IN THE COURT OF APPEAL OF TANZANIA

AT DAR ES SALAAM

CORAM: MUSTAFA, J.A.; MAKAME, J.A. And KISANGA, J.A.

CIVIL APPEAL NO. 31 OF 1984

BETWEEN

1. THE NATIONAL INSURANCE CORPORATION
2. M.B.S. FUBILE . . . APPELLANTS

AND

SEKULU CONSTRUCTION COMPANY. . . RESPONDENT

(Appeal from the decision of the High Court of Tanzania at Dar es Salaam (Mtenga, J.) dated the 16th day of June, 1983

in

Civil Case No. 140 of 1978

JUDGMENT OF THE COURT

MUSTAFA, J.A.:

The action in the High Court commenced with a simple claim. Sekulu Construction Co. Ltd. (the respondent herein) filed a plaint against one Fubile and the National Insurance Corporation (the appellants herein) claiming that the appellants had unlawfully converted to their own use a concrete mixer and a vibrator machine, the property of the respondent, and claimed general and special damages for such wrong. The respondent prayed for (1) general damages (ii) special damages amounting to shs. 260,820/- (iii) costs of the suit (iv) interest at 9% from date of suit to date of payment (v) a declaration that the respondent is the owner of the said machines. The appellants in their written statement of defence denied unlawful conversion of the said machines and asserted that they had the right to use them in terms of a contract made between the first appellant and the respondent. The first appellant filed a counterclaim with the statement of defence, and in the counterclaim alleged delay and defective work by the respondent in the construction of a building in terms of a building contract made between the respondent and the first appellant and claiming from the respondent as a consequence of such breach of contract a sum of shs. 722,070.30.

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The respondent replied to the statement of defence denying the appellant's right to use the machines, together with a defence to the counterclaim denying negligence or delay on its part and alleged that it worked properly and with due diligence. The respondent also called in aid an arbitration clause contained in the building contract and demanded that the dispute be referred to arbitration.

Then followed, in the same document, a most unusual claim - headed "counterclaim to second defendant's (i.e. first appellant) counterclaim".

The respondent in this so called counterclaim to a counterclaim alleged that the first appellant had wilfully and unlawfully breached the building contract and claimed from the appellants (a) a sum exceeding shs. 898,000/= for general damages

(b) Costs of this suit

(c) interest on above at 12% from date of counterclaim until final payment.

Apparently at that stage the pleadings ended.

It will be noticed at once that there is no such thing as a counterclaim to a counterclaim. Such a creature is unknown to our civil proceedings and pleadings. We refer to the provisions of Order 8 in the Civil Procedure Code which deal with written statements, set offs and counterclaims.

As English common law developed, in civil pleadings, briefly speaking, an action begins with a statement of claim, or what we call a plaint, then a written defence is filed, to which a reply is made. In the written defence, a counterclaim can be included, which can be rebutted in the defence filed with the reply. Thereafter, until the court gives permission, no other pleading can be filed. Further pleadings may include a rejoinder and then the old ones of surrejoinder, rebutter and surrebutter, the last three being now perhaps out of use.

In any event there can only be one counterclaim, which in fact is a cross suit, in an action filed. There cannot be two.

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In the circumstances the suit in the High Court which resulted in the appeal before us, became very confused, both in its proceedings and in its final decision.

To us it is clear that the original claim was confined to a claim for damages for wrongful use of the respondent's two pieces of machinery by the appellants. The appellants denied any wrongful use, and counterclaimed for damages for delay and negligent work arising from a building contract. All the respondent could do was to file a defence to the counterclaim denying such allegations; which in fact the respondent did.

If at that stage the respondent had wanted to sue the appellants for damages for alleged breach of the building contract, the respondent should have applied for leave to amend its plaint and expand it to include such allegations and claims. Or the respondent could perhaps also have filed an action on the building contract alleging breach by the appellants, and consolidate the two suits, assuming the matters in dispute centred on the building contract. But the respondent could not have proceeded in the way he did, by filing a counterclaim to a counterclaim. He was in fact filing two distinct suits based on two separate causes of action, in the first one the respondent was merely suing for damages for wrongful use of his two pieces of machines, and in the second the respondent was suing for damages for breach of a building contract.

We will examine briefly what happened after the pleadings were closed. Three agreed issues were framed

1. Did the 1st defendant convert the concrete mixer and vibrator of the plaintiff in persue (sic) of the contract?

2. Did any party suffer any damages after the termination of the contract

3. Depending on answer to issue No. 2 - which party was at fault?

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In the course of the trial, and in view of the issues framed, it seems that in a claim for damages for wrongful use of 2 pieces of machinery, a claim for breach of a building contract was adjudicated upon, by a side wind, as it were. There were averments and counter-averments of who was in breach, whether the appellants were right in determining the contract owing to delay and bad workmanship on the part of the respondent and so on and so forth. The trial judge was obviously confused from the way the trial went, perhaps in view of the state of the pleadings.

In the course of his judgment, the judge stated inter alia:

> "After the termination of the contract, the technical officer (D.W.1) requested the plaintiff to present to the second defendants their claims and the plaintiffs duly complied with this advice and they demanded to be paid Shs. 903,860/- excluding the charges of hiring machinery such as vibrator and concrete mixer the subject matters of this suit....."
> (underlining supplied)

Even at the stage of writing the judgment the judge was of the view that the subject matter of the suit was the alleged wrongful use of the 2 pieces of machinery. Obviously, if that were so, the evidence adduced concerning the alleged breaches of the building contract were really not relevant. At another stage in the judgment the judge stated

> "The seizure of the machines and the building materials, was, therefore, wrongful and the defendants are liable to pay for damages as prayed and it is so ordered",

And finally towards the end of his judgment, the judge stated

> "The second defendant, therefore, cannot be heard counterclaiming that he spent a lot of money well over Shs. 1 million to complete the building..... Accordingly the counterclaim lodged by the defendants is hereby dismissed with costs.
>
> Because of the aforesaid, I enter judgment for the plaintiffs as prayed plus costs and interest".

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In the evidence adduced at the trial, a number of issues were canvassed, issues not mentioned in the pleadings nor specifically referred to in the agreed issues framed. For instance such issues included whether the agreed period for completion of the building as contained in the building contract was extended by certain acts of the first appellant and what such extended period should be. It appeared that the issue of extension became one of the main bones of contention between the parties, as it allegedly affected the validity or otherwise of the termination of the contract by the appellants.

In any event the judge in his judgment merely dismissed the counterclaim of the appellants with costs and entered judgment for the respondent as prayed with costs. He did not in fact finally decide on the other matters in controversy relating to the building contract although he made certain observations in connection with some of them.

The decree as drawn up was consistent with and reflected the judgment and order of the judge. The decree reads:

"DAR ES SALAAM

CIVIL CASE NO. 140 OF 1978

SEKULU CONSTRUCTION CO. (T) LTD. . . . PLAINTIFF

Versus

1. M. S. FUBILE
2. NATIONAL INSURANCE CORPORATION } . . DEFENDANTS

D E C R E E

The plaintiff prays judgment and decree against the defendants jointly and severally for:

(i) General damages;

(ii) Special damages amounting to shs. 260,820/=;

(iii) Costs of this suit;

(iv) Interest on (1), (ii), (iii) above at 9% p.a. from the date of filing this suit until final payment and delivery.

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(v) A declaration that the plaintiff is the owner of the said machines.

(vi) Any other relief that this court might deem fit to grant.

This case coming on this day for final disposal before HON. MTENGA, Judge in court in the presence of MCHORA Esq., Advocate for the plaintiff and MUSATI Esq., Advocate for the defendants.

IT IS HEREBY ORDERED AND DECREE THAT:

There is no evidence to the effect that this new contractor spent any money in buying additional building materials. The second defendant therefore can not be heard counter claiming that he spent a lot of money well over shs. 1,000,000/= to complete the building by paying to this second contractor. Accordingly the counter claim lodged by the defendants is hereby dismissed with costs.

Because of the aforesaid judgment is entered for the plaintiff as prayed plus costs and interest.

"BY THE COURT"

Given under my hand and the seal of the Court this 16th day of June, 1983.

REGISTRAR".

It will thus be seen that the decree in favour of the respondent was only for shs. 260,820/= special damages, plus interest and costs, and a declaration that the respondent is the owner of the said pieces of machinery, in terms of the prayer as contained in the plaint filed by the respondent. The appellant's counterclaim was dismissed with costs. There was no sum given for general damages awarded, and the inclusion of the item, general damages, was mere surplusage.

However in the application for execution of the decree dated 5.7.82 (the decree was extracted on 16.6.83) the sum shown as owing for principal was Shs. 3,353,983.00. Interest was charged at 10% p.a. from 12.5.77 to 16.6.83 and amounted to Shs. 335,398.30 making a total sum of Shs. 3,689,381.30.

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There was another sum of 2,041,426.10 for interest at 9% from 12.5.77 to 16.6.83. Costs were taxed at 91,037.50, making a total decretal sum of 5,821,844.90.

The application for execution was drawn up and signed by Mr. Mchora, Advocate for the respondent.

It is crystal clear that the figures shown in the application for execution of the decree have not the slightest connection with the decree as drawn and with the judgment given. Mr. Mchora before us was unable to explain how the figures were arrived at. It is astonishing why there were two sets of interest charged, nor why interest was at 10% on one such amount. The sums set down would seem to have been the figments of somebody's imagination. To make matters worse Mr. Mchora stated from the Bar before us that both the Registrar of the High Court and the trial judge had seen and approved the figures in his application for execution. If that were true, we can only say that we find the whole exercise inconceivable and beyond our comprehension. We thus have a strange state of affairs as revealed in the appeal. The pleadings were in a form unknown to our civil proceedings, and were confused and confusing. At the trial a number of issues were canvassed and evidence was given on them. Some such issues were related to matters vaguely raised in the so-called "counterclaim to a counterclaim". The trial judge in the course of his judgment made remarks and observations on some of these matters raised in the "counterclaim to the counterclaim", but made no final decisions on them. The judge restricted his final finding to the prayer as contained in the plaint and to the counterclaim by the appellant. It seems to us that the judge in effect, in his judgment and decree, only finally dealt with the pleadings as contained in the plaint, the written statement of defence, the counterclaim and the reply thereto. But the judge did deal copiously with other issues outside those contained in the pleadings ending with the reply in the body of his judgment. In fact the judgment and decree, in a manner of speaking, was at variance with the evidence led and the case as conducted at the

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trial, as the trial judge did not make any finding on issues on which he had adjudicated. That is one unsatisfactory feature.

Then there is the variance between the decree as drawn and the figures contained in the application for execution of the decree. We understand that a garnishee order for the decretal sum as reflected in the application for execution was obtained.

We had considered whether we could salvage this matter by dealing in this appeal only with the effective part of the proceedings, i.e. the judgment and decree as drawn and the evidence which concerned the matters contained in the pleadings ending with the respondents reply and defence to the appellant's counterclaim. Such a step would necessitate the reconciliation of the decretal sum in the execution application with that as reflected in the decree. Such a reconciliation seems impossible. And in any event, such a course may prejudice one or both the parties in respect of the other substantial matters in controversy in connection with the building contract, matters which the trial judge had heard evidence on and adjudicated upon, but on some of which he had made no final decision.

We find ourselves in a quandary in this extraordinary and strange situation. We have decided that the only course open to us is to declare the whole trial null and void because of the fundamental divergence between the improper form of pleadings and the evidence adduced at the trial, and that between what was tried and what was finally decreed, and between the sum decreed as due and the sum allowed in execution proceedings.

In the circumstances we allow the appeal, with no order as to costs. We quash and set aside the judgment and decree of the High Court, and declare the trial a nullity. We also declare, should the parties hereto desire to proceed to law in respect of

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the matters in controversy between them, that the period between 11th October, 1978, the date of the filing of the plaint to the date of this judgment be excluded for purposes of calculation of the period of limitation of actions.

DATED at DAR ES SALAAM this 29th day of March, 1986.

A. MUSTAFA
JUSTICE OF APPEAL

L. M. MAKAME
JUSTICE OF APPEAL

R. H. KISANGA
JUSTICE OF APPEAL

I certify that this is a true copy of the original.

(L. A. A. KYANDO)
REGISTRAR
COURT OF APPEAL OF TANZANIA.