IN THE COURT OF APPEAL OF TANZANIA
AT ARUSHA

(CORAM: MWAMBEGELE, J.A., KOROSSO, J.A. And KITUSI, J.A.)

CIVIL APPLICATION NO. 69/2 OF 2023

BLUE ROCK LIMITED ..... 1ST APPLICANT

GEM AND ROCK VENTURES CO. LIMITED ..... 2ND APPLICANT

VERSUS

UNYANGALA AUCTION MART LTD COURT BROKER ..... 1ST RESPONDENT

PATRICK KISWIVI SANGA (As Administrator of the Estate of the Late ABELI SANGA ..... 2ND RESPONDENT

(Application for Review from the Judgment and Order of the Court of Appeal of Tanzania at Arusha)

(Mwarija, Kwariko, Mashaka, JJ.A.)

dated the 6th day of December, 2022
in
Civil Appeal No. 64 of 2017

RULING OF THE COURT

9th November 2023 & 19th January, 2024

KITUSI, J.A.:

The applicants successfully sued the respondents at the High Court claiming general and specific damages for an alleged wrongful and malicious eviction from premises which they were occupying as tenants. However, on appeal to the Court, the judgment of the High Court was quashed and its decree set aside. The applicants are relentless so they have preferred this application for review.

The brief background of the matter is that Njake Enterprises Ltd, not a party, obtained judgment in Commercial Case No. 7 of 2003 against Tanzania Sewing Machine Company Ltd, hereinafter, TASEMA. Execution of the decree in that case required removal of TASEMA from the house on Plot No. 11 Block A, Sokoine Road in Arusha, and hand possession of that house over to Njake Enterprises Ltd. The respondents were accordingly appointed to remove TASEMA from the premises.

The essence of the complaints by the applicants was and is still that the decree which the respondents were executing was from proceedings to which they (applicants) were not a party. On that basis they maintained that they were entitled to a notice before carrying out that eviction. The High Court upheld the applicants but the Court took a different view. It held that the eviction order was addressed to TASEMA, the landlord, so the respondents had no duty to issue notice to the applicants who were not cited in the eviction order. It further held that the applicants had no cause of action against the respondents and that, if anything, they ought to have proceeded against TASEMA, which they did not implead. There lie the applicants' major complaints split in two categories as it will unfold in due course.

The notice of motion cites section 4 (4) of the Appeilate Jurisdiction Act, Cap 141, (the AJA), and specifically rule 66 (1) (a) and (b) of the Tanzania Court of Appeal Rules, 2009 (the Rules). Although, as we have shown above, the major complaints are in two categories, in the motion the applicants have raised four grounds to support their application. These are:

(i) The holding of this Honourable Court that "*even though the respondents were tenants in the suit promises, the eviction order from the court to the first appellant did not mention them and there was no indication that the suit promises had tenants in it so that they couid have equally been served with the notice to vacate" is based on a manifest error on the face of the record resulting in miscarriage of justice in view of the very Eviction Order (exhibit D1) itself which directed the 1st and 2nd respondents to "remove the said judgment debtor/debtors and any person claiming or deriving title from, through or under him/her/them any person or persons bound by the order who refuses to vacate the said premises and put the decree holder in possession".*

(ii) The Honourable Court's holding that the applicants herein had no cause of action against the appellants (now the respondents) was reached without affording a hearing to the applicants, hence the applicants were wrongly deprived of an opportunity to be heard.

(iii) *The holding of this Honourable Court that "if the respondents had any claims flowing from the execution of the decree on the suit premises, they were supposed to take them to their landlord (TASEMA)" is based on a manifest error on the face of the record resulting in the miscarriage of justice for shifting to the landlord (TASEMA) liabilities arising from the illegalities committed by the appellants (respondents herein) in the course of execution of the decree.*

(iv) *The holding of this Honourable Court that "there is no way the first appellant could have issued a notice to the respondents or any other occupants who were not mentioned in the evection order" is based on a manifest error on the face of the record resulting in miscarriage of justice in the light of Order XXI Rule 34 of the Civil Procedure Code (Cap. 33 R.E 2019) which provides that:*

> *"Where a decree is for the delivery of any immovable property in the occupancy of a tenant or other person entitled to occupy the same and not bound by the decree to relinquish such occupancy, the Court shall order delivery to be made by affixing a copy of the warrant in some conspicuous place on the property and proclaiming to the occupant the substance of the decree by such means as are used locally to make public pronouncements".*

There are two joint affidavits to support the application. The first was taken jointly by Eliamin Mgallah and Sammy Mollel as Managing Directors of the first and second applicants, while the second affidavit was also jointly taken by Mr. Mpaya Kamara and Ms. Neema Mtayangulwa, both learned advocates, who had the conduct of this case at the trial and before the Court on appeal. Mr. John Faustin Materu, also learned advocate, took two affidavits in reply to each of the joint affidavits referred to above. He has also been acting for the respondents before and has resisted the present application on their behalf assisted by Mr. Ombeni Kimaro, learned advocate. The applicants appeared through Ms. Neema Mtayangula and Ms. Rehema Kitaly, both learned advocates.

In her submissions, both written and oral, Ms. Mtayangulwa learned advocate addressed the application in the two limbs as earlier intimated. The first limb is what the learned counsel considers to be a manifest error apparent on the face of the record. The second is the alleged deprival of the right to be heard.

We shall address the second limb first that alleges denial of the night to be heard which falls under grounds 2 and 3 of the grounds supporting the motion. The applicants' counsel maintained that the conclusion that

the applicants had no cause of action against the respondents was arrived at without affording the applicants a hearing. She cited the usual Article 13 (6) of the Constitution of the United Republic, 1977 (the Constitution) and cases such as **Mbeya -Rukwa Autoparts and Transport Ltd v. Jestina George Mwakyoma** [2003] T.L.R 251 on this settled principle. As we shall later demonstrate, the issue requiring our determination is not what the principle is all about and the fatality of violating it, which as we have said is settled, but whether in fact, the applicants were denied a hearing. Ms. Mtayangulwa pointed out that the issue of cause of action was not one of the agreed issues during the trial nor a ground of appeal. She then argued that if the Court was disposed to raise it as an issue, it ought to have recalled the parties to address it. For that principle, the learned counsel cited to us two cases bearing somewhat identical parties; **Charles Christopher Humphrey Kombe v. Kinondoni Municipal Council,** Civil Appeal No. 81 of 2017 and; **Charles Christopher Humphrey Kombe t/a Kombe Building Materials v. Kinondoni Municipal Council,** Civil Appeal No. 19 of 2019 (both unreported).

Responding to the alleged denial of the right to be heard, Mr. Materu briefly submitted that in stating that the applicants had no cause of action against the respondents, the Court had already decided the case and

therefore that statement was not part of the decision. From the paragraph below, Mr. Materu underlined the words *in other words* to demonstrate that at the time of making the statement about absence of cause of action, the decision had been reached on the basis of other grounds. The relevant paragraph reads : -

> *"In other words, the respondents had no cause of action against the appellants who were only executing the eviction order directed to TASEMA".*

The learned counsel maintained that, in any event, the parties were not prejudiced by that statement by the Court.

In her short rejoinder, Ms. Mtayangulwa submitted that the statement that the applicants had no cause of action against the respondent remains to be part of the decision and cannot be severed from it. She pressed for a finding that the applicants were wrongly deprived of the right to be heard. The learned counsel was not quite certain as to what should be our consequential orders if we upheld her on this. She suggested that we may remit the record to the trial court for it to hear the parties on that point which was raised by the Court on its own motion.

From the submissions of both learned counsel, there is no dispute that the parties were not invited to address the Court on the issue of

cause of action, therefore, our preoccupation on this aspect is whether, in line with Mr. Materu's argument, that statement was made after the decision had been reached and therefore inconsequential, or it is an integral part of the decision and fatal as suggested by Ms. Mtayangulwa. We agree with Mr. Materu that the Court had three grounds of appeal before it and disposed the appeal on one ground related to notice to the applicants. Although there is no dispute that the Court raised the issue of cause of action on its own motion while composing judgment and did not afford the parties a hearing, that statement did not, in our view, inform the final decision. This is evident in the statement made by the Court subsequent to that reiterating its earlier finding that there was no need to issue notice. It stated :-

> *"There is no way the first appellant could have issued a notice to the respondents or any other occupants who were not mentioned in the eviction order. We find thus, that the first ground has merit".*

Therefore, we go along with Mr. Materu and reject Ms. Mtayangulwa's argument on the point. In our view, for violation of the right to be heard as envisaged in the Constitution as well as in the many decided cases, to be held fatal, it must be relevant to the decision in

question. After all, there must be an exception to every rule, as the Court stated in the case of **Judge Incharge High Court Arusha & Another v. Lord Munuo Ng'uni** [2004] T.L.R 44 where it held in part that :-

> *" We are aware that the audi alteram partem, like all legal rules, has exceptions".*

In this case, we conclude that although the conclusion that the applicants had no cause of action against the respondents was arrived at without hearing the parties, that statement had no bearing to the final decision of the Court, therefore not fatal. We therefore dismiss the second ground of review for want of merit.

We go back to the first limb. Addressing us on it, Ms. Mtayangulwa was of the view that the Court's interpretation of the eviction order was narrow as it did not appreciate the fact that by referring to *any other persons deriving title under the judgment debtor,* the eviction order was addressing other occupants of the premises such as the tenants. She therefore submitted that the omission to serve the applicants with the eviction order rendered the execution illegal and the Court should have held so, and further that the holding that the applicants were not cited in the eviction order is a manifest error. The learned counsel insisted on the fact that there was no dispute that the applicants were tenants in the

premises, and argued further that the Court did not effectively deal with the eviction order and that, she submitted, constituted a manifest error. The learned counsel buttressed her submission with the Court's decision in the case of **Edger Kahwili v. Amer Mbarak & Another,** Civil Application No. 21/13 of 2017 (unreported) where we allowed the application for review because an important issue had not been effectively dealt with.

In addition, counsel cited rule 34 of O. XXI of the Civil Procedure Code, hereinafter the CPC, which provides for the duty of the executing officer to notify all those persons deriving title from the person targeted in the eviction order. She cited the case of **Balozi Abubakar Ibrahim & Another v. M/s. Benandys Ltd, & Another,** Civil Revision No. 6 of 2015 (unreported), for the holding that where enforcement of a decree is through assistance of the court, the law must be strictly complied with. The learned counsel prayed for an order vacating the Court's finding that there was no need to notify the applicants.

On the other hand, Mr. Materu submitted in opposition drawing our attention to the principles underlying applications for review, and cautioning that the instant application seeks to invite us to rehear the appeal, which is unacceptable. In support of his argument Mr. Materu

cited the case of **Huang Qin & Another v. Republic**, Criminal Application No. 30 of 2021 (unreported). First of all, he sought to demonstrate that the Court's finding that the eviction order did not mention the applicants is not an error apparent on the face of the record. Corollary to that he argued that, in any event, to discover that alleged error if any, it would require the Court to peruse the record, and that is not what is expected of it when dealing with applications for review.

Similarly in relation to the argument that the Court did not effectively deal with the eviction order, Mr. Materu submitted that the Court dealt with it extensively and argued again that this too would require search and a long-drawn argument to discover, which would be against the norm in review applications. For this, the learned counsel cited **SGS Societe Generale De Surveillance SA & Another v. VIP Engineering and Marketing Limited & Another** [2016] 1 T.L.R 568 and **Mathias Rweyemamu v. General Manager (KCU) Limited** [2017] T.L.R 322. He wondered how would the Court appreciate the argument put forward by the applicants while the contents of the eviction order, though admitted as an exhibit, were not reproduced in the judgment. In conclusion, the learned counsel submitted that, at most, the

applicants have only managed to show that they have been aggrieved by the decision of the Court.

In a rejoinder, Ms. Mtayangulwa submitted that in **Felix Bwogi t/a Eximpo Promotion & Services v. Registrar of Buildings,** Civil Application No. 26 of 1989, the Court went beyond its usual scope by looking into an exhibit which was, however, not part of the record, and she invited us to act in a similar manner in this application because the record of appeal has been attached to one of the supporting affidavits.

Having received those arguments from both sides, our starting point is, naturally, rule 66 (1) (a) of the Rules, which stipulates: -

> *"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".*

Caselaw has made this provision more elaborate by circumscribing what a manifest error on the face of the record means. There is a large family of decisions on this area and we have chosen to go by the celebrated one in **Chandrakant Joshubhai Patel v. Republic** [2004]

T.L.R 218 cited in the case of **Edger Kahwili** (supra). We too shall recite the following oft-quoted paragraph from the decision: -

> *"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 be two opinions: [State of Gujarat v. Consumer Education and Research Centre (1981) AIR GU 223]...* ***Where the judgment did not effectively deal with or determine an important issue in the case, it can be reviewed on the ground of error apparent on the face of the record*** *[Basselios v. Athanasius (1955) 1 SCR 520]..."*

Ms. Mtayangulwa has drawn our attention to the bolded part of that paragraph calling upon us to grant the application on the ground that the impugned judgment did not effectively deal with or determine an important issue and that it constitutes an error apparent on the face of the record. According to her, the issue that the Court did not effectively deal with or determine is the eviction order and the need to have notified the applicants. Mr. Materu submitted that the Court dealt with that issue

extensively and argued that it will require a long-drawn process of argument to appreciate the alleged error.

In our determination of the complaint in the first limb, we wish to observe that there is no denying the fact that the applicants' status as tenants on the premises as well as the issuing of notice of eviction to them were key in the determination of the appeal. In the impugned judgment of the Court, it referred to part of the arguments by the counsel for the applicants justifying issuance of notice to them as follows :-

> *"One, since **the respondents derived title from the judgment debtor**, the first appellant ought to have issued a 14 days' notice of execution to them as they were not parties to Commercial Case No. 7 of 2003 whose decree was subject of the execution order. He added that as the first appellant did not issue the notice, the respondents were not aware of the eviction so that they could make alternative arrangement for relocation of their offices or otherwise".*

During the hearing of this application, the learned advocate for the applicants insisted that there was no dispute that the applicants were tenants. We agree with her because it can be inferred from the relevant finding of the Court which is reproduced below: -

> *"In the case at hand,* ***even though the respondents were tenants in the suit premises,*** *the eviction order from the court did not mention them and there was no indication that the suit premises had tenants in it so that they could have equally been served with the notice to vacate".*

We are afraid however, that the above exposition does not represent an effective determination of the important point as to the status of the applicants in relation to the suit premises. We are able to identify one apparent error, and that is that, while the Court acknowledges that tenants would be entitled to notice, it does not proceed to specifically make a finding whether the applicants were tenants or not. With respect, we do not agree with Mr. Materu that the above error is subtle and goes against the norm in review cases. He was of the view that we cannot get to that alleged error without accessing the notice, **exhibit D1**. Ms. Mtayangulwa submitted in opposition that we can go beyond the judgment and take a look at **exhibit D1**, citing **Felix Bwogi** (supra).

However, we do not agree with both learned counsel on their submissions on the method of identifying the error. To begin with, the decision in **Felix Bwogi** (supra) relied on by Ms. Mtayangulwa was on an application for correction of an error in the judgment that had relied on a

document which was not part of the record. It was made under section 4 (2) of the Appellate Jurisdiction Act, 1979 and Rule 40 of the Tanzania Court of Appeal Rules 1979 which were in force in 1989. The Court had to go into the details of the pleadings to appreciate the argument. Ours is an application for review of our own decision governed by principles so restrictive that they deny us the luxury of acting the way we acted in **Felix Bwogi** (supra). We need to emphasize that in cases of review all that we need to scrutinize is the judgment or order, which has been a subject of many of our decisions. See for instance the cases of **Isaya Linus Chengula (as administrator of the Estate of the late Linus Chengula) v. Frank Nyika (as administrator of the Estate of the late Asheri Nyika),** Civil Application No. 487/13 of 2020 and **Attorney General v. Mwahezi Mohamed (as administrator of the Estate of the late Dolly Maria Eustace) & 3 Others**, Civil Application No. 314/12 of 2020 (both unreported). In our view, Ms. Mtayangulwa's suggestion that we should peep into the record of appeal because it has been attached to the affidavit is a cunning attempt to circumvent the principle stated in the two cases just cited above. If we accept that invitation by the learned counsel then we will find ourselves sitting in a smoke screened appeal of our own judgment.

We agree with Mr. Materu in his argument that the error alluded to by Ms. Mtayangulwa may only be detected by perusing the eviction order. We have declined the invitation by Ms. Mtayangulwa to look into the record of appeal attached to the supporting affidavit because that is novel and a deviation from the established principles. We have expressed our genuine fear that if we uphold Ms. Mtayangulwa's scheme there will be no end to ingenuities.

Appreciated, there could be errors in the judgment sought to be reviewed. However, have we not pronounced ourselves on that in a good number of our decisions before? In **Shadrack Balinango v. Fikiri Mohamed @ Hamza & Others**, Civil Application No. 25 of 2019 citing **Peter Ng'omango v. Gerson A. K Mwanga**, Civil Application No. 35 of 2002 (both unreported) we stated that :-

> *"...no judgment, however elaborate it may be, can satisfy each of the parties involved to the full extent. There may be errors or inadequacies here and there in the judgment. These errors could only justify a review of the Court's judgment, if it is shown that the errors are obvious and patent".*

In our considered judgment, since we need to look into the record of appeal to appreciate the error that Ms. Mtayangulwa has attempted to

demonstrate, it cannot be said that the error is obvious and patent. Besides, we reiterate that going through the record of appeal attached to the supporting affidavit is quite unconventional in considering applications for reviews as it amounts to sitting on appeal of our own decision, as it were.

Ms. Mtayangulwa cited the case of **Edger Kahwili** (supra) to impress on us that the Court did not effectively deal with an important issue. It is true that in that case, the Court's judgment was reviewed on the ground of failure to effectively deal with an important issue. However, in that case unlike in the instant, the Court had wrongly nullified the entire proceedings including the pleadings. In the review, the Court held that there was nothing wrong with the pleadings and an order of retrial would have been appropriate instead of nullifying the entire proceedings including the pleadings, directing that any interested party could institute a fresh suit. On the other hand, in this case, the Court dealt with the issue of notice, as submitted by Mr. Materu, although its conclusion may have been wrong. A wrong conclusion, in our view, is not the same as failure to effectively deal with an important issue, justifying a review.

For the foregoing reasons, there is no merit in the first limb contending that there was an error apparent on the face of the record in

the impugned decision. Consequently, we find the whole application devoid of merit, and dismiss it with costs.

DATED at **DAR ES SALAAM** this 15th day of January, 2024.

J. C. M. MWAMBEGELE
JUSTICE OF APPEAL

W. B. KOROSSO
JUSTICE OF APPEAL

I. P. KITUSI
JUSTICE OF APPEAL

The Ruling delivered this 19th day of January, 2024 in the presence of Mr. Neema Mtayangula assisted by Mr. Henry Simon, learned counsel for the 1st and 2nd Applicants and Mr. Ombeni Kimaro, learned counsel for the 1st and 2nd Respondents vide video link from the High Court of Tanzania at Arusha, is hereby certified as a true copy of the original.

O. H. KINGWELE
DEPUTY REGISTRAR
COURT OF APPEAL