IN THE COURT OF APPEAL OF TANZANIA

AT DAR ES SALAAM

(CORAM: NYALALI, C.J., MAKANE, J.A. And OMAR, J.A.)

CIVIL APPLICATION NO. 26 OF 1989

FELIX BWOGI t/a EXIMPO PROMOTION & SERVICES ..... APPLICANT

And

REGISTRAR OF BUILDINGS ..... RESPONDENT

(Application for an order that the judgment of the Court Civil Appeal No. 19 of 1988 be corrected from the judgement/Court of Appeal of Tanzania at Dar os Salaam)

in

Civil Appeal No. 19 of 1989

ORDER OF THE COURT

NYALALI, C.J.:

This is a very unusual application made by one FELIX BWOGI t/a EXIMPO PROMOTION & SERVICES for orders stated in the Notice of Motion as follows:

"(a) The Judgement of the Court in Civil Appeal No. 19 of 1988 be corrected by erasing the portion being page 6, line 24, the use of Evidence Exhibit "D" a letter from the Regional Finance Officer as the said letter of defence of first defendant in the High Court dated 15/10/1982 on page 22-34 of the memorandum of appeal and therefore not forming part of the proceedings. Amended statement of defence of the defendant dated 24/5/83 page 43-59 was introduced.

(b) Judgement against applicant be set aside."

What the applicant is really seeking is a rectification of the judgement on the ground that the judgement contains an error induced by an accidental slip which misled the Court in deciding against the applicant.

The facts of civil appeal case No. 19 of 1988 are stated in the judgement in question. There were two main issues on the merits of the case. The issue which is relevant to the present application is whether the appellant in that case, that is, The Registrar of Buildings, which was the Landlord of the applicant, had wrongly terminated a tenancy in respect of commercial premises situated at plot No.582/9 along Samora Avenue/Independence Avenue in the City of Dar es Salaam. This Court held that the appellant (who is the current respondent in this application) was entitled to terminate the tenancy agreement. The Court stated:

..../2

"Undoubtedly there was uncontroverted evidence adduced at the trial as Exhibit D attached to the written statement of defence of the first defendant, that is, a letter Ref. No. RFO/CR/BJ/GEN/Vol.II/135 dated 26th February 1980 addressed "TO WHOM IT MAY CONCERN" by the Regional Finance Officer, Dar es Salam and Coast Region. The letter reads:

'M/S EXIMFO

The above martial business is ordered to stop operation with effect from 26th November 1979 because they were found in operation while their business licence had already expired on 31st March 1979 and it had not been reviewed. They will go into business again after they had obtained a valid licence to cover the period from May 1979 to 30th April 1980 and after their offence for carrying on business illegally had been compounded under the Finance Act 1972.'

We are of the view that since the tenancy agreement between the parties was for the purpose of carrying on business in the premises in question, that agreement contained an implied term to the effect that the respondent was to carry on that business lawfully. By failing to renew his trade licence and illegally carrying on business as stated in the contents of Exhibit D, the respondent was in breach of the tenancy agreement. We are satisfied that the appellant was entitled to terminate the tenancy to stop the respondent using the premises illegally."

From the record of Civil Appeal No. 19 of 1988 filed in this court by the appellant in that case, that is, the Registrar of Buildings, it is apparent that when the case was on trial in the High Court, the co-defendant of the Registrar of Buildings, that is, one Kenneth Cunningham, the first defendant, filed two written statements of defence, the first one was on 15th October 1982 and the second one on 26th May 1983. Exhibit "D" which was relied upon by this court in resolving the issue of wrongful termination of the tenancy agreement was annexed to the first written statement of Defence as part of paragraph six thereof.

It is the applicant's contention, which is not disputed by the respondent, that the first written statement of defence was abandoned and replaced with the second written statement of defence, and that this court therefore erred in relying on a non-existent Exhibit D. The applicant, who is represented by Mr. Maira, learned advocate, further submitted that this court has jurisdiction under section 4(2) of the Appellate Jurisdiction Act, 1979 and Rule 40 of the Rules of the Court to correct this error by erasing all that portion of its judgement concerning exhibit D. The respondent, who is represented by Mr. Lukwaro, learned counsel of the Tanzania Legal Corportion, contends on the other hand, that the court has no jurisdiction either under section 4(2) of the Appellate Jurisdiction Act, 1979 or under Rule 40 of the Rules of this Court.

The central issue of this application therefore is whether this court has jurisdiction to erase or strike out the relevant portion of its judgement against the applicant, and consequently enter judgement for the applicant.

Unfortunately neither side was helpful in citing authority to support its position. The only authority cited by Mr. Lukwaro for the respondent is MULLA's textbook on the Code of Civil Procedure, 12th and 14th Editions concerning the learned author's commentaries on the provisions of section 132 of the Indian Civil Procedure Code, 1908. This lack of assistance from the parties involved us in doing our own legal research in addition to our normal daily work of hearing and [illegible] other cases. We were almost certain, that the issue raised in this application, though undoubtedly a new one in our jurisdiction, must have been raised and dealt with in other jurisdictions within the Common Law legal system. Our task has been rewarded, though at the expense of delaying our decision, which we reserved on the 23rd February 1990. We have done this research not for academic reasons, but on the firm conviction that the experience of people in other countries or jurisdiction can, properly used, enrich the lives and activities of the people in our jurisdiction, on the basis of our common humanity and heritage.

Let us now turn first to the provisions of section 4(2) of the Appellate Jurisdiction Act, 1979, which state as follows:

> "For all purposes of and incidental to the hearing and determination of an appeal in the exercise of the jurisdiction conferred upon it by this Act, the Court of Appeal shall, in addition to any other power, authority and jurisdiction conferred by this Act, have the power, authority and jurisdiction vested in the Court from which the appeal is brought".

Obviously, what the court is being asked to do in this application does not fall within the ambit of section 4(2) which relates only to the "power, authority and jurisdiction vested in the court from which the appeal is brought". It is beyond doubt that the court below, that is, the High Court in this matter, is not vested with the power, authority and jurisdiction to erase or strike out the portion of the judgement of this court which is the subject of the applicant's complaint. Section 4(2) could conceivably have been invoked if the application concerned a portion in a judgement of the High Court from which the appeal was brought to us.

Now we turn to Rule 40 which deals with 'correction of errors'. It states:

"40(1) A clerical or arithmetical mistake in any judgement of the Court or any error arising in it from an accidental slip or omission may at any time, whether before or after the judgement has been embodied in an order, be corrected by the court either of its own motion or on the application of any interested person so as to give effect to what the intention of the court was when judgement was given.

(2) An order of the court may at any time be corrected by the court, either of its own motion or on the application of any interested person if it does not correspond with the judgement it purports to embody or, where the judgement has been corrected under sub-rule (1), with the judgement as corrected."

It is the applicant's contention that the reference to and reliance upon exhibit D was an accidental slip or omission within the scope of sub-rule (1) of Rule 40. On the other hand, the respondent's contention is that, that reference and the reliance by the court was not accidental, since the court clearly intended to use and rely upon the exhibit in its judgement, and that such error, if at all, was an error of judgement, and therefore beyond the scope of rule 40.

The question which we have to ask ourselves at this stage is whether this court in giving the judgement in question accidentally referred to and relied upon exhibit D. To be able to answer this question, we have to be clear in our minds as to what is meant by an accidental slip or omission of the court.

In our considered opinion, an accidental slip or omission of the court, as distinct from a clerical or mathematical mistake may be any of the following:

First, a fortuitous slip or omission such as occurs in a criminal trial when entering a plea of not guilty the word 'Not' is not recorded by a slip of the pen, inspite of the trial judge's firm intention to make or cause to be made a full and correct recording of the plea. In many ways such an error is similar to a clerical mistake, except that the latter usually occurs in the registry or office of the court as envisaged by Lord Penzance in the case of LAWRIE v. LEES (1881) 7 App.C.35. An accidental slip or omission of the Court however occurs in the course of proceedings in court. As our present case does not involve a slip of the pen, we need say no more except that on the available authorities, including the case of Re Swire (1885) 30 Ch. D. 239, this first category of errors, when it occurs, is rectifiable under the inherent jurisdiction of the court without invoking the appellate jurisdiction. It may also be rectified under an express legal provision.

The Court of Appeal held to the effect that since the rectification sought did not alter the nature or substance of the judgement, there was inherent jurisdiction to rectify the judgement.

In Thyne's case, a court dissolved the marriage of a couple who, undisclosed to the court, had gone through two ceremonies of marriage, the second and invalid one being the subject of the court proceedings. On a summons to rectify the record of the court so that the first ceremony of marriage could be cited in the proceedings, it was held, by a majority on appeal by the Court of Appeal, that there was jurisdiction to rectify as requested both under the inherent jurisdiction of the court and under Order 70, rule 1 of the Rules of the Supreme Court.

These four cases, especially PERRIMAN's case and Thyne's case, are persuasive authority for the proposition that there is inherent power in a court to correct an error induced by misrepresentation where such action does not alter the operative or substantive part of the court's decision and that the exercise of such power is discretionary and will not be used where it would result in injustice. In situations where the action would result in an alteration of the operative or substantive part of the court's decision, the only remedy lies in the appellate process.

Now, although the case before us does not involve an error occassioned by misrepresentation, we think that these authorities need to be mentioned to complete the picture of accidental slips or omissions.

The forth and last category may be described as accidental slips or omissions occassioned by false assumption of existence of a fact crucial to the case. The celebrated case in this category is obviously the case of LAZARD BROTHERS AND COMPANY v. MIDLAND BANK Ltd. (1933) A.C. 289. In that case, judgement was entered in England against a Russian Bank in default of appearance. It later transpired that the Russian Bank had been nationalized and ceased to exist at the time the legal action was instituted in the English High Court. On subsequent proceedings in the High Court on a garnishee order, the High Court, Roche J. held, inter alia, that the judgement of the High Court was a nullity on the ground that the judgement debtor was non-existent. That decision was reversed by the Court of Appeal on appeal. However, on further appeal to the House of Lords, the decision of the High Court was restored. Lord Wright, in delivering the unanimous decision of the Court stated, inter alia, on page 296,

.../7

> "..... it is clear law, scarcely needing an express authority, that a judgement must be set aside and declared a nullity by the court in the exercise of its inherent jurisdiction if and as soon as it appears to the court that the person named as the judgement debtor was at all material times at the date of writ and subsequently non-existent ....."

The case before us is essentially similar to the Midland Bank's case in that we the existence of a crucial fact, that is, the written statement of defence which in fact had ceased to exist. We are of the considered opinion that the law in this country is similar to English law on this point. It follows that under the inherent jurisdiction of the court we have to declare our earlier judgement vitiated to the extent that it relied upon exhibit D. The portion of the judgement which is thus vitiated begins with the issue whether the appellant wrongfully terminated the tenancy in June 1980. Our finding on this issue based on exhibit D was in the negative. We must now substitute an affirmative finding, that is that the appellant wrongfully terminated the tenancy of the respondent in June 1980.

The question that follows concerns the relief or reliefs to which the applicant is entitled in respect of the wrongful termination of the tenancy.

The High Court granted the following reliefs against the present respondent, who was the second defendant in the suit, and the landowner of the suit premises.

> "(a) He (Plaintiff) is duly declared to be the legal tenant in the suit premises and the first defendant is to vacate the premises immediately.
>
> (b) The second defendant shall pay him compensation at the rate of shs. 3,000/= per day from 19/6/80 to 7/8/84 and interest thereon shall run at 7% p.a. up to the date of satisfaction.
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> (c) The Plaintiff will have his costs of the suit. It is fair that separate costs be allowed to the defendants. The first defendant shall pay $\frac{2}{3}$ of the costs and the second defendant $\frac{1}{3}$."

The question of compensation has been dealt with by us in the portion of our judgement which has not been vitiated. We held therein that "the High Court had no power to award compensation for a sum greater than that claimed by the respondent in the plaint". The applicant/plaintiff had claimed compensation at the rate of shs. 1,500/= but the High Court awarded it at the rate of 3,000/=. For the avoidance of doubts we reiterate that the applicant/plaintiff is entitled to payment of compensation only at the rate shs. 1,500/= per day from 19/6/80 to 7/8/84, plus the interest decided by the High Court.

No appeal was brought against the Order for costs. So we need not disturb that order. However the order declaring the applicant/plaintiff to be the legal tenant was challenged in the appeal. We must therefore consider whether the High Court was correct in making the order. It is trite law that declaratory orders ar discretionary. However, since on the facts established by the trial High Court, the tenancy was terminated by the Second Defendant (the respondent in the present application) and the premises were subsequently allocated to the First Defendant who was still in occupation of the suit premises at the time of the suit, and since we have found that the termination was wrongful, we are satisfied that as between the parties to the suit, the High Court was correct in declaring the plaintiff/applicant to be the legal tenant and ordering the eviction of the First Defendant, that is, the said Kenneth Cunningham.

If as a consequence of the decision of the High Court, the plaintiff/applicant entered into occupation of the suit premises and is still in occupation, his tenancy is to be treated as valid until otherwise terminated according to law. In case the plaintiff/applicant entered into occupation but has subsequently vacated as a consequence of the earlier judgement of this court, or in case he did not enter, he may now re-enter into occupation as a tenant of the suit premises, unless the landlord - that is the Second Defendant, has allocated the premises to a new tenant consequent upon our earlier judgement. In such a case where such bona fide new tenant is in occupation, we are of the considered opinion that it would be just and proper for the plaintiff/applicant to be paid compensation by the landlord in lieu of tenancy at the rate of shs. 1,500/= per day from 1980 to the date of this decision, excluding any period that the plaintiff/applicant may have been in occupation of the suit premises in consequence of the judgement of the High Court. To that extent and with the modification of the quantum of compensation, the appeal is allowed with costs to be taxed.

We order accordingly.

DATED at DAR ES SALAAM this 25th day of July, 1990.

F. L. Nyalali
CHIEF JUSTICE

L. M. Makame
JUSTICE OF APPEAL

A. M. A. Omar
JUSTICE OF APPEAL

I certify that this is a true copy of the original

(J. H. Msoffo)
SENIOR DEPUTY REGISTRAR