16 October 2002
Revision Application No. 1/2002

COMESA COURT OF JUSTICE

COMMON MARKET FOR EASTERN AND SOUTHERN AFRICA AND ERASTUS MWENCHA
v.
KABETA MULEYA

JUDGMENT

BEFORE:	LORD PRESIDENT: A.M. Akiwumi LORD JUSTICE: J. B. Kalaile; E. L. Sakala; J. M. Ogoola; J. Mutsinzi
Citation:	COMESA v. Muleya, Revision Application No. 1/2002, Judgment (COMESA-CJ, Oct. 16, 2002)
Represented By:	APPLICANT: J. P. Sangwa RESPONDENT: S.S. Zulu

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JUDGMENT OF THE COURT

Lord Justice James Ogoola delivered the Judgment of the Court.

[1] By their Revision Application No 1/2002 (the "Application"), the Applicants sought a revision of this Court's Judgment of 23rd April, 2002 in Reference No. 2/2001. The Application was brought pursuant to Rule 88 of the Rules of this Court and Article 31 (3) of the COMESA Treaty. Paragraph 7 of the application sets out a long list of the "POINTS ON WHICH THE JUDGEMENT IS CONTESTED". These points are immediately followed by and elaborated upon by an even longer list of the "FACTS ON WHICH THE APPLICATIONS IS BASED." Last, but by no means least, the Application lists a "SUMMARY OF THE POINTS OF LAW ON WHICH THE APPLICATION FOR REVISION IS FOUNDED."

[2] By way of preliminary but vital issues, the Court needs to be satisfied about the jurisdiction for and competence of this Application. An application for revision is permitted under Article 31 (3) of the COMESA Treaty, which provides that:

"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." [emphasis added]

[3] It is evident from the above-quoted Article that judgments of the Court may be revised either on the grounds of discovery of some new fact(s), or on account of some mistake or error on the face of the record. This Court has had occasion in the case of Eastern and Southern African Trade and development Bank (PTA Bank) and Dr. Michael Gondwe v Martin Ogang, Reference Revision No. 1/2001, to deal with a revision on both grounds, namely: discovery of new facts and error on the face of the record. In that case this Court held that:

"In our view, a mistake or error on the face of the record is not a matter that affects the substance of the issues before the Court or the validity of its judgment. They must be formal such as misnaming of parties, errors in calculation, clerical mistakes or obvious slips that appear on the face of the record which can be corrected without changing the validity or effect of the judgment." [emphasis added]

[4] The present Application for revision is based only on the second ground, namely: a mistake or error on the face of the record.

[5] As regards the issue of competence of the present Application, Rules 88 and 89 of the Rules of this Court are pertinent. These rules prescribe a 3-month deadline within which to make an application for revision. They also prescribe the various elements that the applicant is required to specify in the application for revision, namely: the points, facts, evidence, etc, on which the judgment is contested. The Court is satisfied that the present Application is in conformity with all the requirements of rules 88 and 89 and is, therefore, competent to be entertained by this Court.

[6] Regarding the merits of this Application, the Court has made a long and exhaustive analysis of the twelve points that are particularized in the Application as the grounds for this application. As stated earlier on, all these grounds are stated to be "errors on the face of the record". While the phrase "mistake or error on the face of the record" may by now have become a term of art, it does not appear to have any precise or exhaustive judicial definition. In this connection, this court found very helpful the observations expressed by the Kenya Court of appeal in the recent case of Nyamogo & Nyamogo Advocates v Moses Kipkolum Kago, Civil Appeal No. 322 of 2000 (unreported). In that case, their Lordships considered a Kenyan rule on review on grounds of "a mistake or error apparent on the face of the record", and stated that:

"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."

[7] We entirely agree with the above dictum. We also wish to emphasize that having stated the definitional difficulty above, their lordships proceeded to lay out a set of helpful principles by which to test and determine whether a given error is or is not apparent on the face of the record. They stated thus:

"Where an error on a substantial point of law stares one in the face, and there would

reasonably be no two opinions, a clear case of 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 where there may conceivably be two opinions can hardly be said to be an error on the face of the record." [emphasis added]

[8] We also agree with the above principles, and are prepared to adopt them for an assessment of the grounds listed in the present Application. We find that only the first two and the last two grounds so listed – out of the applicants' twelve grounds – are remotely close to being considered "errors on the face of the record." The rest of the other grounds are matters, which go much deeper than the face of the record. This is clearly and irrefutably brought out by the "FACTS ON WHICH THE APPLICATION IS BASED". All the arguments set out in the Application, other than those relating to costs, extension of probation, non compliance with Rule 56 (h) and non compliance with Rule 56 (i), make it patently clear that the applicants are raising fundamental points regarding the analysis, reasoning and the basis by which the Court arrived at the various elements, opinions and conclusions in its Judgment. Clearly then, these are not contentions about which one could say that "the point stares one in the face," to use the graphic language employed by their Lordships in the Nyamogo case, (supra). On the contrary, these are issues, which can be established only through "a long drawn out process of reasoning." Moreover, each one of the contentions advanced by the Applicants is clearly a contention "where there may conceivably be two opinions" on the same argument. On this, their Lordships in the Nyamogo case (supra), were quite emphatic. They held that:

"... if a view adopted by the Court in the original record is a possible one, it cannot be an error apparent on the face of the record even though another view was also possible."

[9] In our view, the above is a correct position of the law. We are further fortified in this view by the similar holding of the High Court of Uganda in the case of Abasi Balinda v Frederick Kangwamu [1963] EA 557, in which the applicant for revision contended that the lower Court took an erroneous view of the evidence and of the law. The High Court adopted the following dictum, which is expounded in A.I.R. Commentaries on The Code of Civil Procedure by CHITALEY & RAO (4th Edition), vol. 3, p 3227:

"a point which may be a good ground of appeal may not be a ground for an application for review and an erroneous view of evidence or of law is not a ground for review though it may be a good ground for an appeal." [emphasis added]

[10] There is, therefore, a clear distinction made between the Nyamogo case and the Abasi Balinda case regarding the effect of an error on the face of the record, on the one hand, and an erroneous view of the evidence or the law, on the other hand. An error on the face of the record, justifies a revision. An erroneous view, justifies an appeal, where an appeal lies. In the present Application, all the grounds set out therein other than the four specified above, are substantive challenges to the Court's Judgment of 23rd April, 2002 in as much as the Applicants' contentions therein are to the effect that the Court took an erroneous view of either the evidence or the law, or both. On the basis of all these reasons, this Court finds that these grounds do not constitute either mistakes or errors on the face of the record so as to entitle the Applicant to a revision of the Judgment under Article 31 (3) of the COMESA Treaty. They may well be grounds – even good grounds – for an appeal. However, the COMESA Treaty does not provide for appeals against judgments of this Court.

[11] On the other hand, the four grounds for revision already specified above, may appear to be errors on the face of the record. We will now deal with them one by one.

(i) Costs of the Reference

[12] The applicants' contentions are that the Court's award of costs to the Respondent contravenes Rule 62 (2) (a) and Rule 62 (3) of the Court's Rules, and that, moreover, the Respondent's pleadings did not pray for costs, while the Applicants did pray for costs in their defence. With respect, these contentions are misconceived.

[13] First, rule 63, which forbids the award of costs to COMESA in certain cases, provides that:

"...in proceedings between the Common Market and its employees, the Common Market shall bear its own costs."

[14] Secondly, Rule 62 (4), which permits the Court to award costs even against a successful party, provides that:

"The Court may order a party, even if successful, to pay costs which the Court considers that party to have unreasonably or vexatiously caused the opposite party to incur." [emphasis added]

[15] It is true the Applicants, who were the Respondents in the contested Judgment, were successful in respect of certain prayers. Nonetheless, this court categorically stated in its judgment that though the Applicants had succeeded on subsidiary points, the Respondent, who was the Applicant in that judgment, had succeeded on his principal prayer. More importantly, however, this Court was of the considered view that the Applicants' handling of the Respondent's entire performance review process was replete with irregularities of one kind or another. This was expressly stated in the Court's Judgment in the following unambiguous terms;

"On the whole, having taken into account the catalogue of seemingly contrived irregularities cited by counsel for the applicant, and having duly considered the submissions of counsel for the Respondents on the validity of the Staff Appraisal Performance Report, we find that the Report .... is fundamentally flawed." [emphasis added]

[16] This led this Court to award costs to the Respondent in terms of Rule 62 (4). That Rule does not require the injured party's pleadings to specifically pray for costs. And even if it did, such a requirement would not affect the Court's inherent power under rule 2 (2), which provides that:

"Nothing in these Rules shall limit or otherwise affect the inherent power of the Court to make such orders as may be necessary to meet the ends of justice or to prevent abuse of the process of the Court."

(ii) Extension of Probation – Letter of 29th May, 2001

[17] This contention, which is admitted by the Respondent, is indeed an error on the face of the record. True, the reference in the Judgment to the letter of 29th May, 2001 was an error,

as that particular letter refers to an extension of the Respondent's special leave, and not his probation. Nonetheless, there is indeed a letter in the pleadings dated 26th October, 1999, which fully addresses the issue of the extension of the Respondent's probationary period, and which was the letter that the Court took into account. For this reason, this Court hereby decides that the reference, in the Judgment, to the letter of 29th May, 2001 written by the Acting Secretary – General, shall be a reference to the letter of 26th October, 1999 written by the Secretary General. However, the court's analysis, findings and conclusions on this issue, namely, that the Applicants breached rules 27 (2) and 27 (4) of the Staff Rules and Regulations of COMESA, are not affected at all by the wrong reference to the letter of 29th May, 2001.

(iii) Non-compliance with Rule 56(h)

[18] The Applicants' contention is that the Court's Judgment does not contain a summary of the facts of the case. This is an idle claim. The Judgment gives a brief but succinct summary of the facts as follows:

"The facts of the matter are that the Applicant was duly appointed Director of Administration and Finance of COMESA by a Letter of Appointment of 27th June 1998. His Letter of Appointment stipulated, inter alia, that the effective date of his initial contract was 27th June 1998 for a period of three years. Under the direction of the Secretary-General of COMESA, his functions were to carry out certain specified duties relating to human resources, finance, conferences, and purchasing and administration. The applicant's job description clearly spelt out that he was directly answerable to the Secretary-General. Since these proceedings hinge on whether or not the applicant's Report was mishandled, it is pertinent to outline the principles which govern the preparation of a staff Appraisal Report. These PRINCIPLES are...."

[19] Moreover, the rest of the Judgment reverts from time to time to an explanation of the facts wherever the context so required.

(iv) Non compliance with Rule 56(i)

[20] The applicants' advocate's contention that the Judgment does not contain the grounds for the decision is simply mischievous. The contested Judgment contains adequate grounds for the decision on the issues raised in the Reference.

[21] This Court has considered the present Application and the written observations submitted on behalf of both Parties, in closed session as it must do under Rule 90 of the Court's Rules. For all the reasons given above, this Court finds that the Application is inadmissible, except for the wrong reference to the letter of 29th May, 2001, which is hereby rectified as specified above. Given the circumstances of this application, each Party shall bear its own costs.

[22] It is so ordered.

[23] Dated and delivered this 16th day of October, 2002.

A.M. Akiwumi
Lord President

J.B. Kalaile
Lord Justice

E. L. Sakala
Lord Justice

J. M. Ogoola
Lord Justice

J. Mutsinzi
Lord Justice