IN THE COURT OF APPEAL OF TANZANIA
AT MTWARA

(CORAM: NDIKA, J.A., KEREFU, J.A., And KENTE, J.A.)

CIVIL APPLICATION NO. 10/07 OF 2022

BAHARI OILFIELD SERVICES EPZ LTD.....APPLICANT

VERSUS

PETER WILSON..... RESPONDENT

(Application for review from the decision of the Court of Appeal of Tanzania at Mtwara)

(Lila, Levira and Kitusi, JJ.A.)

dated the 11th day of June, 2021
in
Civil Appeal No. 157 of 2020

RULING OF THE COURT

28th & 30th March, 2022

KEREFU, J.A.

This is an application for review of the decision of this Court dated 11th June, 2021 in respect of Civil Appeal No. 157 of 2020 where the applicant's appeal was dismissed. The applicant's notice of motion lodged on 4th August, 2021 is premised under Rule 66 (1) (a), (c) (d) and (2) of the Tanzania Court of Appeal Rules, 2009 as amended (the Rules) and is supported by an affidavit deponed by Mwanahamis Addam, learned counsel for the applicant. The grounds for the review indicated in the notice of motion can be paraphrased as follows: -

(i) *That, the Court overlooked to consider that issues of repatriation and subsistence allowance were already settled by the arbitrator in the proceedings of 26th*

January, 2018 where the parties unanimously agreed on those matters but the CMA, the High Court and this Court proceeded on making decisions on them thus a misapprehension of the facts and determining of the said matters without jurisdiction;

(ii) That, the honourable Court misapprehended the facts and law on the effect of the settled issue of salary deduction at the CMA but still the CMA, the High Court and this Court reconsidered it and determined it as if the same has never been decided upon by any competent tribunal thus dwelling on the said matter without jurisdiction;

(iii) That, the honourable Court acted in a manifest error that has resulted in the miscarriage of justice having dismissed the applicant's appeal in Civil Appeal No. 157 of 2020; and

(iv) That, the honourable Court acted in a manifest error on the face of the record that has resulted in a miscarriage of justice as it disregarded the issue of jurisdiction on the second arbitrator and the High Court to entertain the matter which has already been concluded by the first arbitrator.

The application is resisted by an affidavit in reply deposed by Mr. Salimu Juma Mushi, learned counsel for the respondent. Essentially, the respondent contends that all grounds complained of by the applicant as errors on the face of the record do not constitute grounds for review to

warrant the Court to exercise its jurisdiction to review the impugned decision.

However, before embarking on the merits or demerits of the application, we find it apposite to narrate the brief facts leading to this application as obtained from the record of the application. That, the respondent was a former employee of the applicant from 15th January, 2015 to July, 2017. The employment contract specified that, the total monthly pay which the respondent was going to be receiving would be US$ 10,000. However, from October 2015, the applicant began to pay the respondent US$ 3,000 less on the ground that there was no enough income. Later, in July 2017, the respondent received a letter of termination of his employment on account of curtailed business operations on the part of the applicant. The respondent disputed the alleged reason as he contended that he had worked out business ventures that were bringing income to the applicant and that, in the event, the applicant employed another person who took over from his position. Thus, the respondent prayed for payment of monthly salary for the remaining period of the contract and compensation for unfair termination. The respondent's claims were rejected by the applicant.

Subsequently, the respondent approached the Commission for Mediation and Arbitration (the CMA) complaining against unfair termination

of his employment by the applicant. Specifically, the respondent sought the following reliefs: **One,** payment of basic salary for the remaining period of the contract (four months) at US$ 10,000 per month; **two,** payment of US$ 120,000 being salaries for 12 months as compensation for unfair termination; **three**, payment of US$ 72,000 being refund of deducted salaries; **four**, payment of subsistence allowance at the rate of US$ 150 per day from the date of unfair termination to the date of final determination of the matter and; **finally,** payment of repatriation costs.

Having heard both parties, the CMA was satisfied that the respondent's employment was unfairly terminated, so it proceeded to award him a total of US$ 40,000 being salary for the remaining period of four months, subsistence allowance at the rate of US$ 150 per day from the date of termination to the date of either determination of the matter or of honouring the award, which came to 204 days x 150, equals to US$ 30,600 and deducted salary of US$ 3,000 per month for two months, which came to a total of US$ 6,000.

Aggrieved, the applicant preferred a revision to the High Court vide Labour Revision No. 2 of 2018. Upon hearing the parties, the High Court found that the application had no merit save for the award of US$ 6,000 which was ruled to be time barred. Still dissatisfied, the applicant

unsuccessfully appealed to this Court. Undaunted, the applicant has again approached the Court, but this time, as stated earlier, by way of an application for review.

At the hearing of the application before us, the applicant was represented by Mr. Alex G. Mgongolwa, learned counsel assisted by Ms. Annette W. Kirethi, learned counsel whereas the respondent was represented by Mr. Salim Mushi, learned counsel. Pursuant to Rule 106 (1) and (7) of the Rules, both parties had earlier on lodged their respective written submissions and reply written submissions for and against the application, which they sought to adopt to form part of their oral submissions.

Submitting in support of the first and third grounds of the review, Mr. Mgongolwa faulted the Court for failure to find out that the CMA, the High Court and even itself did not have the jurisdiction to entertain issues of repatriation and subsistence allowances as the same were already settled by the parties. He argued that, when they approached the CMA, the parties were not at issue on those matters and the same were erroneously reopened by the CMA, hence led the other courts, like the CMA, to slip into error of handling those matters without jurisdiction. It was his argument that, since parties were not at issue, they were not accorded the right to

be heard on those matters and thus no sufficient materials to enable the CMA, the High Court and this Court to determine the said matters. He submitted that, this Court, being an apex Court of the land in the administration of justice, is required to rectify the said error.

Upon being probed by the Court and specifically referred to pages 7 to 14 of the impugned decision where the Court had adequately considered those matters along with the issue of jurisdiction of the CMA and the High Court in respect of the said matters which were raised by him before this Court during the hearing of Civil Appeal No. 157 of 2020, Mr. Mgongolwa, although he admitted that the Court had pronounced itself on those issues, faulted it for defining the term '*jurisdiction*' in a narrow context that it was only a creature of statute. He argued that the Court was required to consider the issue of jurisdiction in its wider sense including other factors and circumstances where a court can lose its jurisdiction in the course of hearing the case. He said that, the issue of jurisdiction is a live creature throughout the trial and there are scenarios where the court may lose its jurisdiction. It was his argument that, in the matter at hand, the act of deciding matters which were already settled by the parties, amounted to misapprehension of facts and had affected the jurisdiction of the CMA, the High Court and even this Court in entertaining those matters. To support

his proposition, he cited the case of **Anisminic Limited v. The Foreign Compensation Commission & Another** [1969] 1 All E.R pp. 208 - 256 together with an Indian Book titled *'Mathur, D.N. the Code of Civil Procedure (2nd Ed.) Allahabad: Central Law Publications. 2011 pp. 244 - 245.'* He then urged us to find out that the error of misapprehension of facts by the CMA, the High Court and this Court is reviewable.

As regards the second and the fourth grounds of the review, Mr. Mgongolwa argued that the issue of salary deduction was first raised before the CMA by the respondent who claimed that the salary was deducted from US$ 10,000 to US$ 2,000 per month. The applicant successfully challenged that claim on account that, it was raised out of time contrary to Rule 10 (2) of the Labour Institutions (Mediation and Arbitration) Rules, 2007 GN No. 64 of 2007. He contended that, since on 13th December, 2017, the CMA (Hon. Mwanjeka) had declared the said claim time barred, then, the CMA did not have the prerequisite jurisdiction to reopen that matter. He insisted that, because the issue of jurisdiction is a point of law and crucial for determination of a suit, it can be raised at any time, and that this Court was required to consider the same at the appeal and correct that illegality. On this point, Mr. Mgongolwa referred us to our previous decision in **Chama cha Walimu Tanzania v. The Attorney**

General, Civil Application No. 151 of 2008 and **Jayantukumar Chandubhai Patel @ Jeetu Patel & 3 Others v. The Attorney General & 2 Others,** Civil Application No. 160 of 2016 (both unreported). He then invited us to scrutinize the proceedings before the CMA and find out that it had no jurisdiction to entertain that matter. He finally prayed for the application to be granted and urged the Court to rectify its impugned decision.

In response, Mr. Mushi strongly resisted the application by arguing that, the application has not met the threshold enshrined under Rule 66 (1) of the Rules and so, the Court should dismiss it. He clarified that, to constitute an error apparent on the face of the record, the mistake complained of should not be discerned from a long-drawn process of reasoning but rather, it should be an obvious and patent mistake. To bolster his proposition, Mr. Mushi referred us to our previous decisions in **Chandrakant Joshubhai Patel v. Republic** [2004] TLR 218, **Dar es Salaam Institute of Technology v. Deusdedit Mugasha,** Civil Application No. 233/18 of 2019 and **National Microfinance Bank v. Leila Mringo, Yahaya Juma Ndao & Crossman Godfrey Makere,** Civil Application No. 316/12 of 2020 (both unreported).

He then argued that, in the current application, the grounds of the review stated in the notice of motion and applicant's affidavit are but an

attempt to reopen the appeal, as all matters complained of herein, have already been determined by the Court. Specifically, Mr. Mushi referred us to pages 12 and 21 of the impugned decision and insisted that, the said matters were adequately considered and correctly decided upon by the Court. That, the Court was aware of the CMA's proceedings of 26th January, 2018 and still ruled out that the said proceedings did not oust the jurisdiction of both, the CMA and the High Court. As such, Mr. Mushi urged us to dismiss the application with costs.

In his brief rejoinder, Mr. Mgongolwa challenged the submission by his learned friend for asserting that the applicant is reopening the matter before the same Court. He referred us to **Ottu on behalf of P.I Assenga & 106 Others and 3 Others v. AMI (Tanzania) Limited,** Civil Application No. 20 of 2014 (unreported) and emphasized that the fact that a matter was already determined by the Court cannot preclude the Court from reviewing or rehearing that matter if there are good reasons for the Court to do so. He thus reiterated his previous prayer urging us to allow the application with costs.

On our part, having examined the record of the application, the written and oral submissions advanced by the counsel for the parties for and against the application, the issue for our determination is whether the

grounds advanced by the applicant justify the review of the Court's decision.

To start with, we wish to note that the Court's power of review of its own decisions is provided for under section 4 (4) of the Appellate Jurisdiction Act, [Cap. 141 R.E 2019] whereas the grounds upon which a review can be successfully sought are stated under Rule 66 (1) of the Rules. The said 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 the miscarriage of justice; or*
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> *(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; or*
>
> *(e) the judgment was procured illegally, or by fraud or perjury."*

For an application for review to succeed, the applicant must satisfy any one of the conditions stipulated under Rule 66 (1) of the Rules. It is only within the scope of that Rule that the applicant can seek the judgment of this Court to be reviewed. Therefore, the next question for our

determination is whether the applicants' alleged manifest error is apparent on the face of the impugned decision.

Before venturing in responding to the said question, we find it prudent, at this juncture, to restate the meaning of the phrase '*apparent error on the face of record*' as stated by the Court in **Chandrakant Joshubhai Patel** (supra) that: -

> "*An* ***error apparent on the face of the 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 on which there may conceivably two opinions...* ***A mere error of law is not a ground for review*** *under this rule. 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...***". [Emphasis added].

It is clear from the above case that for an error to warrant review, it must be a patent error on the face of the record not requiring long-drawn arguments to establish it.

In the instant application, the applicant is alleging that the decision of this Court has an error on the face of record resulting in a miscarriage of justice. However, in the contents of the notice of motion and the

supporting affidavit, the applicant has failed to point out the said errors. Furthermore, in Mr. Mgongolwa's written and oral submissions before us, it is clear that the applicant's main complaint is her dissatisfaction with the decision of this Court on how it determined and contextualized the issue of jurisdiction of the CMA, the High Court and even itself in handling respondent's claims on repatriation, subsistence allowances and salary deduction. As correctly argued by Mr. Mushi, since the said issues were adequately considered by the Court when determining the applicant's appeal, it is improper for the applicant to invite the Court to re-assess and re-evaluate the same at this stage. To justify this point, we have revisited the impugned judgment and observed that, at pages 12, 13, 14 and 21 of the said decision, indeed, the Court adequately considered those matters and pronounced itself on them. For the sake of clarity, on issues of repatriation and subsistence allowances and whether parties, when they approached the CMA, were at issue or not, the Court at page 13 stated that: -

> *"In this case, the CMA had allowed the parties to testify on repatriation and there was evidence on it from both parties although scanty. The appellant's witness was asked a question at page 159 of the record if he was aware of any terminal benefits that had been paid to the respondent, and he said he was not. Then, on the respondent's side, he*

testified at page 164 of the record that he was praying to be paid subsistence allowance, salary for the remaining period of the contract and compensation for unfair termination. These testimonies were received by the CMA subsequent to 26th January, 2018, the date on which, the parties had allegedly agreed not to pursue that course. ***In fine, it is our finding that the parties were still at issue on the subsistence allowance which, as rightly submitted by Mr. Mgongolwa himself, is intertwined with payment of repatriation costs. The High Court could not have turned a blind eye to that issue by pretending it was not there for determination. The issue of jurisdiction does not arise in this case.***" [Emphasis added].

Then, on the issue of jurisdiction of the CMA, High Court and this Court to entertain the said matters, the Court at page 12 stated that: -

"So, the issue for our immediate determination is whether what was recorded on 26th January, 2018 had the effect of ousting the jurisdiction of the CMA and that of the High Court as contended by Mr. Mgongolwa. In the proceedings of that date, it is on record that the parties were not at issue on the repatriation because the applicant had undertaken to pay for the same. As we shall see later, the learned Judge took that undertaking as no more than a duty on the appellant to be discharged. ***With respect, we cannot let our imaginations run that far as to suggest that the***

record referred to above amounted to barring the CMA and the High Court from deciding on the issue. Jurisdiction cannot be taken away but through the very instrument that conferred it, *as per the cited case above."* [Emphasis added].

Furthermore, on the issue of salary deduction, the Court at page 21 stated that; -

> *"Mr. Mgongolwa submitted that, if payment of salaries for the remaining period of the contract had to be ordered, it should have been at the rate of US$ 2000, instead of US$ 10,000. With respect, the applicant cannot be heard on this having abandoned ground 2 of the appeal. Only in ground 2 of appeal would the issue of salary revision be resolved one way or the other. However,* ***as the matters now stand, the decision of the High Court that there was no salary revision remains undisturbed."*** [Emphasis added].

From the above extracts, we are in agreement with the submission of Mr. Mushi that all issues raised by the applicant herein were adequately considered and decided upon by the Court. Re-opening the same at the point of review is to sit on appeal of our own decision which is contrary to the spirit of Rule 66 (1). With respect, we find the submission by Mr. Mgongolwa on the above issues to be misconceived and not supported by the record, as although, he argued that parties were not at issue on those

matters, it is clear from the record that parties submitted themselves to the CMA and addressed it on the said matters and made several prayers before it. We even find his assertion that parties were not heard on those matters to be unfounded. We equally find the cases he cited to us distinguishable and not applicable in the circumstances of this matter. For instance, in the case of **Anisminic Limited** (supra), which he mostly relied upon, the House of Lords was sitting on an appeal from the decision of the Court of Appeal involving issues of judicial review and the central issue before the House of Lords was '*whether an ouster clause in a legislation can oust the jurisdiction of the court*' which is not the case herein.

It is therefore our respectful view that, since all matters raised by the applicant in this application were adequately considered and determined by this Court, the applicant's dissatisfaction with the finding of the Court cannot be said to constitute an error apparent on the face of record so as to justify a review. In the case of **Tanganyika Land Agency Limited and 7 Others v. Manohar Lal Aggrwal,** Civil Application No. 17 of 2008 (unreported), we emphasized that: -

> *"For matters which were fully dealt with and decided upon on appeal, the fact that one of the parties is dissatisfied with the outcome is no ground at all for review. To do that would, not only be an abuse of the Court process, but would result to endless litigation. Like life, litigation must come to an end."*

In addition, and discouraging litigants from resorting to review as disguised appeals, and underscoring the end to litigation, in **Patrick Sanga v. Republic,** Criminal Application No. 8 of 2011 (unreported), we emphasized that: -

> *"The review process should never be allowed to be used as an appeal in disguise. There must be an end to litigation, be it in civil or criminal proceedings. A call to re-assess the evidence, in our respectful opinion, is an appeal through the back door.* ***The applicant and those of his like who want to test the Court's legal ingenuity to the limit should understand that we have no jurisdiction to sit on appeal over our own judgements.*** *In any properly functioning justice system, like ours, litigation must have finality and a judgment of the final court of the land is final and its review should be an exception. That is what sound public policy demands."* [Emphasis added].

As intimated above, the application before us does nothing less than inviting the Court to re-hear the appeal afresh which is contrary to the cherished public policy that litigation must come to an end.

In the circumstances, and for the foregoing reasons, we see no merit in the applicant's application to warrant this Court to review its decision.

Accordingly, this application fails in its entirety and it is hereby dismissed. Since this is a labour related matter, we make no order as to costs.

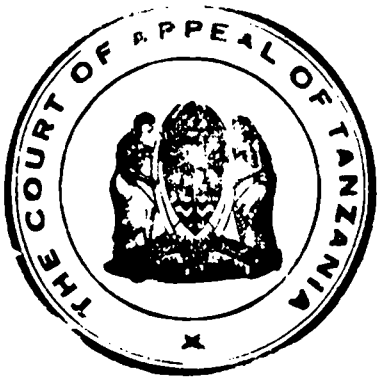
DATED at **MTWARA** this 29th day of March, 2022.

G. A. M. NDIKA
JUSTICE OF APPEAL

R. J. KEREFU
JUSTICE OF APPEA

P. M. KENTE
JUSTICE OF APPEAL

The Ruling delivered this 30th day of March, 2022 in the presence of Ms. Rose Ndemereje holding brief for Mr. Alex G. Mgongolwa and Ms. Annette W. Kirethi, learned counsels for the Applicant and Ms. Rose Ndemeleje holding brief for Mr. Salim Mushi, learned counsel for the respondent is hereby certified as a true copy of original.



D. R. LYIMO
DEPUTY REGISTRAR
COURT OF APPEAL