

TANZANIA / JUDGMENT

VERAELI ELIYA KOMBE scanned

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DECIDED
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IN THE HIGH COURT OF TANZANIA (LAND DIVISION) AT DAR ES SALAAM MISC. LAND APPLICATION NO. 27711 OF 2024 {Arising from Misc. Land Application No. 13487 of2024)
VERAELI ELIYA KOMBE..... APPLICANT VERSUS OSCAR JOSSEY
MUNISI..... 1STRESPONDENT HAPPINESS JOHN
LEOLE..... 2ndRESPONDENT AKIBA COMMERCIAL BANK
PLC..... 3rdRESPONDENT SUMA JKT AUCTION MART COMPANY
LTD..... 4thRESPONDENT

RULING

11/02/2025 & 19/02/2025 A. MSAFIRI, J: This is an application for Review of the decision of this Court in Misc. Land Application No. 10777 of 2024. It has been brought under Section 78(1)

(b) and Order XLII Rule 1 (1) (b) and Section 95, all of the Civil Procedure Code, Cap 33 R.E. 2019, [the CPC]. In the said Application, the current applicant was also the applicant in the former Application No. 13487 of 2024 and was seeking for interim orders to restrain the respondents from any attempt of sale or disposing in anyhow, the applicants property which is described as house on Plot No. KND/MNY/KKP5/10 at Mwananyamala kwa Kopa area, Kinondoni Municipality in Dar es Salaam (the suit property), pending the main suit. After hearing, the said application was dismissed with costs for failure of meeting the criteria set for the court to exercise its discretion and issue the sought temporary injunction. After dismissal, the applicants have lodged the instant application seeking for Review of the court decision as follows;

1. That this Honourable Court be pleased to Review its Ruling and order in the Ruting delivered on the 04th October,2024 in Misc. Application No. 13487of2024;
2. Costs of this application be provided for;
3. Any other reliefs this Honourable Court may deem equitable and just to grant. The application was heard by way of written submissions. The applicant was represented by Mr Andrew Kanonyele, learned advocate, Mr Johston Mwanukuzi, learned advocate represented the 2nd respondent, and Mr David Wasonga, learned Advocate represented the 3rd respondent. The 1st and 4th respondents were absent and the matter proceeded in their absence. On the part of the applicant, Mr Andrew Kanonyele, learned Advocate submitted

that, it is trite law that review is preferred on the grounds which include discovery of new and important matter or evidence or facts which after the exercise of due diligence was not within the Applicant's knowledge, a mistake or error apparent on the face of the record and any. 2 other sufficient reason. He referred this court on the provisions of Section 78(1) and Order XLII Rule 1(l)(b) all of the CPC which lays down the circumstances where the review can be preferred. Mr Kanonyele submitted further that, following the dismissal of Misc. Land Application No. 13487 of 2024 and while Land Case No. 13263 of 2024 is still pending in this court, the 4th respondent served the applicant with an eviction notice (annexed as "VEK- 7" in the applicant's affidavit in support of the Memorandum of Review) wherein they contend to have been instructed by the 3rd respondent. Mr Kanonyele averred that the said eviction is preferred while the property in dispute has not been sold or there is no court order to that effect. That, this evidence or fact was not available during the hearing of the impugned Application and had it been there while the hearing of Misc. Land Application No. 13487 of 2024, it could have materially influenced the outcome of the Application. Mr Kanonyele added that, despite that the 3rd and 4th respondents being parties in the main Land Case which is pending in this Honourable Court, they intend to proceed with the eviction from the applicant's residential house and if they are not restrained by this court, they will execute their intention and this will cause a great hardship and irreparable loss to the Applicant (the plaintiff in the Land Case No. 13263 of 2024) before his 3 legal rights are established in the said case which he has overwhelming chances to succeed. Mr Kanonyele, asserted that the principles of fairness and justice demands that the newly discovered evidence be considered due to the fact that, had it been available at the time of the original ruling, the judge would have reached a different conclusion. That, the new evidence provides critical context that challenges the assumptions made in the initial decision. He prayed that the court find the review to have merit and grant the sought orders. Mr Mwanukuzi, for the 2nd respondent submitted briefly that, it is the cardinal rule that for one to succeed in any application for review it must be established that there is an error on the face record to be reviewed. He pointed that the Applicant has failed throughout his written submission to mention or show the error in the ruling in Misc. Land Application No. 13263 of 2024 dated on 04th October 2024. That even in his affidavit, the applicant has not shown material ground for review and has not advanced any point which was overlooked by the court in the impugned ruling. He prayed for the dismissal of the application with costs. On the part of the 3rd respondent, Mr Wasonga, counsel for the respondent submitted among other things that the Memorandum of 4 Review filed by the applicant on 08/11/2024 does not contain any ground for review. That the memorandum contains prayers which ought to be contained in the chamber summons. Similarly, Mr Wasonga said that the affidavit in support of the application does not contain a single ground upon which the review is preferred, nor does it demonstrate how the applicant would move to exercise its jurisdiction and grant the sought

orders.

Mr Wasonga argued that the applicant has introduced the ground of review through written submissions. That the applicant sole ground for review is the discovery of new evidence which was not within the applicant's knowledge. That, according to the applicant, this new evidence is the eviction of the applicant by the 3rd and 4th respondents. He asserted that the applicant has cited the case of Kigoma/Tabora Railway Corporation vs. Absalom E. Kihinga, Civil Appeal No. 4 of

2003. That in the said case, the court had laid down two conditions for the new evidence to be applicable namely, first, such evidence could not have been obtained with reasonable diligence at the time of original hearing, and second, the applicant must demonstrate that the new evidence is compelling and relevant enough to potentially alter the outcome of the original decision. Jul I 5 Mr Wasonga submitted further that the applicant has not met or has failed to demonstrate how the conditions for the new evidence to apply will be applicable in the instant application. He added that, the applicant has failed to demonstrate any conditions set for review. That there is no any error apparent on face of record, and no new evidence. He prayed for the dismissal of the application, with costs. In rejoinder, Mr Kanonyele maintained that the Memorandum of Review contains implicit ground of review under the categories of error of law and miscarriage of justice, which are central to the court in reviewing its previous decision. He added that the grounds of review are explicitly enumerated in the applicant's affidavit, consequently sufficient to move the court use its discretionary powers to review its dismissal order of Miscellaneous Land Application No. 13487 of 2024. He said that, the applicant's counsel believes that the case of Kigoma/Tabora Railway Corporation vs Absalom E, KiUnga (supra) is purely relevant and applicable; as it sets forth the criteria upon which the court can impose its discretionary power to review its previous decision. He reiterated his prayers. Before embarking on determination of the merit of the instant application, I will first tackle the issue of time limitation which have been raised by 6 both counsels for the 2nd respondent and the 3rd respondent in their

submissions.

The 2nd and 3rd respondents through their counsels has averred that the applicant has filed this review out of time. That, the ruling in Misc. Land Application No. 13263 of 2024 which is sought to be reviewed was delivered on 4th October 2024. That the instant application for review was filed on 3rd November 2024 thus 30 days to file review lapsed on 2nd November 2024. They argued that it is apparent that the applicant has filed this review out of time. The applicant through his counsel has contested the respondents' claim and argued that the application was filed within the time. That, the date of filing should be regarded as 3rd November 2024, being the date which the application was filed electronically in line with Rule 21(1) of the Judicature and Application of Laws (Electronic Filing) Rules. That the presentation of the Memorandum of Review in court registry made on 4th November 2024 is not determinative on reasons that it was

just in compliance of fee payment after issuance of the control number which is not in the control of the applicant. According to the online filing system as shown clearly in the e-case management system, the Application was filed on 04th November 2024. - 7 The impugned ruling was delivered on 04th October 2024, thus making exactly 30 days from the date of the ruling to the date of the filing of the instant application. Therefore, I am satisfied that the application is within the prescribed time. Having heard the submissions from the parties, it is no dispute that this court under Section 78 (1) of the CPC is empowered to receive and entertain an application for review of its decision. The criteria to be considered are provided under Order XLII Rule 1 of the CPC as provided thus; the court may review its decision in the following scenarios;

- i) When there is a discovery of new and important matter or evidence which after exercising due diligence was not within the knowledge or could not be produced by the applicant at the time when the decree was passed or order made, or; ii) On account of some mistakes or error apparent on the face of the record, or for any the sufficient reason, desires to obtain review of the decree passed or order made against him, may apply for a review of judgment of the Court which passed the decree or made the order. The pertinent issue here is whether this application has merit. The respondents through their counsels have argued that neither the memorandum of review, nor the affidavit by the applicant in support of the application shows the grounds for the review. Indeed, the. 8 memorandum of review does not reveal any grounds upon which this court will be moved to review its decision in Misc. Land Application No. 13263 of 2024. The applicant's affidavit is also silent on the reasons why should the court review its decision in the impugned ruling. It is only in the submissions that the applicant through his counsel introduced the grounds for review being that the applicant has discovered new evidence which was not within the applicants knowledge. It is my view that the format of the memorandum of review by itself leaves a lot to be desired for being silent on the grounds for review. Order XLII is the relevant order under the CPC dealing with a review. Order XLII Rule 3 lays down how a format for filing of a review should be. The format is the same as that one which is used for appeals. Order XXXIX Rule 1 (2) of the CPC describes the format for filing an appeal. It is only grounds of appeal which must be contained in the memorandum of appeal. Likewise, a memorandum of review should also contain grounds for review which will guide the court in the review of its decision. As I said earlier, the memorandum of review filed by Mr Kanonyele, counsel for the applicant does not reveal any grounds for review. Hence the memorandum for review is defective. -/V ? 9 My second observation is that even if the memorandum of review had been drawn up properly, there is no likelihood for the same to succeed. The conditions for allowing a review have not been fulfilled by the applicant. These conditions are provided for under Order XLII Rule I (b) of the CPC. One is that there must be discovery of new and important matter or evidence not within the knowledge of the applicant even after exercise of due diligence. The other is an apparent mistake on the face of the record. Lastly there must be other sufficient cause which however, must be relevant. The applicant major ground for review as said earlier, has been introduced in the submissions that there is new evidence which was not within the applicant's knowledge when this court was delivering its ruling

dated 04th October 2024. It was Mr Kanonyele's assertion that had this new fact/ evidence been in the knowledge of the court, the court would have concluded otherwise in its decision in Misc. Land Application No. 13487 of 2024. According to Mr Kanonyele's submission, this new evidence is that, following the dismissal of Misc. Land Application No. 13487 of 2024 and while Land Case No. 13263 of 2024 is still pending in this court, the 4th respondent served the applicant with an eviction notice wherein they_ 10 contend to have been instructed by the 3rd respondent. Mr Kanonyele averred that the said eviction is preferred while the property in dispute has not been sold or there is no court order to that effect. With due respect, the serving of the eviction notice to the applicant by the 3rd respondent through the 4th respondent is not new evidence which was not within the knowledge of the applicant during the hearing of Misc. Land Application No. 13487 of 2024. Is say so for the reason that the notice of eviction was served to the applicant following the decision of this court, dismissing the application for temporary injunction. It was only after the said decision when the 3rd respondent through the 4th respondent served the eviction notice to the applicant. Looking at the said eviction, it was served to the applicant on 25th October 2024 while the impugned ruling was delivered on 04th October 2024. By this, it is clear that the counsel for the applicant Mr Kanonyele has misconceived, either on purpose or by mistake, the principle laid down in the condition for review where the court is invited to review it decision, following the absence of important evidence which was at the time, not in possession of the applicant and could not be produced in court. It is my belief that the new evidence for the purpose of Order XLII Rule 1 (l)(b) of the CPC is the one which is available at all time during the hearing but ii was not within the knowledge or could not be produced by the party at the time the ruling was being passed. I find that the circumstances in the instant application does not fit the conditions set under Order XLII Rule 1 of the CPC. In the instant application, as already observed, the notice of eviction which is claimed to be the new evidence, was issued to the applicant following the ruling of the decision which is sought to be reviewed. Following the above analysis, it is my decision that the application does meet the requirements for review set under the law. There is no any error apparent on the face of record, nor is there any new evidence which was not available during the ruling of the impugned ruling. I hereby dismiss the application, with costs. 12

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