IN THE COURT OF APPEAL OF TANZANIA
AT DAR ES SALAAM
(CORAM: MWARIJA, J.A., SEHEL, J.A., AND FIKIRINI, J.A.)

CIVIL APPLICATION NO. 120 OF 2016

HERMANUS P. STEYN.....APPLICANT

VERSUS

CHARLES THYS..... RESPONDENT

(Application for review of the decision of the Court of Appeal of Tanzania at Dar es Salaam)

(Massati, Juma & Mugasha , JJA.)

dated the 1st day of March, 2016
in
Civil Appeal No. 45 of 2017

.....

RULING OF THE COURT

9th & 26th August, 2021

MWARIJA, J.A.:

By a notice of motion filed on 28/4/2016, the applicant, Hermanus P. Steyn brought this application moving the Court to review its judgment dated 29/2/2016 arising from Civil Appeal No. 45 of 2007. In that judgment the Court allowed the appeal filed by the respondent against the decision of the High Court of Tanzania at Arusha (Sheikh, J) in Civil Case No. 14 of 1999.

In the High Court, the respondent was sued by the appellant who claimed for specific and general damages for a loss which he allegedly suffered as a result of the respondent's acts of dishonesty and fraudulent misrepresentation. The applicant contended that the respondent, whom

he used to travel with in his (the applicant's) aircraft from Kilimanjaro International Airport, Tanzania to Bujumbura, Burundi, misrepresented himself as a mere passenger but unknown to the appellant, used to smuggle gold, diamonds and Tanzania currency to Burundi. The applicant contended further that, as a result, he was arrested, detained and his properties were nationalized. He also contended that he was declared a prohibited immigrant in Tanzania. He thus claimed for specific damages of USD 150,000,000.00 and general damages as would be determined by the High Court.

The respondent denied the claims contending that he travelled only once to Bujumbura in the applicant's aircraft and that, he did not carry and prohibited goods from Tanzania to Burundi.

Having heard the case, the learned trial Judge found that the respondent was liable for fraudulent misrepresentation as claimed by the applicant. She thus awarded him specific damages of USD 150,000,000.00 and general damages of USD 1,000,000.00.

The respondent was aggrieved by the decision of the High Court and thus appealed to this Court raising six grounds of his dissatisfaction. Against the appeal, the applicant raised a preliminary objection consisting of the following three grounds:

"(1) That the record of appeal is incompetent in that it does not comply with Rule 12 (4) of the Court of Appeal Rules, 2009.

(2) That the purported appeal is incompetent for want of a notice of appeal.

(3) That on account of the fact that, a similar appeal (found on the same judgment and decree) to wit, Court of Appeal Civil Appeal No. 92 of 2007 was dismissed on 8th day of December 2015, then the current appeal is untenable and or barred by the doctrine of res judicata".

The Court heard both the preliminary objection and the appeal hence the judgment which incorporates the decision overruling the three grounds raised in the objection. It is that decision which has given rise to this application for review.

The application, which was brought under Rule 66 (1) of the Tanzania Court of Appeal Rules, 2009 as amended (the Rules) and supported by an affidavit sworn by Elvaison Erasmo Maro, advocate, is predicated on the following three grounds:

"(i) That the Court erroneously consolidated

two

disparate grounds of preliminary objection (the second and third) then proceeded to determine only one of them (the third) erroneously leaving the other ground (the second) undetermined.

(ii) That the Court erred in failing to consider and determine the effect of the respondent's non-compliance with an undischarged order of the Court when determining the first ground of the preliminary objection.

(iii) That the Court erred in deciding the third ground of the preliminary objection ***per incuriam*** *Rule 102 (4) of the Tanzania Court of Appeal Rules, 2009."*

At the hearing of the application, Mr. Peter Kibatala, learned counsel appeared for the applicant. On his part, the respondent who was served through his email address after the efforts to serve him physically through his former counsel had failed, did not enter appearance. As a result, in terms of Rule 63 (2) of the Rules, hearing proceeded in his absence.

In compliance with Rule 106 (1) of the Rules, the learned counsel for the applicant had duly filed his written submission in support of the application. In the written submission which he proceeded to highlight

during his oral argument, Mr. Kibatala contended that the errors pointed out in the notice of motion are self-evident. According to the learned counsel, the errors are apparent on the face of the record as regards the decision which overruled the preliminary objection.

He argued, **first,** that the objection based on want of a notice of appeal and the other one which is to the effect that the appeal was barred by the doctrine of *res judicata,* were fundamentally distinct grounds rooted on different facts and principles of the law and therefore, should not have been consolidated. **Secondly**, he argued, that the Court omitted to render a decision on the second ground of the objection; that the appeal was incompetent for want of a notice of appeal.

Mr. Kibatala went on to argue that, in its decision, the Court did not determine the effect of the respondent's failure to comply with the order made by Lubuva, JA in Civil Application No. 105 of 2007 granting leave to the respondent to amend the record of appeal so as to comply with Rule 12 (4) of the Rules. It was, therefore, the learned counsel's submission that, because court orders must be complied with and because no decision was made as regards the effect of such non-compliance, the Court should proceed to make a decision on the matter. He added in his oral submission that, had the Court considered the effect of dismissal of Civil Case No. 92 of 2007, it would have found that the

appeal giving rise to the decision sought to be reviewed is incompetent for want of an notice of appeal and therefore, deserved to be struck out. To bolster his argument, the learned counsel cited the case of **William Shija v. Fortunatus Masha** [1997] TLR 2013.

Mr. Kibatala went on to argued that, although he is alive to the position taken by the Court in the case of **ARCOPAR (O.M) S.A. v. Herbert Marwa and Family Investments Co. Ltd and 3 Others,** Civil Application No. 94 of 2013 (unreported), that case is distinguishable. According to the learned counsel, while in that case, there was no order of amendment, in the case at hand, the Court ordered the appellant to amend the record of appeal.

On the ground that the preliminary objection was decided *per incuriam* Rule 102 (4) [now Rule 102 (5)] of the Rules, Mr. Kibatala argued that the Court erred in relying on the principle stated in the case of **Ngoni – Matengo Cooperative Marketing Union Ltd v. Alimahomed Osman** [1959] 1EA 577 to hold that, where the matter is dismissed without being heard on merit, the doctrine of *res judicata* does not apply.

We have duly considered the arguments made by the learned counsel for the applicant. We wish to start with grounds (i) and (iii) of

review. On ground (i) the issues which arises for our determination are, **first,** whether as a result of consolidation of the 2nd and 3rd grounds of the preliminary objection, the decision sought to be reviewed is based on manifest error on the face of the record resulting in miscarriage of justice. **Secondly,** is whether the 2nd ground was left undetermined.

We need not be detain much in determining the second issue. We are with respect, unable to agree with the counsel for the applicant that the 2nd ground of the preliminary objection was not determined. At page 14 of the judgment, the Court held as follows:

> *"Insofar as we are concerned, the **second** and third grounds are devoid of merit and are hereby dismissed".*
>
> *[Emphasis added]*

We need not say more in answering this issue because the complaint by the applicant is that, the Court proceeded to determine the 3rd ground of the preliminary objection "leaving the other ground (the second) undetermined". The fact is that the 2nd ground of the preliminary objection was determined in favour of the respondent whose counsel had argued that, so long as the appeal under consideration was filed earlier than the dismissed appeal, the question of a notice of appeal being used in more than one appeal did not arise.

As for ground (i) of review, in deciding to consolidate the two grounds, the Court observed as follows:

> *"From the submissions of the two learned counsel, we propose to deal first with the second and third grounds that this appeal is bereft of a notice of appeal and that dismissal of civil Appeal No. 92 of 2007 makes the instant appeal res-judicata as they* ***raise a common question of law*** *and can conveniently be disposed of together. Both learned counsel are on common ground that a single Notice of Appeal cannot simultaneously support two appeal to this Court"*
>
> *[Emphasis added].*

From his submission, the counsel for the applicant is in essence, challenging the decision taken by the Court to consolidate and dispose of together the 2nd and 3rd grounds of the preliminary objection on account that the two grounds raise a common question of law. In that regard therefore, in order to decide ground (i) of review, it will be necessary to determine whether the two grounds of the preliminary objection are distinct and if the answer is in the affirmative, whether the Court was precluded by any law from combining and disposing of those grounds together. That will not however, be within the scope of the Court's review jurisdiction.

The position stated above applies also to ground (iii) of review in which, the applicant is challenging the finding by the Court that, dismissal of Civil Appeal No. 92 of 2007 did not have the effect of making the previously filed Civil Appeal No. 45 of 2007 incompetent for want of a notice of appeal. In its decision, the Court Stated as follows:

> *"In so far as the effect the dismissal of Civil Appeal No. 92 of 2007 had on the instant appeal is concerned, we whole-heartedly agree with the position taken in* ***Ngoni-Matengo Cooperative Marketing Union Ltd v. Alimahomed*** *which Ms. Karume cited to us. The record of Civil Appeal Number 92d of 2007 which was filed later than Civil Appeal No. 45 of 2007 bears out Ms. Karume's line of submission that dismissal of their former appeal was not on merit to invoke the doctrine of* ***res judicata*** *against the latter.... As correctly submitted by Ms. Karume, Civil Appeal Number 92 of 2007 was not heard on its merit before its dismissal as to raise the doctrine of* ***res judlcata*** *as against the instant appeal before us."*

In the two grounds of review, the Court is called upon to reconsider its decision on the ground that the same is based on incorrect exposition of the law. It is now a settled position that, discerning of an error which is manifest on the face of the record resulting in miscarriage of justice, is an exercise which does not require a long-drawn process of reasoning.

The position has been stated by the Court in a number of its decisions. In the case of **Chandrakant Joshubhai Patel v. Republic** [2004] T.L.R 218 for example, the Court cited with approval a passage from Mulla, 14th Edition at pages 2335 – 36 where it is stated 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 be conceivably two opinion....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".*

In our considered view, the two grounds of review are in effect, grounds of appeal which do not fall within the purview of Rule 66 (1) (a) of the Rules. We are supported in that view by the case of **Rizali Rajabu v. Republic** Criminal Appeal No. 4 of 2011 (unreported) in which the Court stated as follows:

> *"We are alive to a well-known principle that a review is by no means an appeal in disguise. To put it differently, in a review the Court should not sit on*

*appeal against its own judgment in the same proceedings. We are also mindful of the fact that as a matter of public policy litigation must come to an end hence the Latin Maxim-**interestei reipubiicae ut finis litium...**"*

See also the cases of **Marky Mhango and 684 Others v. Tanzania Shoe Company and Another,** Civil Application No. 90 of 1999 and **Tanganyika Land Agency Limited and 7 Other v. Manohar Lal Aggrawal**, Civil Application No. 17 of 2008 (both unreported).

For these reasons therefore, we dismiss grounds (i) and (iii) of review.

On ground (ii) of review, we find, with respect, that the same is equally without merit. In the first ground of the preliminary objection, the applicant did not contend that the appeal was incompetent on account of the respondent's failure to comply with the order made by Lubuva, JA. The crux of the complaint in that ground of the objection was the respondent's failure to comply with Rule 12 (4) [now Rule 12 (5)] of the Rules which requires that, in all applications and appeals, every tenth line of the page of the record should be indicated on the right side of the sheet. It was that irregularity which formed the basis of the applicant's contention that the appeal was incompetent. It was during his submission in support of that ground that Mr. Ng'maryo

informed the Court about existence of the order of Lubuva, JA granting leave to the respondent to amend the record of appeal so as to comply with the above stated requirement.

From the contents of the grounds of the preliminary objections, it is clear that the applicant did not challenge the competence of the appeal on account of the respondent's failure to comply the said order. The complaint was about the breach of Rule 12 (4) of the Rules which persisted following the respondent's failure to amend the record of appeal. The objection was thus based on non-compliance with Rule 12 (4) of the Rules and the Court was called upon to determine, the effect thereof, not the respondent's failure to amend the record of appeal. In the circumstances, we are, with respect, unable to agree with the counsel for the applicant that the Court erred in failing to determine the effect of the respondent's failure to comply with the order granting him leave to amend the record to appeal. As pointed out above, that did not constitute one of the grounds of the preliminary objection raised by the applicant in the appeal, the decision of which has given rise to this application. Consequently, we also dismiss this ground of review.

On the basis of the foregoing, we find that this application has been brought without sufficient reasons. In the event, the same is hereby dismissed with costs.

DATED at **DAR ES SALAAM** this 25th day of August, 2021.

A. G. MWARIJA
JUSTICE OF APPEAL

B. M. A. SEHEL
JUSTICE OF APPEAL

P. S. FIKIRINI
JUSTICE OF APPEAL

The Ruling delivered this 26th day of August, 2021 in the presence of Mr. Alphonce Nachipyangu, counsel for the applicant and in the absence of the respondent is hereby certified as a true copy of the original.

G. H. HERBERT
DEPUTY REGISTRAR
COURT OF APPEAL