

TANZANIA / JUDGMENT

mbeya cement co ltd vs mary mchome and amos mwambo as joint administrators of the estate of the late gilliad mbwambo 2010 tzhccomd 13 2 november 2010

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TZHCCOMDDECIDED
2 November 2010

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IN THE HIGH COURT OF TANZANIA (COMMERCIAL DIVISION) AT PAR ES SALAAM
COMMERCIAL CASE NO.126 OF 2005 MBEYA CEMENT CO. LTD.....
APPLICANT/RESPONDENT VERSUS MARY MCHOME MBWAMBO AND AMOS MWAMBO as Joint
administrators Of the Estate of the late Gilliad Mbwambo..... 1st DEFENDANT/APPLICANT
Date of last order - 21/07/2010 Date of oral submissions - 21/07/2010 Date of ruling - 02/11/2010

RULING

MAKARAMBA, J.: This ruling relates to submissions of the learned Counsel for the parties in an application for review of the default judgment and decree of this Court dated 27th March, 2006, the Applicant filed in this Court on 11th day of March 2010. The Applicant sought a review of the default judgment and prayed that it be substituted by an appropriate order allowing the Applicant to file a defence to the claims, and the case to proceed inter-partes until its final conclusion. 1 The Applicant through this review petition has sought the review of the impugned default judgment and decree on the grounds stated in the Memorandum of Review thus:

1. That there is an error apparent on the face of the record in that the court entered default judgment while there was already in the file an application filed early in the very date vide Exchequer Receipt No. 25619388 and 25619387 wherein the Applicant (Paulus Wanjau) sought leave of the court to defend the suit as a next friend. That application stood undetermined until today.
2. That there is an error apparent on the face of the record in that the court rushed to enter a default judgment contrary to the provisions of Order VIII Rule 1(2) of Chapter 33 RE 2002 of the Civil Procedure Act. Wherein the Applicant could have made an application for extending the period for filing written statement of defence.

3. That there is an error apparent on the face of the record in that the default judgment entered by this Court contravenes the provisions of Order VIII Rule 14(2) as there was no proper proof of service of the court summons and the amount involved in the suit is above Tshs. 1,000/=.
4. That the court was not made aware that there was collusion between the Plaintiff Company and one Ambwene Mwamakula who obtained letters of administration over the estate of the late GHHad Mbwapbo fraudulently. The purported administrator did receive summons and never filed defence in court and after the default judgment the Plaintiff's counsels did draw pleadings and represent the purported administrator in this court. Copies of the family meeting minutes, Judgment of the District Court of Kinondoni in Civil Appeal No. 20 of 2006 and drawn pleading by the Plaintiffs counsels are hereto annexed and Marked NCALA-c. 2. The application by consent of Counsel for the parties was disposed of orally, Mr. Ngudungi, learned Counsel appearing for the Applicant and Mr. Liso, learned Counsel representing the Respondents. On the first ground of review, the Applicant's Counsel submitted that the default judgment was entered while there was a pending application by Paulus Wanjau who had sought leave of the court to defend the applicant as a next friend, which was not dealt with as to this date it remains undetermined and it is in the court file but the court proceeded to pronounce a default judgment. In the opinion of the Applicant's Counsel, once there was an application pending, the court ought to have heard and determined it first before dealing with the main issue. On the second ground of review, the Applicant's Counsel submitted that the court rushed into entering a default judgment, for the reason that it was a first mention to the Applicants, which was on 27th March, 2006, while the counting dates from when the purported service was made it was not beyond the 42 days but it was 28 days. The Applicant's Counsel cited the provisions of the amendment to Civil Procedure Code brought about by Government Notice 422 of 1994 and argued that the applicant statutorily had time to ask for extension of time within the next 21 days upon expiration of the first 21 days. So that became an error because as it limited and obstructed the applicants to have any meaning for remedy for asking extension of time. Submitting on the third ground of review, the Applicant's Counsel averred that the default judgment contravenes the provisions of Order VII Rule 14 (2) of the Civil Procedure Code because there was no proper proof of service, that is, there was no affidavit in proof of service, and moreover the amount involved was over and above Tshs. 1,000/= and as of now the claim is over Tshs.300,000,000/-. The Applicant's Counsel contended further that the law requires that where a claim is less or Tshs. 1,000/= the court can enter a default judgment, but where the claim is above that the court ought to have ordered to prove the case *ex parte* and not to enter a default judgment such the learned trial judge did in this suit which involve a big amount of money. On the last ground of review, which in the opinion of the Applicant's Counsel is the most important ground, the Applicant's Counsel submitted that there was collusion between the Plaintiff's company and the 1st Defendant, one Ambwene Mwamakula who was removed by the District Court of Kinondoni in 2007 from being an administrator of the estate of the late Gilliad Mbwapbo on grounds of fraud. The Applicant's Counsel submitted further that the

court was not made aware that there was collusion between the Plaintiff's company and the said Ambwene Mwamakula who had obtained letters of administration over the estate of the late Gilliad Mbwapbo fraudulently. The Applicant's Counsel submitted further that the purported Administrator did receive summons and never filed a defence in court, and after the default judgment the Plaintiff's counsel who is appearing in this application dropped from representing the purported administrator in this Court. The Applicant's Counsel submitted that at one time they were Counsels for the Plaintiff and at a later stage they represented both the Plaintiff and the Defendant. 4 The Applicant's Counsel amplifying on the fraudulent nature of the transaction and how the fraud was committed resorted to three documents, namely, a copy of the judgment in Civil Appeal No.20 of 2006 of the District Court of Kinondoni; a copy of minutes of which the purported Administrator one Ambwene Mwamakula had relied on, that he was appointed, which is not the case; and a copy of the court documents which were drawn and filed in this Court by Law Associates, and in this case, wherein they represented both the Plaintiff and the Defendant in the same case. Starting with Annexure NCA-1a, the Applicant's Counsel submitted that the fraud shown here is that the so called minutes of the clan meeting said to have been chaired by Mrs. Marry Mchome Mbwapbo and the Secretary was Mzee Ambwene Mwamakula, there was evidence on record which is indicated in the judgment of the District Court of Kinondoni that at that particular moment in time Mrs. Marry Mchome Mbwapbo, the current applicant by way of Administrator, was under medication and she was admitted in hospital. The Applicant's Counsel submitted further that this was reflected in the judgment of the District Court of Kinondoni to the effect that the signature which appears to be that of Mrs. Marry Mchome Mbwapbo was not hers but of some other person, and Mr. Ambwene Mwamakula admitted so under oath in court. The Applicant's Counsel submitted further that this is reflected in the judgment of the District Court of Kinondoni in Civil Appeal No. 20 of 2006, where it is stated as follows: "On the first ground of appeal Mr. Ngudungi submitted before the Court that, at the trial there were purported minutes of family meeting which 5 appointed the Respondent to be the Administrator, the minutes which also shows that the Appellant herein was the Chairman of the meeting, the fact which he knew was not true as the Appellant at such time the meeting took place was on medication after being involved in a car accident and therefore, the Appellant denies the signature at the minutes to be his." The Applicant's Counsel submitted further that in response Mr. Ambwene Mwamakula stated as follows:- "Further the Respondent conceded to the fact that the Appellant at the time the family meeting was convened she was not able to write but she did thumbprint. That it was the Appellant son who signed the minutes on her behalf, and therefore no forgery was made. The Respondent added that he was given the duty to collect debts of Mbeya Cement by the Court and the two sons of the deceased, who are Mbonea and Philipo Mbwapbo to assist him in the collection." The Applicant's Counsel submitted further that the Respondent has admitted that the signature which appears on the minutes is not that of Mrs. Marry Mchome Mbwapbo and has said that Marry Mchome Mbwapbo just thumbprinted the minutes, but on the minutes there is no sign of thumbprint, save on the signature. The Applicant's Counsel submitted further that this is the first admission that the

Respondent obtained the letters of administration by fraud and finally the court removed him from being an administrator in September, 2006. At that particular moment of his removal, the judgment dated 27th March 2006 was already in existence, the Applicant's Counsel further submitted. It was the further submission of the Applicant's Counsel that Mr. Ambwene Mwamakula was not legally an administrator because he obtained the letters of administration illegally 6 which is why he was served with the documents of the court requiring him to file defence, but he never filed the defence, and a default judgment was entered. The Applicant's Counsel submitted further that when the judgment debtors started the process of setting aside the default judgment, Mr. Ambwene Mwamakula crossed the line and went to Law Associates who were Advocates for the Plaintiffs of whom they have a judgment against him because at that particular moment the default judgment was in existence. The Applicant's Counsel submitted further that when the other judgment debtor, Marry Mchome Mbwapbo, came to court to set aside the default judgment, Mr. Ambwene Mwamakula, the first judgment debtor, crossed over and went to the Plaintiff's Counsel and sided with them in drawing pleadings to oppose the judgment to be set aside against himself, together with the Plaintiff, as evidenced in annexure NCA-1C. The Applicant's Counsel submitted further that this is very fatal even in professional ethics, and that is why they have come to this Court to seek to set aside the default judgment and let justice take its course. The Applicant's Counsel submitted further that the default judgment was entered on 27th March, 2006 and in this application the Counter Affidavit was sworn on 3rd May, 2006 hardly a month after, and reckoning from 27th March 2006 to 3rd May 2006 is about 40 days. The Applicant's Counsel submitted further that in this application, the Applicant, Marry John, had an application before this court seeking to set aside the default judgment but to her surprise Mr. Ambwene Mwamakula crossed over from being a judgment debtor to a judgment creditor for the reason that he 7 became a client of Law Associates of whom they were also representing the Decree Holder. The Applicant's Counsel submitted further that the Affidavit was drawn by one Mr. Kitururu, Advocate one of the Advocates in Law Associates and it was filed in this Court by Law Associates as it is shown and duly signed. The Applicant's Counsel submitted further that this dual appearance by the Counsel for the Decree Holder leaves a lot to be desired, and which to the best of knowledge of the Applicant's Counsel, in no way Counsel for the Plaintiff can appear also for the Defendant in the same case, but in this application they appeared both as Decree Holders and Judgment Debtors. The Applicant's Counsel enquired as to whose interest they were serving, whether it is that of the Plaintiff, Mbeya Cement Company or that of Ambwene Mwamakula. The Applicant's Counsel submitted further that to his understanding, if the judgment was executed, Mr. Ambwene Mwamakula could have benefited a lot from the estate and that is why he was fighting against and not in favour of the deceased's estate. The Applicant's Counsel submitted further that Mr. Ambwene Mwamakula obtained the letters of administration by fraud, was served with the court's documents but never made any active steps to defend the interest of the deceased and when other parties who have interest in the deceased's estate started to look for remedial measures in court, he came to the fore front defending his position to diminish the interest of deceased. The Applicant's Counsel

submitted further that these are errors on the face of record which will make the default judgment entered by this Court on 27th Mach 2006 amenable to review. The Applicant's Counsel submitted 8 further that if the default judgment is reviewed and set aside on ground of fraud, the proper procedures in terms of the law have to be followed so that justice may take its proper course, because there was no proper service to the Applicant, and even if service was effected on one Ambwene Mwamakula for the grounds already submitted, it leaves a lot to be desired. The Applicant's Counsel prayed that the application be allowed with cost. Mr. Liso, learned Counsel for the Respondent in reply started by wondering whether the application was properly before this Court because the original Plaintiff and decree which subsequently followed show that the parties were MBEYA CEMENT COMPANY LIMITED versus AMBWENE MWAMAKULA and MARRY JOHN, and the present applicant is MARRY MCHOME MBWAMBO and AMOS MWAMBO who were not parties in the original claim which gave rise to the default judgment now sought to be reviewed. The Respondent's Counsel submitted further that the application is not proper for having being presented by persons who are not interested in the matter. Submitting on the 1st ground of review, the Respondent's Counsel stated that it is not correct to say that the application stood undetermined to this date since the record shows that it was determined and dismissed on 8th of December, 2006 by Honourable Justice Mjasiri J. (as she then was) on ground that the accompanying affidavit did not disclose why the Applicant should be represented by a next friend. On the second ground of review, the Respondent's Counsel submitted that the default judgment was proper because the decree which emanated 9 from it clearly shows that on the 27th of March, 2006 it was delivered in the presence of Mr. Kitururu Advocate for the Plaintiff and Mr. Ngudungi Advocate for the second Defendant, and in the absence of the 1st Defendant. The Respondents Counsel submitted further that it is on record that the Defendants were both served on 20th of February 2006 but none of them has filed any defence to this date, and therefore the Court entered a default judgment on that basis, and the decree shows that. On the third ground, the Respondent's Counsel submitted that the default judgment did not contravene any provisions of the law and it was proper since the Defendants were duly served and defaulted to file their defence and therefore there was no any error apparent on the face of the record. As for the fourth ground, the Respondent's Counsel submitted that by then one Ambwene Mwamakula was still lawfully recognized appointed legal representative of the deceased's estate, and so there was no any collusion between the Plaintiff company and Ambwene Mwamakula as alleged by the Applicant. The Respondent's Counsel submitted further that if anything that matter should be determined in another forum and not in these proceedings. The Respondent's Counsel submitted further that there was no any fraud at the time the default judgment was entered, and insisted that if there was any fraud then it should have been determined in another forum not in these review proceedings. The Respondent's Counsel surmised that the application has no merit and prayed that it be dismissed with costs. io Mr. Ngudungi , learned Counsel for the Applicants in rejoinder reiterated his submission that at the time the default judgment was entered there was in Court an application filed by Paulus Wanjau on 27th March 2006 which until this date has not been attended and there is no any finding made

thereafter. Mr. Ngudungi insisted that what was determined by Honourable Mjasiri, J. on the 8th day of December 2006 was another subsequent application by another person by the name of MARRY JOHN, not PAULUS WANJAU. Mr. Ngudungi insisted that the application Honourable Mjasiri J. (as she then was) determined was not filed on 27th March 2006 but on a date subsequent thereto, and the Applicant is not PAULUS WANJAU but MARY JOHN. Responding to the submission by the Respondent's Counsel that the current application should be dismissed because the persons who are applying as far as the decree is concerned are not interested parties and that they are not parties in this particular case, Mr. Ngudungi retorted strongly that this is not true. Mr. Ngudungi submitted that the Respondent's Counsel has not gone through the record of this case file because the current applicant that is MARRY MCHOME MBWAMBO and AMOS MBWAMBO who are co-administrators of the estate of the late GILLIAD MBWAMBO, and were jointly appointed by the High Court of Tanzania on 6th day of October, 2008, and they are the persons who have filed this review application on behalf of the estate of the late GILLIAD MBWAMBO. Mr. Ngudungi submitted further that the estate has remained without any administrator from the year 2006 when the District Court of Kinondoni gave its judgment on the 7th of September 2006 removing Mr. n Ambwene Mwamakulas, and so in the eyes of the law the applicants are the first judgment debtors and the estate of the late Gilliad Mbwambo, and therefore the assertion that the current applicants have no interest and they are not parties is incorrect. On the assertion by the Respondent's Counsel that there is nothing which was defaulted when the court entered a default judgment because there was proof of service as the decree will indicate, Mr. Ngudungi insisted that there was no proper service because the person whom was served, in the eyes of the law, it has already been determined that he was not a lawful administrator since he obtained the letters of administration fraudulently. Mr. Ngudungi submitted further that even if there was service to the 2nd Defendant, there is no affidavit in proof of service. Mr. Ngudungi insisted further that the court rushed to enter default judgment because the purported service was said to have been effected on 20th of February, 2006 and the default judgment was entered on 27th of March, 2006, only 8 days since the month of February carries 28 or 29 days only, and adding up with 27 days of March, comes to about 35 or 36 days. Mr. Ngudungi reiterated his earlier submission that Government Notice No.422 of 1994 did amend the Civil Procedure Code, limiting the period the court could grant extension of time and allowing a party to ask for extension of time within a period of 42 days, that is, if the first 21 days allowed by the Civil Procedure Code expire, the intending part is allowed by law within the next 21 days to file an application for extension, and therefore entering the default judgment before the expiration of that period constituted an error on the face of the record. 12 Mr. Ngudungi submitted further that the fact that the Respondent's Counsel did not reply on whether a default judgment can be entered for an amount of over Tshs. 300,000,000/- without proof meant that they have conceded. Mr. Ngudungi faulted the reasoning of the Respondent's Counsel that whatever Mr. Ambwene Mwamakula did was lawful because he was the current administrator at that particular moment, and that if there is any fraud there is another forum to deal with it, by submitting that fraud in civil cases can be a basis for changing decisions, and if a party is aggrieved to

the extent of imposing criminal responsibility, he can pursue both avenues, civil and criminal action. Mr. Ngudungi submitted further that there is no limit that so long as it is alleged he is not allowed to come to this court to seek remedy resulting from the fraud, the applicant is not in court here asking for somebody to be sent to prison, insisting that the Applicant is not asking the court to review whether what the court decided was accurate or not, but had the court been informed of this information it could not have reached this decision. Mr. Ngudungi submitted that there has been no response by the Respondent's Counsel on the allegations that Mr. Ambwene Mwamakula obtained the minutes of the family meeting fraudulently, neither has there been any comment or reservation or response by the Respondent's Counsel as to why the current Law Associates at one time represented Ambwene Mwamakula hand and hand with Mbeya Cement Co. Ltd., which suggests a guilty mind, and since he who comes to equity should prove that he is clean, the Respondents are not that clean. 13 Mr. Ngudungi prayed that the application be granted with costs, because the Respondents have admitted that they did not make any contrary comments to what the Applicants have alleged. Mr. Ngudungi surmised that the matter can be set back to square one and the parties can be granted the opportunity to file pleadings in response thereto, and thus meeting the ends of justice to both parties. In the present application this Court did not get the benefit of argument by learned Counsel of the parties on the right of a person who considers himself aggrieved by a decree or order, and who desires to obtain its review by applying to the court which passed the decree or made the order. It is trite to point out here that the right to seek review is neither natural nor fundamental right of an aggrieved party. The power to review normally is the creation of a statute and in our case it is provided for under Order XLII Rule 1 of the Civil Procedure Code [Cap.33 R.E. 2002]. Before this Court clinches the points in issue it would be desirable to spell out the scope of the power of the Court to review its judgment and order or decree. The scope and/or authority of review is derived from Order XLII Rule 1 of the Civil Procedure Code [Cap.33 R.E. 2002], which provides as follows: "f.1) Any person considering himself aggrieved- fa) by a decree or order from which an appeal is allowed, but from which no appeal has been preferred; or

- (b) by a decree or order from which no appeal is allowed, and who, from the discovery of new and important matter or evidence which, after the exercise of due diligence, was not within his knowledge or could not be produced by him at the time when the decree was passed or order made, or on account of some mistake or 14 error apparent on the face of the record, or for any other sufficient reason, desires to obtain a review of the decree passed or order made against him, may apply for a review of judgment to the court which passed the decree or made the order." Emanating from the above provision, a person aggrieved by an order, from which no appeal has been preferred or no appeal is allowed may prefer a review on-
- (a) discovery of new and important matter of evidence which, after the exercise of due diligence, was not within his knowledge or could not be produced at the time when the order was passed or made; or

- (b) mistake or an error apparent on the face of the record; or (:) any other sufficient reason. As mistake(s) or an error(s), apparent on the face of record, cannot be defined precisely and exhaustively and there is an element of indefiniteness inherited in the terms, it is therefore left to the discretion of the Court to determine the same judicially on the basis of facts of the case. The error however, must be one that speaks for itself and is difficult to be ignored. It should be noted here that the exercise of review however, is not permissible in the case of an "erroneous order" so as to render the order as "reheard and corrected." The law has made clear distinction between what is an "erroneous decision" and an "error apparent on the face of the record." While the former can be corrected by only a higher forum, the latter can be corrected by exercise of power of review by making an application to the court which handed down the judgment and order seeking its review. A power of review therefore is not to be confused with appellate power which may enable an Appellate Court to correct all errors committed by the Subordinate Court. It is very difficult however, to define an "error apparent on the face of the record" precisely, scientifically and with certainty. In this regard I am alive to the observations made by Chagla, C.J. in the Indian case of *BATUK K. VYAS V. SURAT MUNICIPALITY*, I.L.R 1953 Bom.191; AIR 1953 Bom.133 that: ".../7(9 error can be said to be apparent on the face of the record if it is not manifest or self-evident and requires an examination or argument to establish it." In that case the Court admitted that although the said test might apply in majority of cases satisfactorily, it proceeded to comment that there might be cases in which it might not work inasmuch as an error of law might be considered by one Judge as apparent, patent and self-evident, but might not be so considered by another Judge. In that case, the Court concluded that: "...an error apparent on the face of the record cannot be defined exhaustively there being an element of indefiniteness inherent in its very nature and must be left to be determined judicially on the facts of each case." The power of review has a limited scope and is normally used for the correction of a mistake but not to substitute a view in law. Such mistake or error contemplated under Order XLII Rule 1 of the Civil Procedure Code [Cap.33 R.E. 2002] must be such which is apparent on the face of the record and not a correction of an error which requires long drawn process of reasoning. In this regard I am also alive to the observations in connection with an error apparent on the face of the record which was made in the Indian case of *SATYANARAYAN LAXMINARAYAN HEDGE VS. MALLIKARJUN BHAVANAPPA TIRUYMALE* A.I.R. 1960 SC 137 thus:- "An error which has to be established by a long drawn process of reasoning on points where there may conceivably be two opinions can hardly be said to be an error apparent on the face of the record. Where an alleged error is far from self-evident and if it can be established, it has to be established, by lengthy and complicated arguments, such an error cannot be cured by a writ of certiorari according to the rule governing the powers of the superior Court to issue such a writ." The Honourable Supreme Court of India in the case of *PARSHION DEVI V. SUMITRI DEVI* (1997(8) SCC 715) while addressing its mind on Order XLVII Rule 1 of the Indian Civil Procedure Code, which is *pari materia* with our Order XLII Rule 1, had occasion to make the following observation: "Under Order XL VII, Rule 1, CPC a judgment may be open to review *inter alia*, if there is a mistake or an error apparent on the face of the record. An error which is not self evident and has to be detected by a process of

reasoning, can hardly be said to be an error apparent on the face of the record justifying the Court to exercise its power of review under Order XLVII, Rule 1, CPC. In exercise of the jurisdiction under Order XL VII, Rule 1, CPC it is not permissible for an erroneous decision to be reheard and corrected. A review petition, it must be remembered, has a limited purpose and cannot be allowed to be an appeal in disguise." 17 Emanating from the above persuasive judicial observations with caution this Court has to ensure that the power of review is not exercised like entertaining an 'Appeal in disguise.' Furthermore, where conceivably there may be two opinions and an error has to be established by a long drawn process it is not an error apparent on the face of the record. Review proceedings have to be strictly confined to the ambit and scope of Order XLII Rule 1 of the Civil Procedure Code [Cap.33 R.E. 2002], under which a judgment may be open to review inter alia, if there is an error apparent on the face of the record. An error which is not self evident and has to be detected by a process of reasoning, can hardly be said to be an error apparent on the face of the record justifying the court to exercise its power of review under Order XLII Rule 1 of the Civil Procedure Code [Cap.33 R.E. 2002]. In exercise of the jurisdiction under Order XLII Rule 1 of the Civil Procedure Code [Cap.33 R.E 2002], it is not permissible for an 'erroneous decision^' to be reheard and corrected. A review petition, it must be remembered has a limited purpose and cannot be allowed to be an "appeal in disguise." An error which is not self evident and has to be dictated by a process of reasoning can hardly be said to be an error apparent on the face of the record. It is obligatory on an applicant to establish on record that there was an error apparent on the face of the record or there was such other material available with the applicant which if not taken into consideration would cause miscarriage of justice. Let us now examine the grounds of review within the context of the guiding principles I have endeavoured to outline above. The first ground of 18 review is that the court entered default judgment while there was already in the file an application filed early whereby the Applicant (Paulus Wanjau) sought leave of the court to defend the suit as a next friend, which application stood undetermined until to date. This ground can hardly be said to be an error apparent on the face of the record. It is not self evident since it has to be detected by a process of reasoning. Simply stated therefore the error does not speak for itself. The second ground of review is that the court rushed to enter a default judgment contrary to the provisions of Order VIII Rule 1(2) of Chapter 33 R.E. 2002 of the Civil Procedure Act, in that the Applicant could have made an application for extending the period for filing written statement of defence. The third ground of review is that the default judgment entered by this Court contravenes the provisions of Order VIII Rule 14(2) of the Civil Procedure Code as there was no proper proof of service of the court summons and the amount involved in the suit is above Tshs. 1,000/=. These two grounds in my view fall squarely within the ambit of an "erroneous decision?" by the Court, which can be dealt with by a higher court but not by this Court in review proceedings. This being a review petition, it must be remembered, has a limited purpose, and cannot be allowed to be an "appeal in disguise", which is what the Applicant is seeking in these two grounds of review. The Applicant claims that the Court was not made aware that there was collusion between the Plaintiff's company and one Ambwene Mwamakula who obtained letters of administration

over the estate of the late Gilliad Mbwambo fraudulently. The Applicant's Counsel insisted that non 19 consideration of the allegations of fraud by the Court, which admittedly were not brought to its attention as the Applicant's Counsel rightly submitted, can hardly be said to be a "mistake or error apparent from the record." In my view, this is the kind of an error which has to be established by a long drawn process of reasoning on points, and where there may conceivably be two opinions, thus failing the test of error or mistake apparent on the face of the record. An error cannot be said to be apparent on the face of the record if one has to travel beyond the record to see whether the judgment is correct or not as is the case in the present application. An error apparent on the face of the record means an error which strikes on mere looking and does not need long drawn out process of reasoning on points where there may conceivably be two opinions, which is a possibility where allegations of fraud are made as is presently the case. Furthermore, such error should not require any extraneous matter to show its incorrectness. In the upshot and for the foregoing reasons, I find no reason whatsoever to review the judgment of this Court dated 27th day of March 2006 and substitute it by an appropriate order allowing the Applicant to file a defence to the claims and the case be heard inter-partes to its final conclusion as prayed. Thus, this application is hereby dismissed. I shall make no order as to costs. Each party is to bear own costs in this application. Order accordingly. R.V. MAKARAMBA JUDGE 02/11/2010 20 Ruling delivered this 2nd day of November 2010 in the presence of Mr. Ngudungi, Advocate for the Applicants and Mr. Ngudungi Advocate for Law Associates for the Respondent. R.V. MAKARAMBA JUDGE 02/11/2010. Words count: 5,677 21

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