

TANZANIA / JUDGMENT

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IN THE COURT OF APPEAL OF TANZANIA AT ARUSHA {CORAM: MBAROUK, J.A .• NDIKA, J.A .. And MWAMBEGELE, J.A.) CIVIL APPLICATION NO. 79 OF 2015 KITINDA KIMARO

APPLICANT VERSUS ANTHONY NGOO I DAVIS ANTHONY NGOO j~....."....." RESPONDENTS {Application for Review of the decision of the Court Appeal of Tanzania · at Arusha) · {Kileo, Mjasiri and Kaijage, JJ.A) dated the 24th day of February, 2015 in Civil Appeal No. 25 of 2014 RULING OF THE COURT 6th & 16th July, 2018 MWAMBEGELE, J.A.: By a Notice of Motion taken out under Rule 66 (1) (a) of the Tanzania Court of Appeal Rules, 2009 (hereinafter referred to as the Rules), the Court is moved to review the decision it rendered on 24.02.2015 at Arusha in Civil Appeal No. 25 of 2014 (Kileo, Mjasiri and Kaijage, JJ.A).. The Notice of Motion is supported by an affidavit deposed by Kitinda Kimaro, the first applicant. No affidavit in reply was lodged by the respondents to resist it. However, it was 1 confronted on-all fronts and with a strenuous resistance at the hearing before us on 06.07.2018 during which both parties had legal representation. While the applicant was ably represented by Mr. Majura Magafu, learned counsel, the respondents had the noble ' services of Mr. Michael Ngalo, also learned counsel. Mr. Magafu argued the application with force. Having adopted the Notice of Motion, the affidavit supporting it and the written submissions earlier filed, he submitted that there was a manifest error on the face of the record as provided by Rule 66 (1)(a) of the Rules. He submitted that the main issue for determination by the Court was the interpretation on whether a partnership agreement must be registered. He went on to submit that according to the decision of the Court which is. the subject matter of the applic~tion, the Court decided in favour of respondents on the main ground that there was no partnership agreement between the applicant and first respondent. The Court relied on sections 190 and 191 of the Law of Contract Act, Cap. 345 of the Revised Edition, 2002 (hereinafter referred to as the Law of Contract Act). It was his submission that the Court misconstrued sections 190 (1) and 191 (2) (c) of the Law of ~ontract 2 Act and argued that there is no law which requires that a partnership must be registered. Mr. Magafu went on to submit that the Court did not consider section 194 of the Law of Contract Act which is about the conduct of business and mutual rights and liabilities of the parties. Neither did the Court con~ider sections 10, 11, 12 and 13 of the Law of Contract Act. By applying for a joint Mining Licence it means that there was a partnership agreement to do business jointly, he submitted. Mr. Magafu summarized that there was an error apparent on the face of the record upon the Court's failure to consider sections 10, 11, 12, 13 and 194 of Law of Contract Act and misinterpretation of . sections 190 (-1) and 191 (2) (c) of the Law of

Contract Act. He thus beckoned upon the Court to allow the application with costs. The learned counsel relied on legislation, case law and books of authority as well as the Bible. For his part, Mr. Ngalo, with equal force, submitted that the application is predicated upon Rule 66 (1) (a) of the Rules which gives the Court power to review its decision if there is a manifest error on the face of the record. On what this phrase means, the learned counsel referred us to *Chandrakant Joshubhai Patel v. Republic*

[2004] TLR 218 and to *Dr. Ephraim Njau v. Tanzania Pharmaceutical Industries Limited*, Civil Application No. 54 of 1999 (unreported) on the point that the fact the Court analyzed evidence and came to a different conclusion is not a ground for review because review is not an appeal. The learned counsel relied on several other authorities including *Tanganyika Land Agency Limited & 7 others v. Manohar Lal Aggrwal*, Civil Application No. 17 of 2008 (unreported). Mr. Ngalo added that the fact that the applicant has spent fourteen pages arguing that there is an error on the face of the record is clear testimony that there is none. What the applicant has done, he added, was to analyze the evidence in the High Court. On the complaint to the effect that the Court did not consider sections 10, 11, 12, 13 and 194 of the Law of Contract Act, Mr. Ngalo -argued that the applicant was ably represented and that the issue did not arise in the High Court, the applicant cannot be heard to complain at this stage on a new matter which never surfaced in the High Court. On the strength of the above arguments, Mr. Ngalo submitted that the applicant has not made out any case to justify a review and prayed that the application be dismissed with costs. Rejoining, Mr. Magafu submitted that basing on the presumption that it is the Court which knows the law, failure by an advocate to bring certain provisions of the law to its attention does not take away the rights of the applicant to apply for review. He added that by referring to an error on the face of the record, it entails consideration of all points in the judgment; not only those raised in the affidavit. Regarding the *Tanganyika Land Agency* case (supra), a case relied upon by Mr. Ngalo, Mr. Magafu submitted that the case supports the applicant's case in that it refers to three ingredients for an application for review to succeed - one, there ought to be an error, two, the error must be one on face of the record and three, has resulted into the miscarriage of the justice. That is what happened in the present case, he stressed. The learned counsel reiterated his prayer that this application be granted as prayed. With the above articulation of the cases for the applicant and respondents, we should now be in a position to confront the issue in the application which is whether or not the applicant has advanced enough grounds to justify a review of our decision. Before we delve into the determination, we feel pressed to commend both learned counsel the parties for the industry they exhibited in the preparation and presentation of their arguments before us. Indeed, both argued the application with amazing zeal and tenacity; a good work well done. We find it appropriate to state at the outset that this Court has power to review its own decisions. The provisions of subsection

- (4) of section 4 of the Appellate Jurisdiction Act, Cap. 141 of the Revised Edition, 2002 (hereinafter referred to as the AJA) bestow the Court with such powers. These powers were introduced in the AJA by the Written Laws (Miscellaneous Amendments) Act, 2016 - Act No. 3 of 2016 which came into force on 08.07.2016; the date of its publication. 6 f- Before that, the Court's powers to review its decisions were derived from case law [commencing with *Felix Bwogi v. Registrar of Buildings*, Civil Application No. 26 of 1989 (unreported)] and later by Rule 66 of the Rules under which the present application was made. For the avoidance of doubt, the present application was lodged before section 4 (4) of the AJA became operative. Adverting to the determination of the matter, the applicant complains that our decision of 24.02.2015 has a manifest error on the face of it resulting in the miscarriage of justice. We think to decide whether that decision has "a manifest error on the face of the record" we need, first, to determine what that means. As good luck would have it there have been attempts in a good number of cases to discuss what it means and we think it should now be fairly settled regarding what the phrase entails. The case that comes immediately to our minds is *Chandrakant* (supra); the case referred to us by Mr. Ngalo. In that case, the Court, with sufficient lucidity, discussed what "a manifest error on the face of the record" entails. Having revisited at some considerable length the law relating to the subject in India, from where we imported our law on civil procedure, set out principles which have since uninterruptedly been followed in numerous decisions of the Court. Some of the principles enunciated in that case have been incorporated in Rule 66 of the Rules. In *Chandrakant*, the Court, at
- p. 225, reproduced the following excerpt from MULLA: the Code of Civil Procedure, 14th Edition at pp. 2335-6 (omitting cases cited therein): "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 ... 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]. 8 In *Chandrakant* (supra), the Court was satisfied that for purposes of the discussion, the expressions "manifest" and "apparent" were synonymous and treated them as such. That decision has been followed uninterruptedly in subsequent decisions of the Court some of which have been cited and supplied by the learned counsel for the parties. One of the decisions that followed *Chandrakant* (supra) is *Nguza Vikings @ Babu Seya & another*

- v. Republic, Criminal Application No. 5 of 2010 (unreported). In that case the Court observed: "There is no dispute as to what constitutes a manifest error apparent 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..." The Court went on: "If the Court has in many instances refused to treat as manifest errors on the face of the record ... in the following cases:-
- (a) If the error is not self evident and has to be detected by the process of reasoning; [b]-If there are two possible views regarding the interpretation or application of the law; (c) Any ground of appeal;
 - (d) Any erroneous decision; (e) A mere error or wrong view; and
 - (f) A different view on a question of law or an erroneous view on a debatable point or a wrong exposition or wrong application of the law." [Emphasis ours]. We subscribe to the reasoning and conclusion on what amounts to a manifest error on the face of the record as articulated in Chandrakant (supra) and cases that followed thereafter and we will be guided by those decisions to investigate the complaint in the present application. The errors complained of by the applicant which Mr. Magafu submits with force amount to manifest on the face of the record, as can be gleaned from the record and the oral hearing before us, are that the Court misinterpreted sections 191 (1) and 191 (2) (c) of the Law of Contract Act and that it did not consider sections 10, 11, 12, 13 and 194 of the same Act. We have dispassionately read the impugned decision in relation to the applicant's complaint. Having so done, we are of the considered view that the applicant's complaint is wanting in merit. We say so because in the impugned decision, the Court addressed itself to the ground of complaint above and made a decision thereon. We shall demonstrate. In our demonstration, we think we can do no better than reproduce what we stated at pp. 13 through 14. We observed: "There is no evidence on record that the partnership was registered. Even for the sake of argument that there was a non-registered partnership/ the terms of the partnership agreement have not been established. No document was produced in the course of the trial indicating what the terms of the agreement between the 1st Appellant and the Respondent were. The Respondent as PW1 in his testimony at the High Court merely complained that the Appellant breached the terms of their agreement. The terms were never laid bare and none of the witnesses for the Respondent in the trial came up with the particulars. The testimony given by the Respondent's witnesses were merely speculative. The only document linking the 1st Appellant and the Respondent is the primary mining licence. No agreement was brought forth specifying the terms and conditions agreed upon by the parties. Nor was oral evidence provided to establish the nature of the relationship between the 1st Appellant and the Respondent. Is the primary mining licence on its own sufficient to establish the partnership arrangement between the 1st Appellant and the Respondent? This is a court of record and we are therefore not in a position to speculate and conclude what the relationship between the parties would entail." We went on at pp. 14 to 15: "Given the circumstances, and after giving the situation a lot of thought, we are compelled to conclude,

as we hereby do, that the High Court wrongly reached a finding that there was an existing partnership between the parties. It then follows as the night follows day that if there was no partnership between the parties there could never be a breach of the partnership agreement. This means that the remedies sought for by the Respondents and granted by the High Court with a premium (that is the order for the dissolution of partnership and the sale of the partnership properties) were not Justified. There is no evidence or record that the Respondent had invested into the mining project and how much he has contributed. Once we are able to establish that no partnership existed between the plaintiff it is sufficient for us to quash the judgment and decree of the High Court and to set aside the orders for permanent injunction, general and specific damages, and interests awarded." It is apparent from the foregoing excerpt that the Court discussed the point and made a decision thereon disagreeing with the applicant. We wish to state here that the mere fact that the applicant was dissatisfied with the verdict of the Court, that would not amount to a ground to justify review. This Court will not sit as an appellate court of its own decisions - see: *Blueline Enterprises Ltd v. East African Development Bank*, Civil Application No. 21 of 2012 (unreported). In view of the above, we are disinclined to agree with Mr. Magafu that the impugned decision has a manifest error on the face of it. We are of that view because it would require a long drawn process of learned argument to detect an error, if any, in the impugned judgment. That is perhaps the reason why Mr. Majura spent a considerable time and energy in the 16-page written submissions as well as at the oral hearing before us in an attempt to unveil an error, if any, in the impugned judgment. We wish to underline at this juncture that there may be an error in the impugned judgment but that error cannot necessarily justify a review. As was stated in *Chandrakant* (at page 224) and reiterated in *East African Development Bank v. Blueline Enterprises Tanzania Limited*, Civil Application No. 47 of 2010 (unreported) and *Blueline Enterprises Tanzania Limited v. East African Development Bank* (supra): "It is, we think, apparent that there is a conflict of opinion as to what amounts to an error manifest on the face of the record and it is important to be clear of this lest disguised appeals pass off for applications for review' We say so for the well-known reason that no judgment can attain perfection but the most that courts aspire to is substantial justice. There will be errors of sorts here and there, inadequacies of this or that kind, and generally no judgment can be, beyond criticism. Yet while an appeal may be attempted on the pretext of any error, not every error will justify a review. As held by the Supreme Court of India in *Thungabhadra Industries Ltd v. State of Andhra Pradesh*, [(1964) SC 1372] a review is by no means an appeal in disguise whereby an erroneous decision is reheard and corrected, but lies only for patent error'. [Emphasis added]. In sum, we find and hold that the applicant has failed to establish that our decision of 24.02.2015 is marred with a manifest error on the face of it which resulted in the miscarriage of justice to warrant a review. If anything, what Mr. Magafu has succeeded to do is to re-evaluate the evidence in the impugned judgment and to show his dissatisfaction in some of the portions and asks our second opinion. That, as we have shown above, cannot justify a review. We reiterate the stance we have taken in a good number of cases that the Court invokes its powers to review its decisions sparingly - see: *Tanzania Transcontinental Co. Ltd. v. Design Partnership Ltd.*,

Civil Application No. 6 of 1996 (unreported). We 16 ----- J also wish to remind the applicant that it is in the interest of the Republic that there should be an end to litigation. In the upshot, we find this application for review wanting in merits. It stands dismissed with costs to the respondents. Order accordingly. DATED at ARUSHA this 14th day of July, 2018. M.S.MBAROUK JUSTICE OF APPEAL G. A. M. NDIKA JUSTICE OF APPEAL J.C. M. MWAMBEGELE JUSTICE OF APPEAL I certify that this is a true c py of the 6riginal DEPUTY TRAR COURT PEAL 17

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