IN THE COURT OF APPEAL OF TANZANIA

AT DAR ES SALAAM

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

CIVIL APPLICATION NO. 127 OF 2011

1. **WAMBURA EVARIST**
2. **MARY MATEREGO**
3. **J. NZANZA t/a NATHANIEL SERVICES** ..... **APPLICANTS**
4. **MWEMA NYITUNGA**
5. **JOHN MAWAZO & ZULU NYAHENGE**
6. **REGINA MASENYI**
7. **MICHAEL NYEKUMBARA**

VERSUS

1. **SADOCK DOTTO MAGAI**
2. **FISHPARK (T) LIMITED** ..... **RESPONDENTS**

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

(Munuo, Nsekela, Mandia, JJJ. A.)

dated the 1st day of August, 2011
in
Civil Appeal No. 67 of 2007
.....

RULING OF THE COURT

30th April & 13th May,2015

MBAROUK, J.A.:

This is an application for review of the judgment of the Court in Civil Appeal No. 67 of 2007 dated 1st August, 2011. The application is made under Rule 66 (1) (a) and (c) of the Tanzania Court of Appeal

Rules, 2009 (the Rules) and is supported by the affidavit of Godwin Muganyizi, an advocate of the High Court of Tanzania.

Before going any further, we have found it proper to point out the facts leading to the institution of the appeal and thereafter this review. According to the facts gathered in the record of this application, the facts are as follows. The matter initially arose when the seven applicants sued the 1st and 2nd Respondents at the High Court for Tshs. 84,249,394/= for the purchase price of raw fish they supplied to the 2nd Respondent whose Receiver Manager was the 1st Respondent at that material time. In determining the suit filed by the applicants, the High Court of Tanzania Commercial Division in Commercial Case No. 70 of 2005 delivered a judgment on 30th April, 2007 condemning the 1st Respondent to pay the seven Applicants the sum of Shs. 82,526,140/= with interest at the rate of 21% per annum on each of the applicants' respective claim from the date of filing the suit to payment in full with costs.

Following the decision in Commercial Case No. 70 of 2005, the 1st Respondent preferred an appeal to this Court in Civil Appeal No. 67 of 2007 on the following grounds:-

1. *That the learned judge erred in law and in fact in holding that the receivership business was not conducted in good faith by the appellant so he is personally liable for fraudulent trading even though the alleged fraud was not proved at the required standard in law or at all.*
2. *The learned judge erred in law and in fact in holding the appellant personally liable for the 1st to 7th Respondents claims and not the Company (8th Respondent) on the basis that the Appellant decided to manage the 8th Respondent as a going concern after appellant was satisfied, on the strength of the financial due diligence conducted by the appellant that the Company was in a sound business condition, a fact which is not true, and without taking into account of the 8th Respondent's self commitment in the Debenture document that he latter would alone be liable for all the appellant's acts and defaults.*
3. *The learned Judge erred in law and in fact when he made the findings that the Appellant must have known that the 8th*

Respondent was insolvent yet allowed it to enter into further credit transactions and that the appellant's failure to show in the business documents that the 8th Respondent was under receivership and furthermore that his failure to file an abstract with the Registrar of Companies all reflected fraud and fraudulent intentions on the part of the appellant.

The decision in Civil Appeal No. 67 of 2007 reversed the decision in Commercial Case No. 70 of 2005 and the 2nd Respondent was ordered to pay the claims of the applicants. The applicants were not satisfied with the decision of the Court in appeal, hence they preferred this application for review.

In their Notice of Motion, the applicants are seeking to move the Court for an order that the judgment in Civil Appeal No. 67 of 2007 dated 1st August, 2011 be reviewed and the appeal be dismissed on the grounds that:-

1. The decision is based on a manifest error on the face of the record resulting in the miscarriage of justice.

2. The Court's decision is a nullity.

In this review application, the applicants are represented by Mr. Erasmus Buberwa and Mr. Godwin Muganyizi, learned advocates, whereas the 1st and 2nd respondents are represented by Mr. John Kamugisha and Mr. Thomas Massawe respectively.

At the hearing, Mr. Buberwa prayed to adopt his written submission filed earlier on 5th November, 2013. Submitting on the point that the decision subject to this review was based on a manifest error on the face of the record resulting to miscarriage of justice, Mr. Buberwa submitted that, in arriving at its decision, the Court did not take into consideration a "Deed of Appointment" of a Receiver/Manager which required him to act under all powers conferred by the "Debenture" and or **by law**. He added that, the Court in its judgment, dealt with terms and conditions of the debenture instrument, and forget to cast its eyes on the Deed of Appointment which formed part of the record and which required the Receiver/Manager in exercising the powers conferred on him to observe the law.

Mr. Buberwa further pointed out that, the issues of law were forming part of the record in Civil Appeal No. 67 of 2007. He named the matters of law sought to have been referred as that:-

i. The Appellant (1st Respondent herein) ought to have informed the 1st to 7th Respondent that the 8th Respondent, Fishpak (T) Limited was insolvent;

ii. The Appellant was aware the 8th Respondent was insolvent but fraudulently omitted to disclose the same to the 1st to 7th Respondents;

iii. The Appellant made no attempt to publish the receivership status on the companies documents and

iv. The Appellant never filed an abstract with the Registrar of Companies as required by law.

He then urged us to find that, though the four pointed out issues were issues of law, they were not at all given the attention they deserved when the Court arrived at its decision. Mr. Buberwa added that, the requirement of observing the law on the part of Receiver/Manager had to go hand in hand with that of observing the terms and conditions of the Debenture instrument. He further

contended that, the Receiver/Manager did not file an abstract of the record and there was no advertisement concerning the appointments. Mr. Buberwa was of the strong opinion that, the documents issued by the Company subsequent to appointment of receiver did not meet the requirements of the law. For that reason, Mr. Buberwa urged us to find that, the issue of disregarding provisions of law was an error on the face of the record which was obvious or self evident. He said, that led into miscarriage of justice as the 1st Respondent was finally made to benefit from his own wrongs and the Applicants were made to suffer because at the time he was appointed, there was nothing left to liquidate and could not pay out of nothing and did not do any business with the applicants and refused to pay them. In support of his submission, he cited the decisions of this Court in **Chandrakant Joshubhai Patel vs Republic** [2004] TLR 218, **Blueline Enterprises Limited vs East African Development Bank**, Civil Application No. 21 of 2012, **Rizali Rajabu vs Republic**, Criminal Application No. 4 of 2011, **Patrick Sanga vs Republic**, Criminal Application No. 8 of 2011 and **OTTU on behalf of P. L. Asenga & Others vs Ami (Tanzania) Limited**, Civil Application No. 4 of 2012 (All unreported).

As for the issue that the decision of the Court is a nullity, Mr. Muganyizi who assisted Mr. Buberwa took charge of it and submitted that the judgment in Civil Appeal No. 67 of 2007 is a nullity, because it availed the applicants reliefs which are non-existent, in effective and cannot be executed. Mr. Muganyizi gave four grounds in support of his contention, namely:-

1. That, the exclusion clause upon which the court based to overturn the trial court's judgment is an exclusion clause that cannot be enforceable.
2. That, the applicants are strangers so far as the debenture is concerned.
3. That, the findings in this judgment creates a situation which is absurd.
4. That, the findings in this case creates bad precedent.

For the reasons given earlier on by his learned friend and what they submitted, Mr. Muganyizi urged us to vacate the decision in Civil Appeal No. 67 of 2007, quash and set aside the judgment and all its

orders and in lieu thereof, the 1st Respondent be ordered to pay the Applicants claims with costs.

On his part, Mr. John Kamugisha started his submission by praying to adopt his written submission filed earlier on 21st November, 2013. In his reply to the complaint that the Court relied only on the debenture documents and in total forgetness of the Deed of Appointment of a Receiver/Manager, Mr. Kamugisha submitted that the basic document which the Receiver/Manager was appointed and derived his power to act was the Debenture document. He said, even the Deed of Appointment is making reference to the Debenture document. He added that, it is in the Debenture document where authority and general powers of the Receiver/Manager are found and, like what is provided in the Deed of Appointment document those powers are exercised in addition to and without limiting any general powers conferred by the law. Mr. Kamugisha, further contended that, for the reasons he has given, the Court committed no error for not considering that, and even if it is assumed that there was an error, which he denied, the same was not a manifest (apparent) error on the face of the record nor was it self evident. He said, it was an error, if

any, which required an elaborate argument to be established and cannot in law form basis for review. In support of his argument, he cited the case of **Chandrakant Joshubhai Patel** (*supra*).

In his reply to the point raised by Mr. Buberwa that the applicants stand to suffer miscarriage of justice, Mr. Kamugisha submitted that, this is a very strong argument and an afterthought. This is because, he said, the applicants have decided to depart from their own pleadings and prayers in order to protect the 2nd Respondent who has himself not challenged the decision of the Court. He then submitted that, the reasons given by the Applicants could not in law exonerate the 2nd Respondent from the liability to the Applicants and vest the same to the 1st Respondent.

In his response to the point that the Court's decision is a nullity Mr. Kamugisha from the outset denied that contention and instead he submitted that, the Court properly addressed itself to the relevant issues on the point raised in the appeal and correctly reached to a final determination of the appeal. Afterall, Mr. Kamugisha submitted, none

of the issue raised by the advocates for the Applicants were raised for consideration and determination and have surfaced for the first time in this applicant for review. For that reason, he urged us to find that the ground of review preferred by the applicants are misconceived and should not be allowed to stand as a base for review. He then prayed for the review to be dismissed with costs.

On his part, Mr. Thomas Massawe who represented the 2nd Respondent, simply adopted what he has stated in his affidavit in reply and his written submissions. He also supported all what was submitted by the advocates for the applicants. He finally prayed for the Court to depart from its judgment dated 1st August, 2011 and allow the Applicants' review with costs.

The aspect of review applications in our jurisdiction, has its roots from the decision of this Court in the case of **Felix Bwogi vs Registrar of Buildings,** Civil Application No. 20 of 1988 (unreported). Thereafter, several other decisions followed, for instance **Tanzania Transcontinental Co. Ltd vs Design Partnership Ltd,** Civil Application No. 62 of 1996 (unreported), **Chandrakant Joshubhai Patel** (*supra*) and many others.

From the outset, we have to admit that, a judgment may have errors, but not all errors may justify a review. In the land mark case of **Chandrakant Joshubhai Patel,** this Court held as follows:-

> *"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.*** *(Emphasis added).*

In support of that view, this Court in the case of **Blueline Enterprises Limited** (*supra*) cited the decision in the case of **Haystead vs Commissioner of Taxation** [1920] A.C 155 at page 166 where Lord Shaw observed as follows:-

> *"**Parties are not permitted to begin fresh litigations because of new views they may entertain** of the Court of the case or new versions which they present as to what should be a proper apprehension, by the Court*

*of the legal result ..... **If this were permitted litigation would have no end except when legal ingenuity is exhausted.***" (Emphasis added.).

Before the coming into force of the Tanzania Court of Appeal Rules, 2009 (the Rules), this Court was guided by case law in reaching to its decision in the aspect of review. However, currently Rule 66 (1) of the Rules specifically has given the grounds upon which a review application will be entertained. Rule 66 (1) of the Rules provides as follows:-

> "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;

e) the judgment was procured illegally, or by fraud or perjury.

In the decision of this Court in the case of **Richard Mgaya @ Sikubali Mgaya vs Republic**, Criminal Application No. 1 of 2010 (unreported) it was held as follows:-

> "***The grounds enumerated in the Rule are the only grounds for Court to entertain. To re-assess the evidence is not one of the grounds enumerated therein.***" (Emphasis added.).

In this review, the applicants wants the Court to cast its eyes on the Deed of Appointment which required the Receiver/Manager to observe the law. However, we join hands with Mr. Kamugisha to the effect that, the Court was not bound to consider the contents of the Deed of Appointment, because the serious issues at hand related particularly to the conduct of the 1st Respondent as Receiver/Manager

and the commitment of the 2nd Respondent to the acts and defaults committed by the 1st Respondent in the course of receivership business, all of which as between the two documents, were governed by the Debenture document and not the Deed of Appointment.

Looking at page 14 of the judgment in Civil Appeal No. 67 of 2007, the Court guided itself through the following issue:-

> "The issue before us is whether the appellant (1st Respondent) fraudulently purchased fish on credit from the 1st to 7th Respondents (Applicants.)."

The Court went on to say that:-

> *"We are mindful of the appointment of the appellant (1st Respondent) as Receiver Manager under Debenture, Exhibit D7 which spells out his duties. The suit Debenture also provides for the collection and the distribution of the funds collected as well as the maintenance of an account. The appellant (1st*

Respondent) was, under the said Debenture, accountable to the authority which appointed him."

From the application filed by the applicants, it seems the learned advocates for the applicants want us to re-assess the evidence. That is not one of the grounds listed for a review in Rule 66 (1) of the Rules. That is not the aim of a review application under Rule 66 (1) of the Rules. This Court in the case of **Patrick Sanga** (*supra*) it stated as follows:-

"In any properly functioning justice system, like ours, litigation must have finality and a judgment of the final Court in the land is final and its review should be an exception."

As to the complaint that the applicants will suffer miscarriage of justice, we agree with Mr. Kamugisha that the applicants have miserably failed to demonstrate in the affidavit and in submissions that they will suffer miscarriage of justice. The arguments made by Mr.

Buberwa on their 1st ground of review is devoid of merit as it would involve a re-assessment of the evidence which is not within the parameters of the term a manifest error on the face of the record. We are of the considered opinion that, the error was not self evident, and if any, required an elaborate argument to be established, which is not the intended purpose of review.

As for the 2nd ground of review, that the Court's decision is a nullity, we are of the considered opinion that is a misconception as they have surfaced for the first time in this application for review. It was not raised for consideration and determination in the affidavit in support of the notice of motion in this application for review.

Several decisions of this Court made prior to the 2009 Court Rules and thereafter, have emphasized that, the objective of review is not to provide a mechanism of filing an appeal against a final decision of the Court of the land. Review should be resorted to only on exceptional circumstances. (See the decision of this Court in the case

of **Jibu Aman @ Mussa and Another vs Republic,** Criminal Application No. 7 of 2011 (unreported).

All said and done, we are of considered opinion that the two grounds of review preferred by the applicants do not fall under the grounds stated in Rule 66 (1) of the Rules. For that reason, we are constrained to dismiss the application for being devoid of merit. In the event, we dismiss it with costs.

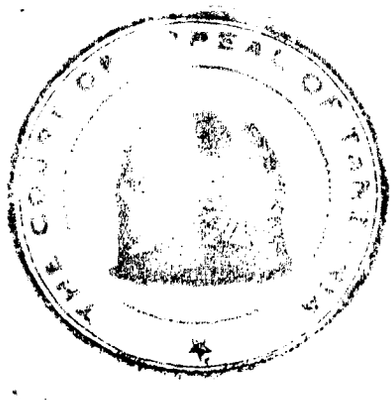
DATED at DAR ES SALAAM this 05th day of May, 2015.

N. P. KIMARO
JUSTICE OF APPEAL

M. S. MBAROUK
JUSTICE OF APPEAL

K. MUSSA
JUSTICE OF APPEAL

I certify that this is a true copy of the original.



E.Y. Mkwizu
DEPUTY REGISTRAR
COURT OF APPEAL