IN THE EAST AFRICAN COURT OF JUSTICE AT ARUSHA

FIRST INSTANCE DIVISION

(Coram: Faustin Ntezilyayo, DPJ; Audace Ngiye, J & Charles Nyachae, J)

APPLICATION NO.14 of 2018

(Application for review arising From **Reference No. 2 of 2016**)

PAUL JOHN MHOZYA ..... APPLICANT

VERSUS

THE ATTORNEY GENERAL OF THE UNITED REPUBLIC OF TANZANIA .....RESPONDENT

6th DECEMBER, 2019

RULING OF THE COURT

A. INTRODUCTION

1. This is an Application by Mr. Paul John Mhozya ("**the Applicant**") seeking a review of the Judgment dated 27th June, 2018 in **Reference No. 2 of 2016** filed against the Attorney General of the United Republic of Tanzania. The Application is brought by Notice of Motion under Article 35 of the Treaty for the Establishment of the East African Community ("**the Treaty**"), as well as Rule 72(2) of the East African Court of Justice Rules of Procedure, 2013 ("**the Rules**").

2. The Applicant is a natural person, a citizen and a resident of the United Republic of Tanzania, a Partner State of the East African Community. His address for service for the purpose of this Application is Kongowe Mzinga (B), Temeke Municipality, Dar Es Salaam, Tanzania.

3. The Respondent is the Attorney General of the United Republic of Tanzania ("**the Respondent**") and he is sued in his capacity as the Principal Legal Advisor of the Government of the United Republic of Tanzania. His address for service of this Application is Attorney General's Chambers, 20 Kivukoni Road, P.O. Box 9050, 11492, Dar es Salaam.

4. The background to this Application is that the Applicant sued the Respondent before this Court over a land dispute and many other events linked to the latter including harassment and death threats. The Applicant alleged that, on various dates, he unsuccessfully approached different services and institutions of the Respondent,

including the Office of the President of the United Republic of Tanzania, to have his property rights protected.

5. In our now impugned Judgment, we dismissed **Reference No. 2 of 2016** in its entirety. We categorically pointed out that:

> **"... the Reference is time-barred for not complying with the provisions of Article 30(2) of the Treaty."**

6. It is this same Judgment that the Applicant now seeks the Court to review.

7. The Application was heard on 15th March, 2019. The Applicant, acting in person, did not appear in Court for reasons that he was unable to fund the costs of so doing as well as for alleged security reasons. Mr. Abubaker Mrisha, Senior Attorney represented the Respondent.

B. APPLICANT'S CASE AND SUBMISSIONS

8. The Applicant's case is as stated in his Notice of Motion and his supporting Affidavit filed on 23rd August 2018.

9. In support of the instant Application, the Applicant relied on the following grounds spelt out in the Notice of Motion:

a) **There is an error apparent on the part of this Court in the choice of the context of the Reference on which the Court judged.**

b) **Following the apparent error abovementioned, the Court then went all out to attack and disable the evidence that may have been in favor of the Applicant's case.**

c) **The Court failed completely to uphold its prime mission of administering justice, instead it entertained rogues.**

d) **The Court also erred by adopting misinterpretations of the Constitution of the United Republic of Tanzania.**

e) **The Applicant understands that the President is informed of the existence of Reference No.2 of 2016 and that to date nowhere has the President or his duly instructed representative come up with any response to the issues raised in the Reference.**

f) **The dispute is still within the jurisdiction of the local institutions of redress, but for the two years of the duration of the Reference, the Respondent has not mobilized any officers of the Government of the United Republic of Tanzania to assess the validity of the Applicant's complaints.**

g) **The Court may have been confused by the too many averments made by the Applicant in the Reference, but seemingly the Court also went further, to misread and misinterpret the Constitution of the United Republic of Tanzania and the Government's Proceedings Act, and to question the legal system of a Partner State is a blatant attempt to knowingly blockade justice for its people, this Applicant inclusive.**

10. The substance of the Applicant's Affidavit was to bring to this Court's attention the fact that the failure by the President to take action in accordance with the Notice to sue the Government of the United Republic of Tanzania amounts to the President's apparent

failure to carry out a legal duty of his calling, and accordingly court action against the President with the Government being sued in his behalf.

11. To further buttress his argument that this Court should grant the orders sought, the Applicant submitted that the source of the error in the Judgment of the Court arises from the assumption that the Court had been invited to resolve a land dispute rather than deliberate on the United Republic of Tanzania President's failure to respond to a legal ultimatum. He further asserted that this Court has a legal mandate to make declarations against a Government that does not respond or wish to talk to its own people, thus denying them transparence and good governance, which is a violation of Articles 6(d) and 7(2) of the Treaty and that that is the way its jurisdiction had been solicited by this Applicant and should have thus been applied.

12. Concerning the land dispute, the Applicant contended that the Court should have addressed its jurisdiction on how the Respondent was working out a solution to the continuing dispute.

13. It was also the Applicant's submission that the error in judgment may have been caused by the insistent prodding of the Respondent into matters over which the Court had no jurisdiction, in other words the Respondent was malingering.

14. To sum up his submissions, the Applicant contended that **Reference No.2 of 2016** was rightly and competently before this Court and the Court be pleased to restore it and grant orders as prayed for.

C. RESPONDENT'S CASE AND SUBIMISSIONS

15. The Respondent opposed the Application and the orders sought through a Replying Affidavit sworn on 19th September, 2018 by Mr. Benson Edward Hoseah, State Attorney in the Office of the Solicitor General of the United Republic of Tanzania. The deponent contended, in a short statement, that the review sought does not comply with the requirements of Article 35 of the Treaty and Rule 72(2) of the Rules as the Applicant would like the Court to believe.

16. In his written and oral submissions in support of the foregoing, learned Counsel relied on Rule 72(1) and (2) of the Rules which provides as follows:

> Rule 72 (1) and (2):
>
> **(1) An application for review of a judgment under Article 35 of the Treaty shall be made in accordance with this Rule.**
>
> **(2) A party who from the discovery of new and important matter or evidence which, after the exercise of due diligence, was not within its knowledge or could not be produced by it at the time when the judgment was passed or the order made, or on account of some mistake, fraud or error apparent on the face of the record, or because an injustice has been done, desires to obtain a review of the judgment or order, may apply to the Court for review of the judgment without unreasonable delay.**

17. In light of the foregoing, learned Counsel submitted that the principle underlying review is that the Court would not have acted the way it did, if all the circumstances had been known. He argued, therefore, that a review would be carried out when and where it is apparent that:

    a) **New evidence has been discovered and it was not within the knowledge of the Applicant even after exercising due diligence or the Applicant could not produce the evidence before the Court at the time the Judgment was passed.**

    b) **There is a manifest error on the face of the record which resulted in a miscarriage of justice. The Applicant would therefore be required to prove very clearly that there is a manifest error apparent on the face of the record. He will have to prove further, that such an error resulted in injustice.**

    c) **The decision was obtained by mistake or fraud.**

18. It was argued for the Respondent that the Applicant conceded that the land dispute between him and the Respondent was not within the jurisdiction of the Court and the same is reserved for redress to local institutions. He added that the Applicant was not able to adduce any new evidence that has been discovered and which was not within his knowledge at the time the Judgment was passed and all the letters annexed in his submission show that all the actions, events and facts stated therein occurred before the prescribed time and are therefore time-barred for determination before this Court. Even the two letters annexed marked AGC1 and AGC2 and

stamped by the Court on 1st December 2016 were considered by the Court in the determination of **Reference No. 2 of 2016** and cannot be considered to be new evidence.

19. He also submitted that the issue of the President's failure to respond to a legal ultimatum has been determined in **Reference No. 2 of 2016** where this Court decided that the President of the United Republic of Tanzania cannot, as an Institution, sue or be sued in this Court and there being no new evidence adduced by the Applicant as such, there is no error on the face of the record and no decision was obtained by mistake or fraud.

20. He further submitted that no error in judgment was caused by the insistent prodding of the Respondent; that this Court determined the matter by considering the facts and evidence provided by the Applicant in his submissions and that the Court was satisfied that **Reference No. 2 of 2016** could not be allowed to stand on account of limitation of time.

21. On the question of continued violations of his rights to property, Counsel for the Respondent referred us to the case of **Attorney General of the Republic of Uganda & Attorney General of the Republic of Kenya vs. Omar Awadh's & 3 others, EACJ Appeal No. 2 of 2012** where this Court held that:

> **"The principal of legal certainty requires strict application of the time limit in Article 30(2) of the Treaty. Furthermore, nowhere does the Treaty provide for any power to the Court to extend, to condone, to waive or to modify the prescribed time limit for any reason."**

22. He further submitted that this Court, being guided by the above decision, could not in any way entertain his Application on merit and therefore the Applicant's Application continued to be time-barred for not complying with the provisions of Article 30(2) of the Treaty.

23. It was also his submission that the Applicant has not shown any of the grounds for review as enumerated by the law and the grounds presented before this Court lack substance as they are grounds of what would appear to be another reference against the decision of this Court delivered on 27th June, 2018; that this should not be allowed since it amounts to another reference in disguise.

24. In conclusion, the Respondent submitted that all the reliefs sought by the Applicant are contrary to Rule 72(1) and (2) of the Rules and prays for the dismissal of the Application with costs and any other order the Court might deem right and just to grant.

D. COURT'S DETERMINATION

25. Having given due consideration to the Application for review and the parties' submissions, it appears that the only issue for determination in this case is whether the Applicant has established any of the grounds to warrant an order of review of **Reference No. 2 of 2016**. It should be noted that the powers of this Court to review its judgments are elaborated in Article 35(3) of the Treaty read together with Rule 72(1), (2) & (3) of the Rules. We reproduce the pertinent provisions thereof below for ease of reference:

> Article 35(3):
>
> **An application for review of a judgment may be made to the Court only if it is based upon the discovery of some**

fact which by its nature might have had a decisive influence on the judgment if it had been known to the Court at the time the judgment was given, but which fact, at that time, was unknown to both the Court and the party making the application, and which could not, with reasonable diligence, have been discovered by that party before the judgment was made, or on account of some mistake, fraud or error on the face of the record or because an injustice has been done.

Rule 72 (1), (2) and (3):

(1) An application for review of a judgment under Article 35 of the Treaty shall be made in accordance with this Rule.

(2) A party who from the discovery of new and important matter or evidence which, after the exercise of due diligence, was not within its knowledge or could not be produced by it at the time when the judgment was passed or the order made, or on account of some mistake, fraud or error apparent on the face of the record, or because an injustice has been done, desires to obtain a review of the judgment or order, may apply to the Court for review of the judgment without unreasonable delay.

(3) The Court shall grant an application for review only where the party making the application under sub-rule (2) proves the allegations relied upon to the satisfaction of the Court.

26. To qualify for review under the above quoted provisions which are the basis for the Court's power of review, an application needs to fulfil any or all the conditions specified therein. The Applicant must adduce discovery of some new set of facts/evidence which was not within the knowledge of the party and the Court at the time of the delivery of the judgment. The impugned judgment must evince some mistake, fraud or error that is manifest on the face of the record; or, alternatively the judgment, as is, must have given rise to a miscarriage of justice.

27. The grounds for the instant Application were largely limited to a mistake or error of law apparent on the face of the record; and only tangentially touched on the element of injustice. Nothing at all was raised by way of discovery of new facts; nor of fraud. Even the documents annexed to this Application were all along known to the Applicant.

28. Of the 7 grounds listed by the Applicant a hefty number raise allegations of error or mistake apparent on the record.

29. All the grounds are far too linked and repetitive to examine one by one. Nonetheless, individually and collectively they all evince one defining characteristic: dissatisfaction and aggrievement by the Applicant at the Court's particular findings, views, opinions, conclusions, interpretations, constructions and decisions on the numerous points now raised as grounds of the prayer for review. They all seek to overturn the Court alleged erroneous views on these points, and to transform them instead into the "correct" views desired by the Applicant.

30. The Applicant's grievance is that **"the source of the error in the judgment of the Court arises from the assumption that the Court had been invited to resolve a land dispute rather than deliberate on the President's failure to respond to a legal ultimatum".**

31. It was the Applicant's further argument that **"the troubling judgment arises from a Court overlook of the legal Notice served upon the Government of the United Republic of Tanzania that the latter would be sued if it did not act as required in the ultimatum. The Court then misdirected its jurisdiction onto a land issue that was reserved for local institutions of redress while at that time the said local institutions of redress were being accused of violating Articles 6(d) and 7(2) of the Treaty on lots of evidence relating to a land dispute. So there was a very thin dividing line between the land dispute case and the violations of the Treaty case. The Court chose the land dispute case in favor of the case of violations of the Articles of the Treaty which then led to the error in judgment."**

32. Consequently, the Applicant's contention is that the judgment of the Court was entered in error apparent on the face of the record.

33. Conversely, it was the Respondent's contention that **"on 18th September, 2017 when the matter came up for scheduling conference, issues were fixed and the Applicant expressed his intention not to attend the Court, on the same day issues were framed for determination. Moreover, the Court in determining the issues in contest deemed appropriate and prudent to**

dispose of the preliminary objection first raised by the Respondent and the Court dismissed the Reference. Determination of the preliminary objection raised by the Respondent was proper and does not amount to an error in the face of records."

34. On the issue of the President's failure to respond to a legal ultimatum, Counsel for the Respondent stated that this Court has determined this issue at page 22 of the judgment and stated that the act in question doesn't constrain the recipient thereof to respond to the notice on the stated timeframe. He further submitted that this Court had already dealt with that issue and no new evidence was adduced by the Applicant. As such there was no error on the face of the record and no decision was obtained by mistake or fraud, Counsel submitted.

35. Finally, it was opined by Counsel for the Respondent that this Court determined the matter by considering the facts and evidence provided by the Applicant in his submission and the Court was satisfied that **Reference No.2 of 2016** could not be allowed to stand on account of limitation of time.

36. In reply, the Applicant essentially reiterated his earlier submissions and insisted on the fact that **"the Court chose the land dispute case in favor of the case of violations of the Articles of the Treaty which then led to the error in judgment."**

37. On the issue of the framed issues and the alleged interchanging of the numbering of the framed issues, this was the Court's position:

> **"In determining the issues in contest within the Reference herein, we deem it appropriate and prudent to**

first dispose of the preliminary objections raised by the Respondent on grounds *inter alia* of jurisdiction and limitation of time before considering the merits of this Reference if need be. Therefore, issue No. (viii) becomes issue No. (i), issues Nos. (x) and (xi) become, respectively, issues No. (ii) and No. (iii) while issue No. (ix) becomes issue No. (iv)."

38. The question of the Court choice of the land dispute instead of the case of violation of the Treaty was also pleaded by the parties in Reference and the Court's view was and is still as follows (para 59):

> **"It is not disputed by either Party herein that the specific act or decision in issue in this Reference is the alleged unlawful land survey and demarcation carried out by the Temeke Municipal Authority on 19th April, 2008 on the Applicant's neighbor's piece of land which according to him, infringed on his property rights. The other actions complained of have been qualified as consequential or related issues by the Applicant himself. This is a fact borne out by the parties' pleadings and submissions."**

39. This Court has had the occasion to consider the import of a good application of Article 30 of the Treaty in **The Attorney General of the Republic of Burundi vs. The Secretary General of the East African Community, EACJ Reference No.2 of 2018.** It was held:

> **"... Article 30 of the Treaty spells out the acts that would give rise to a cause of action before this Court to include any 'Act, regulation, directive, decision or action'. Whereas, for instance, an Act or other statutory law**

would speak for itself and the court might perhaps be compelled to take judicial notice of its existence, an 'action' that compels a party to file a Reference before this Court would require proof of its incidence or occurrence."

40. In **Angella Amudo vs. The Secretary General of the East African Community, EACJ Appeal No. 4 of 2014**, it was held that:

> **"We take it to be settled law that there can be no suit, without a cause of action having accrued to the claimant or plaintiff. It is equally settled that a cause of action should always be gleaned from the plaint or statement of claim and not from the claimant's assertions from the bar or submissions. In this particular case, the Appellant's cause of action could only be traced in her Statement of Claim..."**
>
> We do abide by the same position.

41. The issue of time limitation and the principle of continuing violation was also pleaded by the Parties in Reference and this was the Court determination:

> **"On the question of continuing violations, the Appellate Division of this Court has previously rejected the concept of continuing violations and opted for a strict interpretation of Article 30(2) of the Treaty in order to protect the principle of legal certainty.**
>
> **We are guided by the above decision. In the end therefore, we conclude that the Applicant filed his**

Reference out of the prescribed time, and that, consequently, the Reference is time-barred for not complying with the provisions of Article 30(2) of the Treaty.

Having answered this issue in the affirmative, we would otherwise accordingly refrain from determining the remaining issues for the simple reason that the Reference is no longer alive."

42. In any event, it is well settled that a party is not entitled to seek a review of a judgment delivered by this Court merely for the purpose of a rehearing of the matter and reconsideration of the issues decided by the Court and a fresh decision of the case.

43. Indeed, in **Independent Medico Legal Unit vs. Attorney General of the Republic of Kenya, EACJ Application No. 2 of 2012(Arising from Appeal No. 1 of 2011)** it was held that:

> **"But here, again, even if the Appellant's grievances were well-founded, the appropriate recourse to remedy them would not be a review of the impugned judgment. Rather, it would be a substantive appeal against that judgment because the matters now raised go well beyond the face of the record. They entail a substantive challenge of the merits of the Court's decision. On this, the law is clear: what may be a good ground, even an excellent ground, for appeal, need not be a valid ground for review."**

44. We adopt the above reasoning in this decision in as far as it is relevant to the issue at hand.

45. Turning back to the specific prayers sought, we hasten to add that in dismissing the Reference, we did not base our decision on the merit or otherwise of the Applicant's case.

46. Having found that the Reference is time barred and having declined the invitation to address its merits or otherwise, it follows that the only point or issue for consideration and determination in this Application is whether there is indeed an error or mistake apparent on the face of the record.

47. From the Notice of Motion and the submissions before us, it is clear that the Applicant is seeking a review of the Judgment on the ground of an error apparent on the face of record. Surely, this is one of the permissible grounds for review under Article 35(3) of the Treaty and Rule 72(2) of the Rules. But we wish to make it absolutely clear, as we articulated in para.42 above, that a review of judgment is not granted as a matter of absolute right upon mere assertions of "mistake or error apparent on the face of the record". On this, we find it very instructive to return to the illuminating judgment of the Court in **Independent Medico Legal Unit** (supra) as cited in para 43.

48. Indeed, in this Application, the Applicant contended that it was an error on the part of this Court to decide that the Reference was time barred and was therefore incompetent.

49. There is a clear distinction between a mere erroneous decision and an error apparent on the face of the record. While the first can be corrected by an appellate court, the latter can only be corrected by the trial court in exercise of its review jurisdiction.

50. Further, an error apparent on the face of the record as would justify an application for review has to be self-evident. It must be an obvious and patent mistake and not something which can only be established by a long drawn process of reasoning on points on which there may conceivably be two opinions. Indeed, the case of **Independent Medico Legal Unit** (supra) defined an error apparent on the face of record as follows:

> "...
>
> **As the expression 'error apparent on the record' has not been definitively defined by statute, etc, it must be determined by the Court's sparingly and with great caution.**
>
> **The 'error apparent' must be self-evident; not one that has to be detected by a process of reasoning.**
>
> **No error can be said to be an error apparent where one has to 'travel beyond the record' to see the correctness of the judgment – see paragraph 2 of the *Document on 'Review of Jurisdiction of the Supreme Court of India' (supra).***
>
> **It must be an error which strikes one on mere looking at the record, and would not require any long drawn process of reasoning on points where there may conceivably be two opinions – *see Smti Meera Bhanja v. Smti Nirmala Kumari (Choudry) 1995 SC 455.***
>
> **A clear case of 'error apparent on the face of the record' is made out where, without elaborate 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 – see *Thugabhadra Industries Ltd v. The Government of Andra Pradesh 1964 AIR 1372; 1164 SCR (5) 174* ; also quoted in *Haridas Das v. Smt. Usha Rani Banik & Ors, Appeal (civil) 7948 of 2004*.

In summary, it must be a patent, manifest and self-evident error which does not require elaborate discussion of evidence or argument to establish – (see: *Sarala Mudgal vs. Union of India M. P. Jain, page 382, vol. I.)*

Review of a judgment will not be considered except where a glaring omission or a patent mistake or like grave error has crept into that judgment through judicial fallibility – see Document: '*Review Jurisdiction of Supreme Court of India*" (supra).

We find no reason to depart from that principle in the present Application.

51. In the above cited case it was also held as follows:

"...

The review jurisdiction of the Court cannot be exercised on the ground that the decision of the Court was erroneous on merit. That would be in the province of a Court of Appeal.

A review cannot be sought merely for fresh hearing or arguments or correction of an erroneous view taken earlier.

A review proceeding cannot be equated with the original hearing of the case.

The purpose of the review jurisdiction is not to provide a back door by which unsuccessful litigants can seek to re-argue their cases.

The parties are not permitted to begin fresh litigations because of new views they may entertain of the law of the case or new versions which they present as to what should be a proper apprehension by the Court of the legal result. If this was permitted, litigation would have no end, except when legal ingenuity is exhausted – see *Hoystead v. Commissioner of Taxation (LR 1926 AC 155 at 165)*.

A power to review is not to be confused with appellate power which may enable an appellate court to correct all manner of error committed by a subordinate court."

52. From those principles, it is clear that indeed not every error or mistake in a judgment will justify a review. An error which has to be fished out and searched will not suffice. It should be something more than a mere error.

53. In summary, a review may be granted whenever the court considers that it is necessary to correct an apparent error or omission on the part of the court. The error or omission must be

self-evident and should not require an elaborate argument to be established. It will not be sufficient ground for review that another Judge could have taken a different view of the matter neither is the fact that the Court proceeded on an incorrect exposition of the law and reached an erroneous conclusion a proper ground for review. If the court reached a wrong conclusion of law, it could be a good ground for appeal but not for review. Otherwise the court would be sitting in appeal on its own judgment which is not permissible in law. See **Angella Amudo vs. The Secretary General of the East African Community, EACJ Application No. 4 of 2015 (Arising from Appeal No. 4 of 2014)**.

54. In the matter before us, we have carefully perused the Application for review and the well-argued submissions filed by both parties. It is our considered view that the Applicant has not satisfied the requirements for grant of the orders sought. It should be noted that the grounds for review are very specific as discussed herein. The Applicant herein has not demonstrated that he discovered new and important matter or evidence which was not within his knowledge, neither that there was an error apparent on the record.

55. In addition, the Court's intervention is not being sought to correct self-evident errors or mistake on the part of the Court, apparent on the face of record, which do not require elaborate argument in order to be established. What the Applicant is asking this Court to do is to reverse a decision taken on the basis of what he considers to be an incorrect exposition of the law and an erroneous conclusion on a matter on the basis of alleged misconstruing the law or improper exercise of discretion.

56. In a nutshell, we are of the firm view that if this Court were to exercise its power of revision on the foregoing basis it would have assumed appellate powers, which it is not at liberty to do.

E. CONCLUSION

57. In the final analysis and for the reasons given above, this Application is dismissed.

58. As to costs, we exercise our discretion to order each Party to bear its own costs.

59. It is so ordered.

Dated, delivered and signed at Arusha this 6th day of December 2019.

Hon. Justice Faustin Ntezilyayo
DEPUTY PRINCIPAL JUDGE

Hon. Justice Audace Ngiye
JUDGE

Hon. Justice Charles Nyachae
JUDGE