IN THE HIGH COURT OF TANZANIA

(COMMERCIAL DIVISION)

AT DAR ES SALAAM

COMMERCIAL REVIEW NO. 2 OF 2019

(*Arising from Miscellaneous Commercial Application No. 186 of 2019*)

BETWEEN

ATTORNEY GENERAL..... APPLICANT

Versus

ARDHI UNIVERSITY.....1st RESPONDENT

KIUNDO ENTERPRISES (T) LIMITED.....2nd RESPONDENT

Last Order: 18th Mar, 2021

Date of Ruling:02nd June, 2021

RULING

FIKIRINI, J.

The application was made under section 78 (1) (a) and (b) of the Civil Procedure Code read together with Order XLII Rule 1 (a) and (b) and 3 of the Civil Procedure Code Cap 33 R.E 2019 (the CPC). The applicant aggrieved by the decision and decree of this Court in Miscellaneous Commercial Application No. 186 of 2018 dated 28th August 2018, moved this Court with the Memorandum of Review containing three grounds to wit:

1. That the ruling of this Court is in contravention of section 16 (3) of the Government Proceedings Act, Cap.5 R.E. 2019;
2. That the ruling of this Court is bad in law for contravention of Order XX1 Rule 57 (1) of the Civil Procedure Code, Cap 33 R:E 2019 (the CPC), which requires the Court to conduct an investigation before coming to the verdict in which the legal requirement was not met; and
3. That the ruling of this Court is bad in law for holding that, not every proceeding by the Public Corporation are proceedings of the Government.

The applicant filed skeleton arguments pursuant to Rule 64 of the High Court (Commercial Division), Procedure Rules, 2012 (the Rules). During the hearing the application was orally heard whereby the applicant was represented by Mr. Gabriel Malata - Solicitor General assisted by Ms. Lucy Kimario and Ms. Alice Mtulo learned counsels. Ms. Ester Merundie appeared for the 1st respondent while the 2nd respondent enjoyed the legal service of Mr. Roman Masumbuko learned counsel.

Submitting in support of the filed Memorandum of Review, Mr. Malata, submitted that, the 1st respondent is a government institution solely owned by the Government therefore the execution against the 1st

respondent ought to be effected in accordance with section 16 of the Government Proceedings Act, which provides that, the execution against the Government has to be effected through the Permanent Secretary - Treasury. This required the Court to issue a certificate directing Permanent Secretary - Treasury to honour the awarded sum to the decree holder.

Expanding his submission, he submitted that, Court orders against the Government were conducted in accordance with section 16 (1) & (2) of the Government Proceedings Act and section 8 (1) of the Public Finance Act, the Pay Master General being the accounting Officer of the Government. These powers of the Pay Master General, can however, be delegated to the Permanent Secretaries and Principal officers of the Institutions to act on behalf, and not directly attaching government properties. To buttress his position, he cited the case of **Karata Ernest & Others v AG, Civil Revision No. 10 of 2010, p. 19**, in which the Court held that the High Court was properly moved under section 16 of the Government Proceedings Act.

On the strength of his prayer, he prayed that, the application be granted with costs and the procedure prescribed under section 16 (1) & (2) be

complied with by the decree holder by requesting the Court to issue the certificate, first.

Mr. Masumbuko for the 2nd respondent, in response, submitted that, the applicant has failed to show any errors in the ruling. Submitting on the 1st ground, it was his submission that, the application at hand was contrary to section 16 (1) & (2) of the Government Proceedings Act, because it has never featured and cannot be brought before this Court at this juncture.

He went on submitting that, the applicant brought new facts, and this was due to the fact that the 1st ground was not at all faulting the decision in the Commercial Case No. 120 of 2019. Adding that interpretation of law cannot constitute a ground for review. Furthering his submission, he contended that, the decision of this Court clearly stated that the money involved was not Government money. That fact has therefore already been decided. What can be reviewed should be an apparent error which has not been shown in the present application. The applicant failed to show how the money involved was Government owned even though the transaction was from a private contract.

Deliberating on section 16 (3) of the Government Proceedings Act and section 8 (1) of the Public Finance Act, it was Mr. Masumbuko's

submission that, the above cited provisions were irrelevant and misplaced since what was being executed was not Government money but money from a private contract. And examining the decision in **Karata** (supra) cited by the applicant, he submitted that, the case involved monies belonging to the Government which was not the case in present application.

Contesting the 2nd ground of review, he submitted that, the assertion that no investigation has been done was not necessary due to the fact that, the money was not Government money. Fortifying his position, he cited the case of **African Barrick Gold Plc v Commissioner General TRA, Civil Application No. 350/01 of 2019.** Insisting that not all proceedings against Public corporation were proceedings against the Government, it was Mr. Masumbuko submission that Public corporation are established by different laws which make them body corporate to the extent that they can sue or be sued in their own name. To strengthen his position, he cited the case of **Mzinga Corporation v Ernest Maneno Shija, Civil Case No. 196 of 2003.**

Referring and discussing on section 17 (2) (a) & (b) of the Office of the Attorney General (Discharge of Duties), Act, 2015, Mr. Masumbuko argued that it required the Attorney General to make an application for

intervention and show interest in the matter. Since the law has not been repealed the applicant cannot raise the argument claiming that the present proceedings were Government proceedings, maintained the counsel.

In rejoining submission, Ms. Mtulo submitted that, paragraph 2 of the applicant's skeleton argument demonstrated the error which can be mistake of law and fact. On top of that, she submitted that, paragraph 6 of the skeleton argument pointed out the errors at p. 14 of the ruling.

Basing on the wording of the provision of Order XX1 Rule 57 (1) of the CPC, she submitted that, the order clearly states the circumstances under which the objection proceedings can be preferred. Therefore, it was not true that, they had to seek leave to file objection proceedings.

Submitting on disputed money, it was her submission that, the money which was generated by the 1st respondent belonged to the Government. Ms. Mtulo admitted that there were some projects including consultancy contracts by the 1st respondent; however all the money generated belonged to the Government.

Specifically addressing the 1st respondent's status, she submitted that, Ardhi University did not generate private earnings but Government revenues for which it was established for. Opposing the arguments

submitted by Mr Masumbuko, she submitted that, the Counsel did not cite any case or any fact to substantiate that the arrangement was private. In additional to that, she submitted that, if at all it was a private, then that private person ought to have been sued.

Discussing the **Mzinga Corporation** case (supra), she submitted that there was no private arrangement and therefore execution must comply to section 16 of the Government Proceedings Act. She went on submitting that, the applicant was not seeking the interpretation but pointed out errors under review in which the Court has mandate to review its own decision and prayed the application be granted with costs.

I have carefully examined the rivalry submissions. The only issue for determination is **whether there are sufficient causes or grounds to warrant this Court to review its ruling dated 28th August 2018.**

It is a settled legal position that, the powers of review exercised by this Court is a creature of Statute. **See: Erimiya Serunkuma v Elizabeth Nandyose [1959] EA, 127.** It is also a trite law that, review should not be to challenge the merits of the decision rather it is intended to address the irregularity of a decision or proceedings which have caused injustice to the party. In the case of **Charles Barnabas v Republic,**

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Criminal Appeal No. 13 of 2019, the Court of Appeal when faced with the issue held that:

> *"Review is not appeal. It is not a second bite so to speak. As it is, it appears the applicant intends to appeal against the aforesaid decision through the back door."*

Where an application for review is based on the ground that there is an error on the face of record, the error complained about must be apparent, eye-striking or self-evident and not one which needs to detain a person through a long process of reasoning. In the case of **Chandrakant Joshubhai Patel v Republic [2004] T.L.R 218,** adopting reasoning in **MULLA, 14th Ed, pp. 2335-2336,** the Court of Appeal stated that:

> *"An error apparent on the face of 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 which may conceivably. A mere error of law is not a ground of review.... 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."*

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Similar position has been held in the case of **National Bank of Kenya Ltd v Ndugu Njau [1997] Eklr** when it was held that:

> *".....in this instant case the matter in dispute had been fully canvassed before the learned Judge. He made a conscious decision on the matters on the controversy and exercised his discretion in favour of the respondent.* ***If he had reached a wrong conclusion of law it could be a good ground for appeal but not review*** *by the same court which had adjudicated upon it."*[Emphasis Mine]

Examining the present application in the light of the above settled legal position and close scrutiny of the applicant's grounds for review; starting with the 1st ground that, the ruling is in contravention of section 16 (3) of the Government Proceedings Act, I find this ground does not amount to an error apparent on the face of record or mistake which could be easily corrected as envisioned by the applicant based on the following reasons; **one**, the pointed out error is not apparent rather could be an error which would call for an appeal. In the present application, I find the ground raised good for appeal and not for review. In the case of **Bruno v Minister of Home Affairs & The A.G, Civil Appeal No. 82**

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of 2017, discussing on an error apparent on the face of record they had this to say:

> *"....the application for review must be based on obvious error, self evident, etc but not something that can be established by long -drawn process of the learned argument."*

Two, the provision of section 16 (3) of The Government Proceedings Act should not be read in isolation but together with section 17 (2) (a) & (b) of the Office of the Attorney General (Discharge of Duties) Act, 2015 which requires the Attorney General to make application for intervention and show interest in the matter. Therefore, instead of avoiding that the present proceedings are Government proceedings, the applicant should simply comply with requirement considering that no one can enjoy benefit from own wrongs.

Three, the Court cannot correct incorrect interpretation of the law since an interpretation of law is not an apparent error on the face of the record. It should be noted that the said error of law is neither to be cured nor be grounds for the review. **See: Attilio v Mbowe [1970] H.C.D 3.**

The 2nd and 3rd grounds of review also seemed to be not resultant of an error apparent on the face of record. The genesis of the contested execution is a contractual agreement entered between the 1st and 2nd respondents, as the body of Corporate which can sue and be sued. Relying on the case of **Ernest Maneno** (supra) the reasons advanced for the need to join the Attorney General on the ground that the 1st respondent is a Public corporation or the Government institution and thus has interest in the said Public corporation has no any legal basis. Especially if the said Public corporation, has source of funding separate from that of the Government.

On top of that, neither the Public corporation nor the Government Proceedings Act, Cap. 5 , R.E. 2019, has provided that proceedings against a Public corporation becomes proceedings against the Government automatically.

In the light of the above, I find the application for the review devoid of merits and proceed to dismiss it with costs it is so ordered.

P. S. FIKIRINI

JUDGE

02nd JUNE, 2021