IN THE COURT OF APPEAL OF TANZANIA
AT DAR ES SALAAM
(CORAM: KWARIKO, J.A., MWANDAMBO, J.A. And KENTE, J.A.)

CIVIL APPLICATION NO. 363/17 OF 2021

RUTH MAKARANGA..APPLICANT

VERSUS

SALUM AYUBU..RESPONDENT

(Application for Revision from the Ruling and Order of the High Court of Tanzania, Land Division at Dar es Salaam
(Mango, J.)

dated the 18th day of June, 2021
in
Miscellaneous Land Application No. 385 of 2020

....

RULING OF THE COURT

31st August & 15th September, 2022

KWARIKO, J.A.:

By a notice of motion taken under section 4(3) of the Appellate Jurisdiction Act (the AJA) and rule 65 (1)(2)(3)(4) and (5) of the Tanzania Court of Appeal Rules, 2009, the applicant is moving the Court to revise the decision of the High Court of Tanzania (Mango, J.), Land Division at Dar es Salaam. The impugned ruling arises from an application for review in Misc. Land Application No. 385 of 2020 on the ground that there is an apparent error on the face of the record.

The application is supported by the affidavit of Mr. Bahati S.H.T. Mabula, learned advocate for the applicant. On the other hand, the

respondent filed an affidavit in reply opposing the application. The respondent also raised three points of preliminary objection on the following two grounds: **One**; the application is incompetent for failure to include the proceedings of the lower courts; and, **two**, the application is incompetent and bad in law for being preferred as an alternative to appeal.

The background of this matter shows that the respondent succeeded in a Civil Case No.57 of 2017 for trespass against the applicant before the Ward Tribunal of Saranga (the trial Tribunal). The trial tribunal found that the respondent was the lawful owner of the disputed land and held that the boundary between the parties' plots was an iron bar and the applicant was ordered to demolish her toilet and the wall which exceeded the boundary. Aggrieved, the applicant appealed before the District Land and Housing Tribunal (the appellate Tribunal) where she was declared a lawful owner of the disputed land. However, for what it referred as rules of construction, the appellate tribunal ordered the applicant to demolish her toilet and advance 1.5 meters from the respondent's wall with a view to creating a common land special for social interaction.

The applicant was not satisfied with the order for demolition of her toilets. She thus appealed before the High Court which held that the

appellate tribunal erred for ordering only the applicant to demolish her toilet which was built in her own plot without giving reasons. The court thus held the iron bar to be the boundary between the two plots and proceeded to order that 1.5 meters distance should be measured therefrom towards the applicant's and respondent's plots.

Still discontented, the applicant, through Misc. Land Application No. 385 of 2020 moved the High Court to review its decision but she was unsuccessful. She is now before the Court challenging that decision by way of revision.

At the hearing of the application, Mr. Bahati Mabula, learned advocate, appeared for the applicant while on the adversary side the respondent appeared in person, unrepresented. Ordinarily, we would have heard and determined the preliminary objection before going to the application on merit. However, in order to save time, we entertained the two together starting with the preliminary objections.

Being a layperson, the respondent did not have much to say regarding the preliminary objections. He contended that the same were self-explanatory and urged us to sustain them. For his part, Mr. Mabula argued in respect of the first point of objection that non-inclusion of some of the proceedings of the lower courts is not fatal because the documents included are sufficient to determine the application. To

support his contention, he referred to our decision in **Elizabeth Mpoki and Two Others v. MAF Europe Dodoma,** Civil Application No.436/1 of 2016 (unreported).

This point should not detain us because we agree that through case law, it is the duty of the applicant to lodge with the Court a complete record of the proceedings sought to be revised. See for instance the case relied upon by the respondent; **Zanair Limited and Another v. Hassan & Sons Ltd,** Civil Application No.348/15 of 2017 (unreported). However, the question we have asked ourselves is whether the entire record of proceedings of the lower courts are necessary in the determination of the present application. In our view, since we have been called upon to call and examine the record of proceedings to satisfy ourselves on its correctness, legality or propriety of any finding, order or any decision made therefrom, we agree with Mr. Mabula that the entire record of proceedings of the lower courts are not necessary for the determination of this application. We are satisfied that the judgments of the trial and appellate tribunals and the High Court annexed to the affidavit are sufficient to determine the application. Although the pleadings in the application for review have not been included in the application, the grounds have been reproduced in the ruling of the High Court. Our view is in line with our decision in

Elizabeth Mpoki & Two Others (supra) cited to us by Mr. Mabula where it was stated as follows:

> *"Apparently, both learned advocates are in agreement that the rulings as part of the proceedings in broad context are sufficient for the determination of the application before us because the error complained of is evident in the rulings whose copies are annexed to the founding affidavit".*

The first point of the preliminary is accordingly overruled.

In relation to the second point, we again endorse Mr. Mabula's argument premised on the provisions of Order XLII rule 7 of the Civil Procedure Code (the CPC) thus:

> *"(1) An order of the Court rejecting the application shall not be appealable; but an order granting an application may be objected to on the ground that the application was–*
>
> *(a) in contravention of the provisions of rule 2;*
>
> *(b) in contravention of the provisions of rule 4;*
>
> *(c) after the expiration of the period of limitation prescribed therefor and without sufficient cause,*

and such objection may be taken at once by an appeal from the order granting the application or in any appeal from the final decree or order passed or made in the suit."

It is trite law that revisional jurisdiction of the Court is exercisable in matters which are not appealable to the Court with or without leave or where the appellate process has been blocked by a judicial process. See for instance **Halais Pro-Chemie v. Wella A. G** [1996] T.L.R. 269, **Moses Mwakibete v. Editor-Uhuru & Two Others** [1995] T.L.R. 134 and **Transport Equipment Ltd. v. D.P. Valambhia** [1995] T.L.R. 161.

In the instant application, the applicant has invoked the Court's revisional powers because no appeal lies against the decision of the High Court rejecting the application for review of its decision in terms of Order XLII rule 7 (1) of the CPC. Thus, consistent with the Court's decisions cited above, the applicant had a remedy in revision since her right of appeal was blocked by judicial process. See also **Bin Kuleb Transport Company Limited v. Registrar of Titles & Three Others,** Civil Application No. 522/17 of 2020 (unreported).

The preliminary objection has no merit and is hereby overruled.

Having disposed of the preliminary objections, we shall now turn our attention to the merit of the application.

When he took the stage, Mr. Mabula adopted the written submissions which he had filed earlier and made some oral amplification. Essentially, the learned counsel argued that the learned judge erred in law by holding that according to the evidence on record, the iron bar is the boundary between the two plots and thus 1.5 meters should be measured therefrom towards the applicant's and respondent's plots. He contended that the issue regarding the status of the iron bar was raised and dealt with by the appellate tribunal where it was found that the iron bar was within the applicant's plot and therefore the applicant was declared the lawful owner of the disputed land. It was contended further that that decision was upheld by the High Court on appeal but the respondent never challenged it anyhow. According to the learned counsel, the decision by the High Court that the iron bar should be the boundary between the two plots was based on a manifest error on the face of the record resulting into a miscarriage of justice because it had the effect of vesting the respondent with ownership of the disputed land. As to what amounts to an error on the face of the record warranting review, the learned counsel referred us to the Court's

decision in **Emmanuel Kondrad Yosipati v. R,** Criminal Application No. 90/07 of 2019 (unreported).

In conclusion, Mr. Mabula urged us to revise the impugned decision by quashing the holding that the boundary between the two plots is the iron bar and thus 1.5 meters distance should be measured from the iron bar towards the applicant's and respondent's plots.

In response, the respondent did not have much to say. He adopted his affidavit in reply which essentially averred that the disputed land belongs to him and the boundary between the two plots is the iron bar. He invited the Court to dismiss the application because there is no apparent error on the face of the record in the decision of the High Court warranting revision.

The applicant has moved the Court to exercise its revisional jurisdiction under section 4 (3) of the AJA which stipulates thus:

> *"(3) Without prejudice to subsection (2), the Court of Appeal shall have the power, authority and jurisdiction to call for and examine the record of any proceedings before the High Court* ***for the purpose of satisfying itself as to the correctness, legality or propriety of any finding, order or any other decision made thereon and as to the regularity of any***

proceedings of the High Court." [Emphasis supplied]

The scope of revision in this application relates to the correctness, legality and propriety of the ruling and order of the High Court rejecting the application for review preferred under Order XLII Rule 1 (1) of the CPC. In terms of that rule, the Court has power to review its decision on three grounds; **one,** discovery of new evidence which could not have been produced or come to the party's knowledge after exercise of due diligence; **two,** some mistake or error apparent on the face of the record or; **three,** for any sufficient reason. It is apparent from the impugned ruling that the applicant moved the High Court to review its judgment on account of some mistake or error alleged to have been apparent on the face of the record.

Although the applicant preferred five grounds of review, her complaint related to the court's order on the ownership of the piece of land on which an iron bar held to be the boundary between her land and that of the respondent's wall. According to the applicant, the holding of the High Court maintaining the iron bar as the boundary despite the holding of the first appellate tribunal that the piece of land on which the same was erected was the applicant's property constituted an apparent error amenable to review under Order XLII rule 1 (1) of the CPC.

From our examination of the grounds of review before the High Court, the applicant did no more than asking that court to sit on its own judgment and rewrite it. With respect, that was beyond the scope of review on account of apparent error on the face of the record. We say so alive to the settled law on review which holds that, the power of review should not be confused with appellate powers which enables an appellate court to correct all errors committed by the subordinate court. Commenting on this issue, Justice C.K. Takwani, the author of **Commentary in Civil Procedure,** 6th Edition observes at Page 544 thus:

> .... "*a review cannot be equated with the original hearing of the case and finality of the judgment by a competent court cannot be permitted to be reopened or reconsidered ...*".

Be it as it may, as the complaint was on the alleged error apparent on the face of the record, the applicant was bound to place her case within the confines of reviewable errors; a self-evident error on the face of the record not involving an examination or arguments to establish it. To put it differently, an error which has to be established by a long-drawn process or arguments and reasoning to establish it on points capable of two opinions cannot qualify to be an error apparent on the face of the record. There is a plethora of authorities on this point within

and outside our jurisdiction. For instance, in **Thungabhadra Industries Ltd. v. Government of Andra Pradesh,** AIR 1964 SC 1372 the Supreme Court of India stated:

> *"There is a distinction which is real, though it might not always be capable of exposition, between a mere erroneous decision and a decision which could be characterized as vitiated by "error apparent". A review is by no means an appeal in disguise whereby erroneous decision is reheard and corrected, but lies only for patent error... where without any elaborated argument one could point to the error and say here is a substantial point of law which stares one in the face, and there could reasonably be no two opinions entertained about it, a clear case of error apparent on the face of the record would be made out..." (at.Page 1377).*

That decision dealt with interpretation of Order 47 rule 1 of the Indian Code of Civil Procedure, Act V of 1908 the equivalent of Order XLII rule 1 (1) of the CPC. This Court has made reference to it in its various decisions, amongst others, **Chandrakant Joshubhai Patel v. R** [2004] T.L.R. 218, **Karim Kiara v. R**, Criminal Application No. 4 of 2007 and **Epson s/o Michael v. R**, Criminal Application No. 5 of 2009 (both unreported).

In our view, the application for review on account of error apparent on the face of the record could be sustained only and only if it met the above threshold. We note that the learned judge realized that the mention of iron bar as a boundary between the pieces of land owned by the applicant and respondent was an error considering that the first appellate tribunal had not set it as a boundary. However, the learned judge took the view that the evidence on record influenced her to arrive at that conclusion. Indeed, we also note that the learned judge appears to have overindulged herself by inviting arguments from parties on whether there was any defined boundary between the parties other than the iron bar. With respect, that was outside the scope of review under Order XLII rule 1 (1) of the CPC. Nonetheless, at the end of the day, the learned judge concluded that the mention of the iron bar as a boundary between the two pieces of land did not constitute an error apparent on the face of the record amenable to review and rejected the application.

It is our firm view that the learned judge rightly exercised her power in rejecting the application. Contrary to the submissions by the learned advocate for the applicant, the mention of iron bar in the judgment was not an error apparent on the face of the judgment. It required elaborate argument to determine the alleged error let alone the

fact that it was potentially prone to arriving at more than one opinion. The resort to review was, with respect, uncalled for the more so when viewed in the context of the grounds canvased by the applicant exhibiting no less than grounds of appeal. We have found no error, illegality or incorrectness attracting the Court's revisional power under section 4 (3) of the AJA. The application is accordingly dismissed with costs.

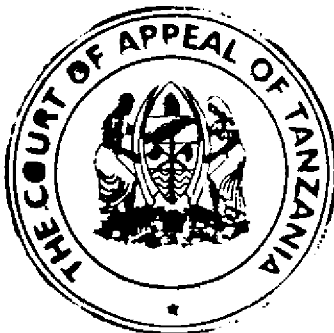
DATED at **DAR ES SALAAM** this 13th day of September, 2022.

M. A. KWARIKO
JUSTICE OF APPEAL

L. J. S. MWANDAMBO
JUSTICE OF APPEAL

P. M. KENTE
JUSTICE OF APPEAL

The Ruling delivered this 15th day of September, 2022 in the presence of Ms. Pendo Charles who hold brief for Mr. Bahati Stephano, learned counsel for the Applicant and the Respondent presence in person, is hereby certified as a true copy of the original.



D. R. LYIMO
DEPUTY REGISTRAR
COURT OF APPEAL