IN THE HIGH COURT OF TANZANIA

(COMMERCIAL DIVISION)

AT DAR ES SALAAM

COMMERCIAL REVIEW NO. 4 OF 2019

(ARISING FROM COMMERCIAL CASE NO 100 OF 2018)

NATIONAL BANK OF COMMERCE .....APPLICANT

VERSUS

DEOGRATIUS JOHN NDEJEMBI ..... RESPONDENT

Date of Last Order:20/09/2021

Date of Ruling: 22/10/2021

RULING

MAGOIGA, J.

The applicant, NATIONAL BANK OF COMMERCE under the provisions of Rule 2(2) of the High Court (Commercial Division) Procedural Rules, 2012, G.N. 250, section 78 (1) (a) and Order XLII Rule 1(1)(a) of the Civil Procedure Code[Cap 33 R.E. 2019] preferred the instant application praying this court be pleased to review its judgement in Commercial case No. 100 of 2018 delivered on 13th September, 2019. The application was filed in this court on 15th October, 2019 on the grounds that:

1. There is a discovery of new and important matters which could not be produced by the applicant at the time when default judgement was

made such matters require changes to be effected in Commercial case No. 100 of 2018 based on the facts that;

(i) That there was no possibility of conducting a full hearing on evidence or an order of the court to adduce reasons (to file a supplementary) as to where there is an existence of the 3 different accounts and which account was credited all in the name of the defendant;

(ii) That there was no possibility when the court had ordered to substitute original documents could not be located as the system had changed from analog to digital all documents were scanned copies and that there was no order of the court to file a certificate/affidavit of authenticity of electronic evidence.

2. The default judgement delivered by the court on 13th September, could not take on board new facts and development in Commercial Case No. 100 of 2018 and which by the date of judgement was delivered were not in a position which could adequately and definitely be communicated to court;

3. Commercial case no 100 of 2018 proceeded ex-parte which justifies ex-parte determination of the review;
4. That basing on the grounds pleaded hereinabove, if the same grounds were adequately and definitely in a position that could be communicated to court and be considered by the court, the default judgement would not be made and consequently the judgement therein would be different.

On the basis of the above grounds, the learned advocate for the applicant prayed that, this court be pleased to review its judgement by vacating its dismissal order and make necessary orders with regard to Commercial Case No. 100 of 2018 which will enable the applicant to communicate the new development that could not be communicated in the affidavit in proof of the claim for default judgement.

Unfortunately, because of the applicant's failure to serve the respondent as ordered, this application suffered several adjournments till on 03/06/2021 when Mr. Erick Kidyalla, learned advocate for the respondent appeared and prayed the matter be argued by way of written submissions. I granted the order and set a schedule for filing written submissions but unfortunately same was not complied with. Non compliance was caused by the applicant's

failure to trace the learned advocate for respondent. For the interest of justice, I extended the time for complying with the order, to pave way for this ruling.

For better understanding of the history of this application for review, I find it imperative to state facts, albeit in brief relating facts to this application. The applicant on 23rd July, 2018 instituted Commercial Case No. 100 of 2018 against the respondent claiming, among others, payment of TZS.89,732,945.00 being principal amount and interest arising from Group personal loan, default interest, general damages, costs of the suit and any other relief this court may deem fit to grant.

Upon being served with the plaint, the respondent/defendant filed a written statement of defence disputing the applicant's claims and consequently prayed that the suit be dismissed with costs. The suit went on well before Hon. Mwandambo, J (as he then was) and same was set for 1st Pre-trial conference on 12/12/2018 whereby the respondent/defendant defaulted appearance and the learned advocate for the applicant/plaintiff prayed that the defence of the respondent to be struck out from the court record. The court granted the prayed and went on to strike out the written statement of defence of the respondent/defendant.

This suit was re-assigned to me in May, 2019 following Hon. Mwandambo, J (as he then was) promotion to Court of Appeal. When the suit was placed before me on 11/06/2019, the learned advocate for the plaintiff prayed to file an affidavit in proof of the claim together with Form No.1 in compliance with the new procedure under rule 22 of the High Court (Commercial Divisions) Procedural Rules, 2012 as amended by G.N. 107 of 2019. The prayer was granted as there was no application to restore the struck out defence.

Following the compliance of the court's directive, the court on 13/09/2019 delivered its judgement by dismissing the suit for, among others, for failure to prove the suit against the defendant vide the affidavit filed in proof of the claim.

Aggrieved, the applicant, instead of appealing, decided to file this review, hence, this ruling on review.

The applicant is represented by Ms. Hamisa Nkya, learned advocate, while the respondent is represented by Mr. Erick Kidyalla, learned advocate.

Ms. Nkya, in her written submissions in support of this application for review, submitted that, under section 78 (1) (a) read together with Order

XLII rule 3 of the Civil Procedure Code, [R.E. 2019] allows for application for review and provides for how the grounds for review were to be set. The learned advocate for the applicant guided by the law under Order XLII pointed out that, review is to be on three grounds which are:

i. If there is a discovery of new and important matter of evidence which, after the exercise of due diligence, was not within his knowledge or could not be produced by him at the time the decree was passed or made;
ii. If there is a mistake or error apparent on the face of the record;
iii. If there is any sufficient reason, desire to obtain a review of the order made against the applicant.

According to the learned advocate for the applicant, they preferred this application on grounds that: the default judgement did not take into account facts which were not in the knowledge of the applicant and that the judgement has in it, a clerical error.

Ms. Nkya went on to submit that, the default judgement has error apparent on the face of the record which is a clerical or arithmetical mistake as provided for under Rule 2 of Order XLII of the CPC. In pointing out the

error, the learned advocate for the applicant changed the submission from that of the error apparent on the face of the record to that of clerical mistake and quoted the error to be the date which was written statement was struck out to be **"12/12/2918."**

Based on the clerical error in date, the learned advocate for the applicant prayed that, the judgement be reviewed to reflect the correct date.

On the second ground was that, the there was new evidence which was not in the knowledge of the applicant until after passing of the default judgement. In this, it was her submissions that, after the judgement, the applicant came across new evidence that was not in the knowledge or hands of the applicant. The new evidence is the original loan application documentation which the applicant failed to tender in this honourable court due to the fact that the applicant's system of storage of documentation was converted from analog to digital and the originals could not be traced, hence, was not certified that there is a true copy of the original without being seen. On the above reason again the learned advocate for the applicant prayed that the impugned judgement be accordingly reviewed to allow her file a supplementary affidavit to state the discrepancies which led to the dismissal of Commercial Case No. 100 of 2018.

Not only that but prayed that the review is necessary and this court should be guided by the overriding objective principle brought about by Miscellaneous Amendment No.3 of 2018 which require court to deal with cases justly and have regards to substantial justice.

Further, according to Ms. Nkya, other sufficient reasons were that, the procedure for proof by affidavit of the claim was new to them and the court adopting new procedure, it constitute a strong ground for review. Besides, no prejudice will be occasioned to the respondent as he is the one who defaulted appearance and led the court to order ex-parte proof of the matter. And that in case review is granted the respondent will have an opportunity to pray that hearing be conducted inter parties.

In support of her stance, the learned advocate for the applicant cited the case of MAPALA vs. BRITISH BROADCASTING CORPORATION [2002] EA 132 which stated the grounds of review under Order XLII to be that; a party is aggrieved by the decision, there is discovery of new and important matter or evidence which after due diligence was not within the knowledge of the party at the time of judgement and there is an error apparent on the face of the record. On the above guidance, Ms. Nkya concluded that the instant

application falls within the same grounds and urged this court to grant as prayed.

On the other hand, Mr. Kidyalla in opposing the instant application, in his opening submissions joined hands with Ms. Nkya that, this court has jurisdiction to review its own judgement by virtue of the provisions cited but qualified it that, such powers are not automatic but subject to fulfillment of the set out conditions therein.

The learned advocate for the respondent right away faulted the learned advocate for the applicant in that, in her submissions included grounds not set forth in the memorandum of review, which are the point of clerical error, error apparent on the face of the record and the procedure being new, and urged this court not to consider them at all.

On discovery of new and important evidence, Mr. Kidyalla joins hand with Ms. Nkya that same can be ground for review but was quick to point that the law require the applicant to strictly prove that the applicant exercised all due diligence in seeking the evidence which could be produced at the time when the decree was passed. According to Mr. Kidyalla, due diligence is prerequisite before an application for review is granted on the ground of

discovery of new evidence. Not only that, but also, that the applicant must strictly prove his allegations that, the discovered evidence could not be adduced when the decree was made. He cited Rule 4 of Order XLII to substantiate his submissions. On the basis of the above submissions, the learned advocate for respondent concluded that no such evidence was so led nor proved but what he sees, is shear remarks which cannot be basis for grant of review.

The learned advocate went on to fault this application because, according to him, the applicant wants to review the judgement on ground of missing evidence due to his negligent acts, which is not a ground for review. Mr. Kidyalla further argued that, even the cited case of MAPALA (supra) will not assist the applicant because the applicant wants to fetch more evidence to clarify the contradictions on the three bank accounts and equated it as an abuse of the court process.

On allegations that the learned advocate is new to the new procedure, the learned advocate was brief to the point and focused that, ignorance of law cannot be a ground of review. According to Mr. Kidyalla, the instant application is an appeal disguise because the way the grounds were framed is inviting this court to re-hear and re-determined Commercial Case No.100

of 2018. To substantiate his submissions, the learned advocate for the respondent cited several cases, which are: CHANDRAKANT JOSHUBHAI PATEL vs. REPUBLIC [2004] TLR 218; AFRIQ ENGINEERING & CONSTRUCTION COMPANY vs. THE REGISTREED TRUSTEES OF THE DIOCESE OF CENTRAL TANGANYIKA, COMMERCIAL REVIEW NO. 3 OF 2020 HC (DSM) (UNREPORTED).

Lastly but least the applicant is praying that, this court vacate its judgement and calls parties to prosecute the case again, this is wrong and cannot be granted, insisted Mr. Kidyalla.

On the foregoing, the learned advocate for respondent prayed that the instant application be rejected for being devoid of any merits.

The learned advocate for the applicant prayed that she be allowed to file rejoinder submissions. I granted the prayer but as I am composing this ruling no rejoinder submissions was filed, hence, marked the end of hearing of this review.

The task of this court now is to determine the merits or otherwise of the instant application. Before going into the grounds for review, I have equally noted as noted by Mr. Kidyalla, that the applicant's counsel without court's

leave raised some additional grounds which were not set out in the memorandum of review. These are: clerical errors on the judgement regarding the date; errors apparent on the face of the record; the procedure is new to the advocate and that no prejudice in case the application is granted. Truly, I will not consider them because no leave was sought and granted to add new grounds, as the procedure adopted by the learned advocate for the applicant is against the procedure of fair trial for parties to be allowed to change from what they first pleaded to suit their own ends.

Now back to the application, I will determine one ground after the other in the order they appear. The first ground was set out that there is a discovery of new and important matter which could not be produced by the applicant at the time when the default judgement was made which require changes be made to the judgement and itemized them as:

i. There was no possibility of conducting a full hearing on evidence or an order of the court to adduce reasons (to file supplementary affidavit as to why there existed 3 different accounts and which account was credited all in the name of the respondent.

At the outset and having gone through the law which allows review, this ground is not one of the grounds that this court can entertain review. The issue of three accounts was produced by the applicant and how this was to be a matter that this court can open up now, with respect to the counsel for applicant, is not a ground for review. Review, in my considered opinion, is a restricted remedy that is available to a party who has been aggrieved by the decision without making an appeal in disguise or is not a remedy for the applicant to fill gaps in its lacking or deficiency evidence at the first trial. Review must be restricted to the grounds as stated in the law or other grounds peculiar to circumstances of the case that may arise.

In the case of P9219 ABDON EDWARD RWEGASIRA vs. THE JUDGE ADVOCATE GENERAL, CRIMINAL APPEAL NO. 5 OF 2011 CAT (UNREPORTED) it was held that:

> " We are alive to the principle that review is by no means an appeal in disguise, and that, it is matter of policy of respectable antiquity that litigation must come to an end."

On that note, I find that, the way the 1st ground was couched, if granted, amounts to allowing re-hearing and re-determining the suit. This court is not prepared for that course.

On the 2nd part of ground one was couched that there was no possibility when the court had ordered to substitute original documents because they were not located as the system has changed from analog to digital. This too, is no ground and no efforts were made at least to show there was due diligent done on their part. The law allows use of photocopies and the applicant has herself to blame with her counsel because that was not stated in the affidavit in proof of the claim. To open it now is to re-hear the matter. This court is not prepared to take that course as well.

On the foregoing, as rightly submitted by the learned advocate for the respondent, and rightly so in my own opinion, ground number one was couched in manner that, it amounts to allow the applicant to re-open the case and re-hear it. This ground has to fail as well for being not on the restricted grounds for review.

On the 2nd and 3rd grounds which I prefer to determine them jointly, on their face value are not grounds which the law allows the court to entertain

review. No new facts have been strictly proved nor stated so far which could convince this court to act on in this application. These grounds too have to fail miserably.

Since the fourth ground is a prayer I find no reason for it to take this court's much time. The fourth ground has to fail as well.

In the totality of the above reasons, I find this review highly misconceived and same must be and is hereby rejected with no order as to costs because the learned advocate for respondent never pray for the same and on the spirit that this matter be put to an end.

It is so ordered.

Dated at Dar es Salaam this 22nd day of October, 2021

THE HIGH COURT OF TANZANIA
COMMERCIAL DIVISION

S. M. MAGOIGA

JUDGE

22/10/2021