IN THE HIGH COURT OF TANZANIA

(COMMERCIAL DIVISION)

AT DAR ES SALAAM

COMMERCIAL REVIEW NO. 7 OF 2018

(Arising from Commercial Case No. 80 of 2006)

TINA AND COMPANY LIMITED .....1ST APPLICANT

WOLFGANG A. SPENGLER .....2ND APPLICANT

CHRISTINE S. SPENGLER .....3RD APPLICANT

VERSUS

EURAFRICAN BANK (T) LIMITED .... RESPONDENT

25/01& 25/02/2019

RULING

MWANDAMBO, J

This ruling seeks to address a fine but very important issue whether the Court's decision made on 18th July 2018 in Commercial case No. 80 of 2006 in execution proceedings is amenable to review under Order XLII Rule 1 (1) (a) of the Civil Procedure Code, Cap. 33 [R.E. 2002] (hereinafter to be referred to as the CPC).The application has been preferred by the applicants represented by Audax Kahendaguza Vedasto learned Advocate. The respondent enjoys the services of Mr. Jonathan Mbuga learned Advocate

The background to the application is not intricate. The applicants were judgment debtors in Commercial Case No. 80 of 2006 in a judgment delivered on 24th April 2009. Following that decision, a lot of water passed under the

bridge resulting into an application for execution of the decree by way of arrest and detention of the 2nd and 3rd applicants as civil prisoners for failure to satisfy the decree in the sum of TZS 86,030,507.26 and USD 13,451 The Court (Mruma, J) did not accede to the application for arrest and detention straight away. Instead, the learned judge invoked the provisions of Order XXI Rule 35 (1) of the CPC by issuing a notice to the applicants to show cause why they should not be committed to civil prison for failure to satisfy the said decree.

In response, on 16th October 2017, the applicants filed an affidavit deponed to by Wolfgang A. Spengler, the 2nd judgment debtor in which they averred that they had satisfied the decree and so that would be sufficient cause against the application. After hearing the parties, the Court found no purchase in the applicants' explanation holding that property did not amount to a sufficient cause against execution by way of arrest and detention in a civil prison and it granted the application ordering the applicants to pay the decretal sum within 3 months failing which the 3rd applicant be detained in a civil prison for 6 months. Aggrieved, the applicants have sought to have that decision reviewed by filing a memorandum of review pursuant to Order XLII Rule 1 (1) (a) and 3 of the CPC as under;

> *"that the honourable Court erred in law and in fact by making of decision to effect of arresting and detaining the 2nd and 3rd respondents for not satisfying the decree dated 24th April 2009 issued by the High Court (Commercial Division) in Commercial case No. 80 of 2006, without taking into account the presentation, through the 2nd respondent's affidavit lodged in this Court on 16th July 2017 which was adopted by all the applicants and the applicant's skeleton arguments lodged on 14th November 2017, to the effect that the decree against the Applicants jointly and severally has been satisfied".*

As the memorandum of review does not permit any reply, the respondent's opposition has been in its skeleton and oral arguments through Mr. Jonathan Mbuga, learned Advocate of Legis Attorneys. The learned Advocate contends in the first place that the application is incompetent because a drawn Order has not been attached to the memorandum of the review and secondly, the learned Advocate argues that the decision sought to be reviewed is not amenable to a review on the ground that the application has not met the criteria of reviewable decisions warranting exercise of the Court's power of review notably; **African Marble Company Limited (AMC) vs. Tanzania Saruji Corporation,** Civil Application no 132 of 2005 referred in **SGS Societe General de surveillance SA & Another vs. VIP Engineering and Marketing Limited & Another,** Civil Application No. 25 of 2015 and **Tanganyika Land Agency Limited & Others vs. Lal Aggrwal,** Civil Application No. 17 of 2008 (all unreported) all of the Court of Appeal of Tanzania.

The learned Advocate referred the Court also to a decision from Kenya in **National Bank of Kenya Ltd vs. Njau** (1995- 1998)2 EA 249 for the proposition that an application for review must disclose an error or omission which is self-evident not requiring an elaborate argument to be established. On the basis of the foregoing, the Court was invited to dismiss the application. I must point out that should the Court find the application devoid of merit, it can reject the same rather than dismissing it in pursuance of Order XLII Rule 4(1) of the CPC.

Mr. Audax Kahendaguza Vedasto learned Advocate represented the applicants premising his arguments on the interpretation of Order 47 Rule 1 of the Code of Civil Procedure Act V of India reflected in the works of *Mulla on the Code of Civil Procedure, 17th edition, Lexis Nexis, Butterworths, 2007 Vol. 4 at PP 661 – 664.* The relevant parts in the said book underscore the court's power of

review in instances where the material on the record escapes its attention and where the judgment did not effectively deal with or determine an important issue in the case as grounds falling under error apparent on the face of the record. The learned Advocate made further reference to the Court's decision in **Mbolye Mhurula vs. Sanya Mbolye** (1974) LRT n. 48 (Mnzavas, J -as he then was) in which it was held that the principle underlying review is that the court would not have acted as it had if all the circumstances had been known. Based on the foregoing, the learned Advocate argued that had the learned judge directed his mind to the applicants' explanation that the decree had been fully satisfied, he should not have come to the decision he made ordering payment of the decretal amount within 3 months failing which risk civil imprisonment.

At the oral hearing Mr. Vedasto made response to the contention made by the learned Advocate for the respondent in relation to the competence of the application and argued in essence that the requirement to attach copies of decrees or drawn orders does not apply to applications for review on the authority of **Chiku Hussein Lugonzo Vs. Brunnids S. Paulo** [2001] TLR 498.

On the strength of that decision by the Court of Appeal, I see no basis of any further argument on the point raised by the learned Advocates for the respondents regarding competence of the application. I accordingly reject it for want of merit.

Regarding the merits of the application, the learned Advocate reiterated that the application had met the threshold stipulated by Order XLII Rule 1 (1) (a) of the CPC and referred the Court to several decisions of the Court of Appeal amongst others; **Truck Freight Ltd vs. CRDB Bank Ltd,** CAT Civil Application No. 157 of 2007, **Alnoor Shariff Jamal vs. Bahadul Shamji,** CAT Civil Application No. 25 of 2006 (both unreported) underscoring the point that a court

decision is incomplete unless it contains determinations on all decisive issues before it this way or the other.

Mr. Dixon Sanga learned Advocate who appeared for an oral hearing representing the respondent reiterated the stance reflected in the written skeleton arguments arguing that the application fell below the threshold required of reviewable decisions reiterated by the Court of Appeal in a number of cases including; **Kitinda Kimaro vs. Anthony Ngoo & Davis Anthony Ngoo**, CAT (AR) Civil Application No. 79 of 2015 (unreported). The learned Advocate also referred to a decision of this very Court in **Bulyanhullu Gold Mining Ltd & 2 Others vs. Isa Ltd & Another,** Misc. Comm. Review No. 1 of 2018 (Sehel, J- as she then was) (unreported).

I have examined the arguments for and against the application by the learned Advocates and what comes out to be clear is that both are agreeable on the principles behind the Court's power of review under Order XLII Rule 1 of the CPC. The authorities cited by each of them settles the law and I need not delve into any discussion more than necessary. What parts their ways is whether the decision sought to be reviewed falls within the cases warranting a review that is to say; whether the decision of this Court made on 18th July 2018 contains an apparent error on the face of the record occasioning miscarriage of justice. The authorities cited by each of them settles the law and I need not delve into any discussion more than necessary. However, I must be quick to point out that **Alnoor Shariff Jamal vs. Bahadul Shamji** (supra) involved an appeal rather than a review although it could have passed for a review had it been pursued before the High Court.

The other aspect which emerges out of the said decisions is that an application for a review is not supposed to be an appeal in disguise through

which an applicant seizes an opportunity for a fresh hearing of the case in the hope that the court will evaluate the evidence afresh and come to a different view from the original one. This is evident from an examination of the commentaries by Mulla (supra), the ratio in East **African Development Bank vs. Blue Live Enterprises Ltd,** CAT Civil Application No.21 of 2012 (unreported) referred by the Court of Appeal in **Kitinda Kimaro's case (supra).** For better appreciation of principles, I take the liberty to reproduce a passage from **Kitinda Kimaro** (supra) citing **Nguza Vikings @ Babu Seya & Another V. Republic** making reference to an earlier decision of the same court in **Chandrakant Joshubhai Patel vs. Republic** [2004] TLR 218 thus:

> *"There is no dispute as what constitutes a manifest error on the face of the record. It has to be such an error that is an obvious and patent mistake and not something which can be established by a long drawn process of reasoning on points which there may conceivably be two opinions" [at p.9]*

As to instances which do not warrant exercise of the power of review, the Court of Appeal listed the following:

> 1. *If the error is not self-evident and has to be detected by the process of reasoning,*
> *2. If there are two possible views regarding the interpretation or application of the law,*
> *3. Any ground of appeal,*
> *4. An erroneous decision,*
> *5. A mere error or wrong view and,*
> *6. A different view on a question of law or an erroneous view on a debatable point or wrong exposition or wrong application of the law.*

The complaint here is that the Court omitted to consider the applicants' defence against the execution by way of arrest and detention in civil prison of the 2nd and 3rd applicants to the effect that the decree had been fully settled. That complaint is made notwithstanding the fact the ruling of the Court shows that the learned judge reached his decision upon consideration of the affidavit. Be that as it may, it is self-evident that the decision does not reflect that the applicants' defence regarding full settlement of eth decree sought to be executed was considered and determined this way or the other before considering the ground on poverty which was rejected for being irrelevant. Consistent with the Court of Appeal decision in **Truck Freight Ltd vs. CRDB Bank Ltd** (supra) failure to consider a point which on the face of it was decisive of the application for execution on the mode preferred by the decree holder appears to me to constitute a manifest error on the face of the record (see also: Mulla cited hereinabove at page 662 and **Mbolye Mhurula vs. Sanya Mbolye** (supra). The test in such cases has always been that had the Court have regard to all the decisive points it wouldn't have come to the same decision complained of by way of an application for review as it were. It will be recalled that the learned judge declined to proceed with granting the application for execution without hearing the judgment debtors who were to be detained as civil prisoners for failure to satisfy the decree.

As indicated earlier, the applicants filed an affidavit in which they contended that the decree had been fully satisfied. Whether those averments were true or not was a different matter altogether. What was crucial was for the Court making a determination on those averments before coming to the conclusion it did. I think the Court's attention was eluded from the applicants' material placed before it and hence the decision it reached failing to determine the very aspect of the notice to show cause as if the applicants had not placed any material for

the Court's consideration. Contrary to the arguments by the respondent's learned Advocates, omission to consider the very defence for which a notice to show cause was issued constituted an apparent error on the face of the record articulated by courts in the cases cited by both Counsel in their respective arguments. I think it should now be plain that detecting the error complained of does not involve a long drawn process of reasoning neither does it call for two possible views because none has ever been expressed by the learned judge.

The same applies to other exceptions to applications for review listed earlier and so I would, with least hesitation endorse the submissions by the learned Advocate for the applicants that this is a fit case for the Court exercising its power under Order XLII rule 4(2) of the CPC. The net effect is that the decision by this Court made on 18th July 2018 is hereby vacated. Going forward, the Court will proceed to compose a fresh ruling having regard to the applicants' defence in the affidavit filed in Court on 16th October 2017.

That said, the application stands allowed. Costs shall be in the cause. Order accordingly

Dated at Dar es Salaam this 25th day of February 2019

L.J.S Mwandambo

JUDGE