IN THE COURT OF APPEAL OF TANZANIA

AT DAR ES SALAAM

CIVIL APPLICATION NO. 25 OF 2015

(CORAM: KILEO, J.A., MASSATI, J.A., And JUMA, J.A.)

1. **SGS SOCIETE GENERALE DE SERVEILLANCE SA**
2. **SGS TANZANIA SUPERRINTENDANCE COMPANY** } **..... APPLICANTS**

VERSUS

1. **VIP ENGINNERING AND MARKETING LIMITED**
2. **TANZANIA REVENUE AUTHORITY** } **..... RESPONDENTS**

(Application for review from the Ruling of the Court of Appeal of Tanzania at Da es Salaam)

(Kileo, J.A., Massati, J.A. and Mmilla, J.A.)

dated the 10th day of February, 2015
in
Civil Revision No. 5 of 2011

REASONS FOR THE RULING

4th July & 5th September, 2016

KILEO, J. A:

On 4th July, 2016 we rejected the applicants' application for review. We ordered the record of the High Court to be remitted to the trial court with directions that the judgment written by Kimaro J, (as she then was) be pronounced by a successor judge or other judicial officer of competent jurisdiction. In terms of Rule 39(6) of the Court of Appeal Rules 2009, (the Rules) we reserved our reasons for so doing which we now proceed to give.

Briefly, on 18.2.2011, Hon. Mruma J, a judge of the High Court of Tanzania (Commercial Division), delivered a ruling in which he ruled that he was entitled to decline to pronounce a judgment prepared by his predecessor, Hon. Kimaro J, (as she then was). This was the nexus of the matter that we ruled upon, the ruling which is now sought to be reviewed. Below is what the learned judge said in his interpretation of rule 2 of Order XX of our Civil Procedure Code, Cap 33 R. E. 2002 (the CPC):

> *"On my part I fully subscribe myself with the view that the rule gives discretion to the successor judge to pronounce judgment. I cannot imagine a situation where the legislature with all its wisdom would enact a law that obliges a successor judge to pronounce a judgment of his predecessor which he himself does not subscribe in or which in his own view erroneous. In the final analysis therefore, I dismiss with costs the preliminary objections raised and find that the application before the court is competent and this court has jurisdiction to try it."*

Aggrieved, the respondents immediately wrote to the Chief Justice complaining of what they thought to be un-procedural and or strange situation. Responding to their letter, the Honourable Chief Justice ordered revision proceedings to be instituted under section 4 (3) of the Appellate Jurisdiction Act, Cap 141 R. E. 2002. Consequently, Civil Revision No. 5 of

2011 was instituted and after the hearing of the same, we gave our decision on 3.2.2015 in which we quashed and set aside the proceedings and the ruling by Hon. Mruma J, and, as aforesaid, ordered the record to be remitted to the High Court (Commercial Division) with directions that the judgment prepared by Hon. Kimaro J, (as she then was) be pronounced by a successor judge or other judicial officer of competent jurisdiction.

Upon the delivery of our decision, the applicants, instantly, lodged a notice of motion under Rule 66 (1) (a) and (c) of the Court of Appeal Rules, 2009 asking the Court to review our decision on the following grounds:-

a) That there is a serious error that occasioned miscarriage of justice in the ruling of the Court in that the Court interpreted Order XX Rule 2 of the Civil Procedure Code to grant the revision without considering the application of section 53 (1) of the Interpretation of Laws Act, Cap 1 of the Revised Edition, 2002.

b) That the Court wrongly interpreted Order XX Rule 2 of the Civil Procedure Code using persuasive foreign conflicting authorities ignoring the binding statutory provision of the law.

c) The Court's ruling has errors and/or omissions that has led to miscarriage of justice in that;

   i. The judgment at the high Court was pronounced by the Registrar not because Hon. Kimaro J, (as she then was) was elevated to the Court of Appeal of Tanzania. The

Honourable judge remained in the High Court and she corrected the judgment after it was pronounced by the Registrar.

ii. The ruling of the Court did not consider the fact that the judgment to be pronounced by the successor judge is a hybrid judgment in that it was first written, dated and signed by Hon. Kimaro J, (as she then was) who later on amended it after it was pronounced by the Registrar.

iii. The Court's ruling wrongly held that the judgment of the High Court was not invalidated.

iv. The Court did not consider the jurisdiction or otherwise of the trial judge to receive fresh submission before pronouncing the judgment.

At the hearing of the application the first and second applicants were represented by Mr. Mustafa Chandoo, Mr. Seni Malimi, together with Audax Vedastus and Gaudious Ishengoma, all learned advocates. Mr. Respicus Didas and Mr. Juma Salim Beleko, learned advocates, represented the first and second respondents respectively.

Mr. Malimi and Mr. Vedastus who made presentations on behalf of the applicants asked the Court to adopt their written submission filed on 13.4.2015. In essence, the Court is impugned for wrongly interpreting the

provisions of Order XX Rule 2 of the Code to mean that the learned successor judge was duty bound to pronounce the judgment prepared by his predecessor. It was further contended that the Court erred in relying on an Indian decision which was no longer good law, even in India itself, and ignoring the binding provisions of section 53 (1) of Cap 1.

On their part counsel for the respondents also asked the Court to adopt the reply affidavit as well as the written submission of the first respondent.

The application was attacked for being baseless and not meeting the criteria set down for review as under Rule 66 of the Rules. Relying on the case of **Chandrakant Joshubyai Patel v. Republic** [2004] T.L.R. 218, it was submitted that there is no error apparent on the face of record in the present application. According to Mr. Didas, an error apparent on the face of record shall be obvious, self-evident or one that does not involve an elaborate process of reasoning or complex counter - arguments. He cited the case of **Cleophas M. Motiba & Another v. The principle Secretary, Ministry of Finance & Others**, Civil Application No. 13 of 2011 CAT (unreported). Mr. Didas contended further that the applicants' grounds are grounds for appeal rather than review. He asked the Court to dismiss them as the law is clear that a review is by no means an appeal. He relied on our

decision in **Tanganyika Land Agency Ltd & others v. Manohar Lal Aggarwal** [2011] 1 EA 438.

Joining hands with Mr. Didas, Mr. Beleko urged us to reject the application as the applicants were playing delaying tactics which is highly unfair. Mr. Didas further asked that as the application is an abuse of the court process advocates for the applicants should be held personally liable for costs.

In a brief rejoinder, Mr. Malimi maintained his submissions that since the Court wrongly interpreted Order XX Rule 2 of the Code, it cannot be said that there is no miscarriage of justice. Thus, he asked the Court to allow the application. On the question of costs Mr. Vedastus argued that they should not be condemned personally to costs as they merely complied with their client's instructions.

The matter need not detain us. The only question here is whether sufficient ground has been advanced to warrant us to review our decision delivered on 10th February 2015. At this point we consider it fit to begin by explaining what review entails. Generally, in an application for review, the Court is being asked to re-consider its own decision on allegation that

something was not considered which resulted in miscarriage of justice – See the case of **Mbijima Mpigaa & Another v. Republic**, Criminal Application No. 3 of 2011 CAT (unreported). The powers for the Court to review its own decision are well stipulated under Rule 66 (1) of the Rules. That Rule provides 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 miscarriage of justice; or*
>
> *(b) a party was wrongly deprived of an opportunity to be heard; or*
>
> *(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."*

Those powers, however, should be exercised cautiously and only in the most deserving cases, bearing in mind the demand of public policy that litigation must have finality. In the case of **Tanzania Transcontinental Co. Ltd v Design Partnership,** Civil Application No. 62 of 1996 CAT (unreported) the Court stated that:-

> *"The Court will not readily extend the list of circumstances for review, the idea being that the Court's power of review ought to be exercised sparingly and only in the most deserving cases, bearing in mind the demand of public policy for finality and for certainty of the law as declared by the highest Court of the land."*

Having the above principles of law in mind, the immediate question is whether the grounds advanced by the applicants for review warrant us to review the impugned decision.

Generally, the applicants' main ground is that there is an error apparent on the face of the record which resulted to injustice in the case. As already shown in their submission, though briefly, the purported errors referred by the applicants are, in our view, three fold; **one** that we wrongly interpreted the provisions of Order XX Rule 2 of the Code, **two** that we failed to consider the provision of section 53 (1) of the Interpretation of Laws Act

and **three** that we erred by relying on the persuasive conflicting Indian case in our decision.

We appreciate the fact that Mr. Malimi tried his best to convince us that we were wrong in our interpretation of Order XX Rule 2 of the CPC that the learned judge was duty bound under that provision to do nothing more but to pronounce the judgment prepared by his predecessor. As shown earlier, he submitted that had we considered the provisions of section 53 (1) of Cap 1 we would have appreciated the fact that the word 'may' used under Rule 2 of Order XX of the CPC implies that the learned judge had discretion to either pronounce the judgment of Hon. Kimaro J, (as she then was) or to hear the matter afresh. Finally, he attacked us for relying on the case of **Nunkala Venkatasu v. Nanduri Suryanayarana & Another** (supra) which, according to him, was declared a bad law in India. However, as aforesaid, apart from a decision of the High Court of India in **Laxman v. Ratnabai & Others** (supra) which opted not to follow the decision in **Nunkala Venkatasu's** case, Mr. Malimi failed to cite the decision in India which overruled **Nunkala Venkatasu's** case.

We have closely scrutinized the purported errors complained of above. The question to be asked is, was there a "**manifest error on the face of**

the record "as stipulated under Rule 66 (1) (a) of the Rules? This Court in the case of **African Marble Company Ltd (AMC) v. Tanzania Saruji Corporation (TSC),** Civil Application No. 132 of 2005 quoted with approval the book of Mulla, Indian Civil Procedure Code, 14th edition pages 2335 – 36 where the phrase "an error apparent on the face of record" was defined to mean an error which can be seen by one who writes 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 be two opinions. For the sake of being precise, we will quote that definition as we did in that case. The Court stated that:-

> *"An error apparent on the face of record must be such as can be seen by one who writes 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 be two opinions.***" [Emphasis added].

In Civil Application No. 17 0f 2008 (unreported) - **Tanganyika Land Agency Limited and Others versus Manohar Lal Aggrwa**l the Court stated:

".....Thus the ingredients of an operative error are that first, there ought to be an error; second, the error has to be manifest on the face of the record, and third, the error must have resulted in miscarriage of justice."

In the circumstances of the present case, the complaint that we wrongly interpreted the provisions of Order XX Rule 2 of the CPC is, in our firm view, something which can be established by a long drawn process of reasoning on which there may plausibly be two opinions. Thus, it does not amount to an error apparent on the face of record. Simply put, such a complaint invites us to re-hear the arguments already considered by the Court on appeal. To review it would be equivalent to hearing another appeal under the guise of a review. As this Court stated in the case of **Richard Julius Rukambura v. Issack Ntwa Mwakajila & Another**, Civil Application No. 3 of 2004 (unreported):-

"The fact that the applicant may have been unhappy with that decision or even that the Court was wrong in holding such a view cannot provide a basis for review, although had there been a higher appellate tribunal the applicant might want to appeal against that decision."

This applies also in the other two complaints in the present matter; that we did not consider the provisions of section 53 (1) of the Interpretation of Laws Act and that we wrongly relied on the persuasive conflicting Indian decision.

There is no gainsaying that a review of the judgment of the highest Court of the land should be an exception. We need to stress once again that review jurisdiction should be exercised in the rarest of cases and in the most deserving cases which meet the specific standards stipulated in Rule 66 (1) of the Rules. As such, an application for review should not be frivolously entertained when it is obvious that what is being sought therein is a disguised re-hearing of the already determined appeal – See the case of **James @ Shadrack Mkungilwa & Another v. Republic**, Criminal Application No. 1 of 2012, CAT (unreported). See also the case of **Peter Kidole v. Republic**, Criminal Appeal No. 3 of 2011 CAT (unreported) whereby the Court quoted with approval the case of **Autodesk Inc v. Dyson (No. 2)** 1993 HCA 6; 1993 176 LR 300 where it was stated that:-

> *"(i) The public interest in the finality of litigation will not preclude the exceptional step of reviewing or rehearing an issue when a court has good reason to consider that, in its*

earlier judgment it has proceeded on a misapprehension as to the facts or the law.

(ii) As this court is a final Court of Appeal there is no reason for it to confine the exercise of jurisdiction in a way that would inhibit its capacity to rectify what it perceives to be an apparent error arising from same miscarriage in its judgment.

(iii) ***It must be emphasised, however that the jurisdiction is not to be exercised for the purpose of re-agitating arguments already considered by the Court; nor is it to be exercised simply because the party seeking a rehearing has failed to present the argument in all its aspects or as well as it might have been put. The purpose of the jurisdiction is not to provide a back door method by which unsuccessful litigants can seek to re-argue their cases.*** "[Emphasis added]

The application failed to meet the standards for review under our laws and it was under such circumstances that we were constrained to hold that

we had no jurisdiction to grant the relief that was being sought by the applicants. That is why, as stated earlier on, we rejected the application.

Before we conclude however, we feel it is desirable to make the record clear as regards the two complaints that we ignored the provisions of section 53 (1) of the Interpretation of Laws Act and that we relied on the persuasive conflicting decision of India. We will tackle them together.

Section 53 (1) of the Interpretation of Laws Act provides that:-

"Where in any written law the word "may" is used in conferring power, such word shall be interpreted to imply that the power so conferred may be exercised or not, at discretion."

In our judgment, after we considered the rival submissions by the parties on the point, and after we consulted some of the decisions in India, we said the following at page 13 second paragraph of our Ruling:-

> *"On our part, we are of the settled mind that though the word used in the rule is 'may' it is mandatory upon the succeeding judge to pronounce the judgment prepared but not delivered by his predecessor, and it is not open to him to re-open the whole matter. That has always been the practice here in our jurisdiction...."*

So, the word "may" in rule 2 of Order XX as read along with sections 2 (2) (a) and (b) and 53 (1) of Cap 1 must be interpreted in such a way as imposing a mandatory obligation on the successor judge to pronounce the judgment of his predecessor. To interpret otherwise is to invest a successor judge with jurisdiction which he does not have.

Section 2 (2) (a) and (b) provide:

> *"(2) The provisions of this Act shall apply to, and in relation to, every written law, and every public document whether the law or public document was enacted, passed, made or issued before or after the commencement of this Act, unless in relation to a particular written law or document–*
>
> *(a) express provision to the contrary is made in an Act;*
>
> *(b) in the case of an Act, the intent and object of the Act or something in the subject or context of the Act is inconsistent with such application; or*
>
> *(c).....*

Inspiration can also be drawn from our decision in **Bahati Makeja v. Republic** - Criminal Appeal No. 118 of 2006 (unreported) where we discussed the above provisions in relation to the word "shall" used in section 53 (2) of Cap 1. There we stated:

"We are therefore, of the well decided view that the interpretation of the word 'shall' given in section 53 (2) of Cap 1 must be subjected to the protective provisions of s. 388 of the CPA.

And that is what the Legislature has done as expressed in s. 2 (2) (a) and (b) of Cap 1.....

It is clear to us that under either of the two paragraphs the definition of the word "shall" to be imperative where a function is imposed does not apply to the Criminal Procedure Act in view of s. 388 which subjects all mandatory provisions in that Act to the test whether or not injustice has been occasioned."

Again, at page 16 of the our Ruling, after a long quotation from the case of **Nunkala Venkatasu** (supra) which is the same case Mr. Malimi said we relied on, we stated as follows:-

*"**We entirely subscribe to the above holding**. The rationale underlying the provision in issue as stated in the above case is to save judicial time. Indeed, if it were discretionary with the succeeding judge to hear the matter de novo it would involve a*

waste of judicial time and cause a great deal of hardship and inconvenience to the parties. ***Since a duty is cast on the judge to pronounce judgment in the interest of litigant public and in the main to save judicial time, the word 'may' used in Order XX Rule 2 of the Code has a compulsory force and the succeeding judge is under obligation to pronounce the judgment that was written by his predecessor and it is not competent for him to re-hear the suit.*** "[Emphasis added].

The quotation above is very clear. It is obvious that we properly considered the use of the word "*may*" under the provisions of Order XX Rule 2 of the CPC.

Even if, for the sake of academic argument it were to be assumed that there was an error in our interpretation of the word 'may' in rule 2 of Order XX the applicants failed to exhibit any miscarriage of justice that was occasioned by that error. It is to be noted that the applicants will still have a right to appeal the Court, if they wish to do so, from the decision of Kimaro, J. (she then was).

It was in the light of the above considerations that we rejected, with costs, the application for review of our decision in Civil Revision No. 5 of 2011 dated 10th February, 2015.

DATED at **DAR ES SALAAM** this 25th day of August, 2016.

E.A. KILEO
JUSTICE OF APPEAL

S.A. MASSATI
JUSTICE OF APPEAL

I.H. JUMA
JUSTICE OF APPEAL

I certify that this is a true copy of the original

E.F. FUSSI
DEPUTY REGISTRAR
COURT OF APPEAL