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COUR DE JUSTICE

COMESA

محكمة العدل

COURT OF JUSTICE

**IN THE COURT OF JUSTICE OF THE COMMON MARKET FOR EASTERN AND SOUTHERN AFRICA – APPELLATE DIVISION AT NAIROBI, KENYA**

**REVISION APPLICATION NO. 1 of 2019**
**(BEING APPEAL NO. 3 OF 2018)**

**MALAWI MOBILE LIMITED ………………………………APPLICANT**

***Versus***

**THE COMMON MARKET FOR EASTERN**
**& SOUTHERN AFRICA (COMESA) ………………RESPONDENT**

**Coram:**

| | | |
|---|---|---|
| **Hon. Dr. Justice Michael Mtambo** | - | **Presiding Judge** |
| **Hon. Mr. Justice David Cheong** | - | **Judge** |
| **Hon. Dr. Justice Wael Rady** | - | **Judge** |

# RULING

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**MALAWI MOBILE LIMITED v COMESA (Revision Application No.1 of 2019) (Appeal No.3 of 2018)**

## INTRODUCTION

1. This is an application by Malawi Mobile Limited ("the applicant") for revision of a ruling delivered on 1 May 2019 by the Appellate Division of the COMESA Court of Justice, composed of Judges Mtambo, Cheong and Rady ("the Appellate Division").

2. At this stage, a preliminary issue which has to be determined is the admissibility of the application in terms of Rule 73(1) of the Rules of Court ("the Rules"). In this respect, we have dispensed with the presence of the parties and oral arguments. As such, in disposing of the issue at hand, we have relied solely on the written submissions of the parties.

3. In the above ruling dated 1 May 2019, the Appellate Division dismissed a motion by the applicant (a) for the recusal of all the Judges of the Appellate Division from hearing its appeal against a decision of the First Instance Division in Reference No.1 of 2017; and (b) for the COMESA Court to request for the appointment of additional and/or temporary Judges.

4. The present application has been entered under Article 31(3) of the COMESA Treaty ("the Treaty") as read with Rules 72 and 73 of the Rules.

5. This application for revision is premised on the grounds that the Ruling dated 1 May 2019 and the entire proceedings in the Appellate Division were tainted and vitiated-

(a) by procedural and substantive mistakes of law and fact; and

(b) by procedural and substantive errors on the face of the record,

which caused gross and manifest miscarriage of justice to the applicant.

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**SUBMISSIONS**

6. It was submitted on behalf of the applicant that:

   i. The COMESA Court of Justice is a creature of the Treaty and enjoys such jurisdiction as conferred by the Treaty including the power to review its own judgments as enshrined in Article 31(3) of the Treaty and Rules 71, 72 and 73 of the Rules. The basic philosophy inherent in the concept of review is acceptance of human fallibility and acknowledgement of frailties of human nature and sometimes possibility of perversion that may lead to miscarriage of justice. The Court should adopt a more generous scope for challenging its decisions.

   ii. The Ruling of 1 May 2019 and the entire proceedings in the Appellate Division were tainted and vitiated by procedural and substantive mistakes of law and fact and errors on the face of the record, which caused gross and manifest miscarriage of justice to Malawi Mobile Limited.

   iii. The Ruling mischaracterised the issue that fell for determination.

   iv. The Ruling failed to consider the fact that Judges Mtambo, Cheong and Rady had sat together with Judges Chibesakunda and Al Bashir in Appeal No. 1 of 2016.

   v. The Ruling failed to consider the fact that the pending appeals Nos. 1 and 2 of 2018 involving Malawi Mobile Limited and COMESA sought to vitiate the proceedings in which all the 5 Judges of the Appellate Division had participated. The Appellate Division therefore erred in concluding that the Judges had no interest in the outcome of the pending appeal between Malawi Mobile Limited and COMESA.

   vi. The Ruling failed to fully consider the applicable law and facts warranting the automatic disqualification, or disqualification on the ground of apparent bias, of the entire bench of the Appellate Division.

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vii. The Ruling erred in failing to apply the legal precepts enunciated in the decision of **In re: Pinochet** (1999) 1All ER 577.

viii. In the circumstances, the Court should issue an order setting aside its impugned Ruling and order for a de novo hearing of the Notice of Motion for recusal of all Judges of the Appellate Division before a fresh panel of Judges to be appointed by the Authority at the request of the Court as prayed for by the applicant in Miscellaneous Application No. 2 of 2018.

7. In response, the respondent submitted as follows:

i. The present application is tantamount to abusing court process which is disallowed by Rule 3 (1) of the Rules and should accordingly be denounced by the Honourable Court.

ii. Rules 72 (1) and (3) of the Rules governing Revision of Judgment state clearly the grounds upon which a Revision of Judgment Motion ought to be premised and the applicant has failed to comply with such provision except for making a vague claim of the existence of an alleged mistake. Rule 72(3) places an onus of proof upon an applicant to further comply with sub paragraphs (a) and (b) of the same Rule, which the applicant has failed and neglected to do.

iii. The respondent denies that the Court mischaracterised the issue that fell for determination. Further, the respondent denies that the Ruling failed to consider the fact that Judges Mtambo, Cheong and Rady had sat together with Justices Chibesakunda and Al Bashir in Appeal No. 1 of 2016. There was no need to consider that fact as it was a different case between Malawi Mobile Limited and Malawi Government and it had no bearing on the present matter.

iv. The respondent's position is in line with paragraph 104 of the ruling in the case of **President of the Republic of South Africa & ors v South African Rugby Football Union 1999(4) SA 147 CC**, where it is stated that while litigants have the right to apply for the recusal of judicial

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officers where there is a reasonable apprehension that they will not decide a case impartially, this does not give them a right to object to their cases being heard by particular judicial officers merely because they believe that such persons will not decide the case in their favour.

## APPLICABLE LAW

8. As already stated above, this application has been entered under Article 31(3) of the Treaty as read with Rules 72 and 73 of the Rules. The relevant provisions read as follows:

***ARTICLE 31***

***Judgment of the Court***

*3. An application for revision 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 or error on the face of the record.*

***Rule 72***

***Revision of Judgment***

*1. Pursuant to Article 31 (3) of the Treaty, a party may apply for revision of a judgment only if it is based upon-*

*(a) 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 when 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;*

*(b) some mistake; or*

*(c) an error apparent on the face of the record.*

*2. The application for revision shall be made within ninety (90) days from the date of delivery of judgment.*

*3. (a) Rules 24 and 31 shall apply to an application for revision;*

*(b) in addition, such an application shall-*

*(i) specify the judgment contested;*

*(ii) indicate the points on which the judgment is contested;*

*(iii) set out the facts on which the application is based; and*

*(iv) indicate the nature of the evidence to show that there are facts justifying revision of the judgment, and that the time-limit laid down in sub rule (2) has been complied with.*

*4. The application shall be made against all parties to the case in which the contested judgment was given.*

***Rule** 73*

***Powers of Court on Revision***

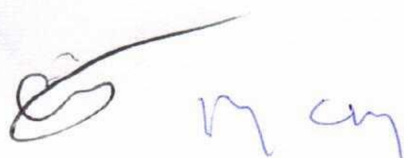
*1. Without prejudice to its decision on the substance, the Court shall, having regard to the written submissions of the parties, give its decision on the admissibility of the application.*

*2. If the Court finds the application admissible, it shall proceed to consider the substance of the application and shall give its decision in accordance with these Rules.*

*3. (a) The original of the decision shall be annexed to the original of the judgment revised; and*

*(b) A note of the decision shall be made in the margin of the original of the judgment revised.*





## ANALYSIS

9. In light of the above, it is clear that an application for revision of a judgment may be made to the COMESA Court only if it is based upon some newly discovered fact, with decisive influence, unknown to the Court and the applicant at the time the judgment was given or on account of some mistake or error on the face of the record.

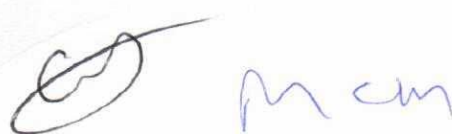
10. The present application is not premised on newly discovered facts but on alleged mistakes or errors on the face of the record.

11. It is well settled that revision is not an appeal procedure but an exceptional procedure that departs from the general rule which is reflected in the principle of *res judicata*, i.e. that decisions of appellate courts are final. In light of the exceptional nature of the revision procedure, the conditions governing the admissibility of an application for revision of a judgment must be interpreted strictly. The applicant needs to establish a *prima facie* case for revision before the court can look at the substance of the matter. It is only in "*the rarest of rare cases*" that the court will intervene.

12. Regarding the ground of mistake or error on the face of the record, the starting position is the fathoming of a definition. In the Kenyan case of **Gikonyo v National Assembly of Kenya (High Court Kenya, Constitutional and Human Rights Division, Petition Number 453 of 2015)**, the Court quoted the following extract:

> "*...an error apparent on the face of the record cannot be defined precisely or exhaustively, there being an element of indefiniteness inherent in its very nature, and it must be left to be determined judicially on the facts of each case. There is a real distinction between a mere erroneous decision and an error apparent on the face of the record. Where an error on a substantial point of law stares one in the face, and there could reasonably be no two opinions, a clear case of an error apparent on the face of the record would be made out. An error which has to be established by a long drawn process of reasoning or on points*





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*where there may conceivably be two opinions can hardly be said to be an error apparent on the face of the record."*

13. It has been stated in the Indian Supreme Court decision of **Satyanarayan Laxminarayan Hedge V Mallikaryun Bhavanappa Tirrumale (1960) 1 SCR 890** as follows:

> *"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"*

14. In the premises, we find that the expression "*mistake or error apparent on the face of the record*" should be strictly interpreted and limited to a self-evident apparent error, and not one that has to be detected by a process of reasoning. It must be a patent, manifest and self-evident error which does not require elaborate discussion of evidence or arguments to establish.

15. Reverting to the case at hand, we note that the applicant is relying on alleged procedural and substantive mistakes of law and fact and errors on the face of the record. However, ex facie the application and submissions, the applicant has lamentably failed to point out what are these procedural and substantive mistakes and errors on the face of the record. In fact, apart from quoting at length authorities, some of which were not relevant, the applicant has made vague and mere allegations that the Appellate Division failed to consider facts and to apply the law and principles.

16. We find that the applicant is no more no less attempting to have a second bite at the cherry. It is a mere rehashing on its part of the points already made with regard to the motion for recusal of all the Appellate Division Judges. A perusal of the Ruling dated 1 May 2019 shows that the Appellate Division dealt with all these points, which the applicant is seeking to raise anew under the guise of a review. A review is certainly not a rehearing of an appeal.

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17. The present application only shows that the applicant is dissatisfied with and aggrieved by the Appellate Division's particular findings, views, conclusions and decision. What the applicant is here attempting to do is to show that the Ruling was erroneous in law and on the facts. But he has been unable to point out mistakes and errors apparent on the face of the record. As held in **Gikonyo** (supra), there is a real distinction between a mere erroneous decision and an error apparent on the face of the record. The grounds relied upon by the applicant, taken either individually or collectively, do not amount to mistakes or errors on the face of the record. In truth, this application is a disguised appeal against the Ruling dated 1 May 2019.

18. Public interest requires that there is finality and certainty of judicial decisions. The review power of courts must be exercised with great caution. It is clear that, ex facie the application and its supporting evidence, the applicant has failed to demonstrate exceptional circumstances warranting our intervention, failing which it would suffer irremediable and manifest injustice. We are not here dealing with "*the rarest of rare cases*".

**CONCLUSION**

19. For the above reasons, ex facie the application and supporting evidence, we find that the applicant has not made out a *prima facie* case for revision of the Ruling dated 1 May 2019.

20. Pursuant to Rule 73(1) of the Rules, the present application for revision is accordingly dismissed as being inadmissible.

21. In accordance with Rule 74(1) of the Rules, we shall make a decision as to costs in our final judgment.

**DATED this** ..18TH.. **day of** ..NOVEMBER 2019.. **at NAIROBI, KENYA.**

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HON. DR. JUSTICE MICHAEL MTAMBO – PRESIDING JUDGE

HON. MR. JUSTICE DAVID CHEONG - JUDGE

HON. DR. JUSTICE WAEL RADY - JUDGE



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