, but when it decides to exercise this jurisdiction, should not by any means open invitation to revisit the evidence and re-hear the appeal*".

Additionally, in the case of **Blueline Enterprises Tanzania Limited v. East African Development Bank,** Civil Application No. 21 of 2012 (unreported), the Court observed that we shall not sit as a Court of Appeal from our own decisions, nor will the Court entertain applications for review on the grounds upon a party having been aggrieved by the decision of the Court. This is with the understanding that: -

> *"no judgment can attain perfection but the most that courts aspire to is substantial justice. There will be errors of sorts here and there, inadequacies of this or that kind, and generally no judgment can be, beyond criticism. Yet while an appeal may be*

attempted on the pretext of any error, not every error will justify a review..."

For the foregoing, having found that the applicant has failed to establish any apparent error in the impugned judgment subject of the instant review, to justify this Court to exercise its review mandate, we are constrained to find that the application is wanting in merit. It thus stands dismissed with costs. Order Accordingly.

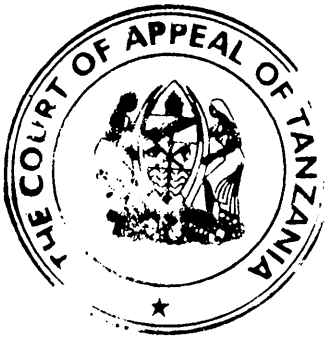
DATED at **MBEYA** this 28th day of September, 2022.

J. C. M. MWAMBEGELE
JUSTICE OF APPEAL

W. B. KOROSSO
JUSTICE OF APPEAL

S. M. RUMANYIKA
JUSTICE OF APPEAL

The ruling delivered this 29th day of September, 2022 in the presence of the applicant in person and Ms. Irene Msaki, learned advocate for the respondents is hereby certified as a true copy of the original.



R. W. CHAUNGU
DEPUTY REGISTRAR
COURT OF APPEAL