IN THE COURT OF APPEAL OF TANZANIA

AT DODOMA

(CORAM: RAMADHANI, J.A., LUBUVA, J.A., And LUGAKINGIRA, J.A.)

CIVIL APPEAL NO. 43 OF 2001

B E T W E E N

JAMES KABALO MAPALALA. . . . . APPELLANT

A N D

BRITISH BROADCASTING
CORPORATION. . . . . RESPONDENT

(Appeal from the Judgment and Decree of the High Court of Tanzania at Dodoma)

(Kileo, J.)

dated the 13th day of December, 2000

in

Civil Case No. 33 of 1994

R U L I N G

LUBUVA, J.A.:

By consent of counsel for both parties, Civil Appeal No. 49 of 2001 and No. 43 of 2001 were consolidated. For ease of reference, throughout this ruling, James Kabalo Mapalala and the British Broadcasting Corporation shall be referred to as the appelland and the respondent respectively.

At the commencement of hearing of this appeal, the Court invited counsel for both parties to make submissions on the legality of the proceedings before the Court. The reason will be apparent from a brief outline of the background giving rise to the matter. In High Court Civil Case No. 33 of 1994, the appellant on 13.4.1995, obtained an ex-parte judgment and decree against the respondent for the sum of Sterling Pounds 800,000 the equivalent of Tanzania

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Shillings 688,000,000/=. The appellant proceeded to execute the decree in England where it turned out that according to the applicable laws on the execution of foreign judgments, the decree could not be executed. According to the law in England the decree could not be executed because the judgment debtor, the respondent, was neither carrying business nor was it ordinarily resident within the jurisdiction of the trial court in Tanzania, and did not voluntarily appear or submit or agree to submit to the jurisdiction of the court.

The appellant took the matter back to the High Court at Dodoma praying for the court to review its judgment. The application was lodged under Order XLII Rules 1 and 3 and section 95 of the Civil Procedure Code, 1966. From the Chamber Summons and the accompanying memorandum of review, the following prayers were sought: The ex-parte judgment and proceedings of 13.4.1995, to be quashed and the amendment of the plaint so as to join Mariam Shamte, the alleged correspondent of the respondent in Tanzania as a co-defendant. On 5.2.1998, the presiding judge (Msoffe, J.) granted the application for review as prayed, and quashed the ex-parte judgment and proceedings. On the basis of the amended plaint, fresh hearing of the case commenced against Mariam Shamte as first defendant and the present respondent as the second defendant. Judgment and decree was given in favour of the appellant for the sum of 30 million Tanzania Shillings as damages for defamation. This is the decision which has given rise to the consolidated appeals in this Court.

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The issue raised by the Court was whether the learned judge had lawful power to quash his own judgment and proceedings of 13.4.1995 and start hearing the case afresh. In response, Mr. Maira, learned counsel for the appellant, conceded that legally, there was nothing wrong with the judgment and decree of 13.4.1995. However, he strongly maintained that it was necessary to review the judgment on account of the following: That according to the applicable law in England, the decree in favour of the appellant could not be executed against the respondent in England. For this reason, the appellant was in a dilemma of having an unexecutable decree. In order to make the decree executable, the appellant sought remedy from the court which was still vested with jurisdiction to deal with the matter. Prompted by the court whether it was proper for the judge to order the amendment of the plaint long after delivery of the judgment, Mr. Maira argued that hearing of the case and execution is part of the proceedings. In the circumstances of this case, Mr. Maira concluded his submission, the learned judge was justified in reviewing his previous judgment so that the appellant could execute the decree and enjoy the fruits of the judgment and decree in his favour.

Dr. Kapinga, learned counsel, assisted by Miss Karume represented the respondent in this Court. He submitted that Order XLII Rule 1 of the Civil Procedure Code sets out the circumstances in which the High Court is empowered to review its own judgment. First, it is necessary to show that there is a party which is aggrieved by the decision. Second, that there is a discovery of a new and important matter or evidence which, after due diligence,

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was not within the knowledge of the party at the time the judgment and decree was passed. Third, that there was an error apparent on the face of the record or any other sufficient reason.

We agree with Dr. Kapinga that in this case there was no aggrieved party. Under the provisions of Rule 1, Order XLII the appellant who sought review in the High Court was not an aggrieved party. He obtained judgment and decree in his favour according to the prayers sought in the plaint. In that situation, it is clear to us that in the application before the learned judge the essential element requiring an aggrieved party was not satisfied. That is, there was no aggrieved party. As submitted by Dr. Kapinga it was therefore not a fit case to justify review of the judgment of 13.4.1995. With respect, we think that had the learned judge considered this aspect, he would not have entertained the application for review.

With regard to new and important matter which it was claimed had been discovered after the judgment and decree, Mr. Maira kept on repeating that the decree could not be executed in England. This, in our view is untenable. It is common knowledge that a court of law grants remedies to the parties according to the prayers sought in the plaint. For this reason, there is no legal basis for a successful party who obtains remedies in terms of the prayers in the plaint to turn back to the court for review on the ground that the decree cannot be executed. To allow such a party to start the case all over after encountering difficulties at the stage of execution process, is in our view, not only an abuse of the court

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process, but it would also lead to endless litigation after the case has been finally determined. In the circumstances, we are unable to accept Mr. Maira's claim that the appellant's failure to execute the decree in England was a new and important matter discovered after the judgment. Thus, the application for review also lacked this other important element.

Next, Mr. Maira made submission on the issue whether it was proper for the learned judge to order the amendment of the plaint long after the matter had reached the stage of execution. According to him, it was proper for the judge to do so because the law under Order VI Rule 17 of the Civil Procedure Code allows the amendment of pleadings at any stage of the proceedings. In this case he further stated, the amendment of the pleadings at the stage of execution process was justified because Mariam Shamte, a necessary party in the proceedings had not been joined. Above all, Mr. Maira stressed, the amendment did not prejudice the respondent.

Countering these submissions, Dr. Kapinga maintained that the learned judge had no power to order the amendment of the plaint at that stage because first, the application for the amendment was made after delivery of the judgment in which case the provisions of Order VI Rule 17 of the Civil Procedure Code did not apply. Second, as the case had come to a close, the amendment of the plaint at that stage amounted to a fresh start of a different case. Third, the judge in granting the application quashing the judgment of 13.4.1995, in effect sat on appeal in his own judgment. In support of this submission, he referred to the case of

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General Manager, E.A.R. & H.A. v. Tuierstein [1968] E.A. 354 and Lotf v. Czarnilov Ltd. [1952] 2 All E.R. 823.

We think there is merit in Dr. Kapinga's submission. While it is not disputed that Order VI Rule 17 of the Civil Procedure Code allows a party to amend pleadings at any stage of the proceedings, the expression "at any stage of the proceedings" should not be extended to cover the time after delivery of judgment. Such a wide interpretation, in our view, would lead to an absurdity. In its plain and natural interpretation, the wording of Rule 17 clearly shows that the law does not provide for the amendment of the pleadings after delivery of the judgment. The rule provides that all such amendments shall be made as may be necessary for the purpose of determining the real questions in controversy between the parties. If the purpose of allowing the amendment to the pleadings is for the determination of the issues in controversy between the parties, it goes without saying that the provision does not apply at the stage after the delivery of the judgment. At that stage, the issues in controversy are already resolved in the judgment. It would therefore serve no useful purpose to amend the pleadings at that stage of the proceedings. So, it is our view that the legal position in our country is that amendment to the pleadings is not allowed after delivery of judgment. In this view, we are reinforced by case law as well. In the English case of Loutf v. Czarnikow, Ltd. (supra) the court was reluctant to allow the amendment to the pleadings after the close of the defendant's case. However, because the case was still at the hearing stage and judgment had not been pronounced, the amendment was allowed. Inter

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alia the court stated that:

> Unless there is good ground and strong justification for so doing, the court should be reluctant to grant amendments of pleadings after the close of the case but before judgment...

In the light of this settled principle of law, we are firmly of the view that it was highly improper for the learned judge to order the amendment of the plaint after the judgment had long been pronounced. He could not lawfully do so.

Dr. Kapinga also raised the issue that the learned judge grossly erred in quashing his own judgment of 13.4.1995, when dealing with the application for review. He said that the learned judge's decision to quash his own previous judgment had serious legal implications. By granting the application for review in which one of the prayers was to have the judgment of 13.4.1995 quashed, it meant that the judge in effect, quashed and set aside his own judgment. In doing so, we think, the judge went beyond the purview and scope of the powers of review under Order XLII Rules 1, 2 and 4 of the Civil Procedure Code. Under the provisions of rule 4, in an application for review, the judge who passed the judgment, if satisfied that there is sufficient ground for a review, shall either grant or reject the application. It is hardly necessary to point out that in an application for review, the judge is not sitting as an appellate court. In that situation, if the judge is satisfied that the tests for review laid down under Order XLII Rule 1 are met, it is expected of him to grant the application by

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effecting the relevant and necessary rectification and corrections sought in the judgment which in warranting circumstances, may be varied as a result of the new and important matters discovered. Otherwise, the judgment is not quashed in a review application. On the other hand, if the judge is satisfied that there is no sufficient ground to justify a review, the application is rejected by dismissing it. In this case, by implication, what the learned judge did in this case, namely quashing his previous judgment and proceedings of 13.4.1995, meant in effect that he sat on appeal involving his own judgment. This, to say the least, is highly improper and irregular. Above all, when the judgment was pronounced on 13.4.1995, he became functus officio. The question when does a court become functus officio was addressed by the Court of Appeal for Eastern Africa in the case of Kamundi v. R. (1973) E.A. 540. The Court stated that:

> The court becomes functus officio when it disposes of a case by a verdict of guilty or by passing sentence or making some orders finally disposing of the case. (emphasis supplied).

In this case, it is clear that the judgment of 13.4.1995 in favour of the appellant finally disposed of the case. The learned judge was therefore functus officio. In the circumstances, we are satisfied that it was improper for him to deal with the matter in the manner he did on 5.2.1998, by quashing the judgment and proceedings of 13.4.1995.

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Finally, we wish to observe briefly on the provision of Order IX Rule 13 of the Civil Procedure Code relating to setting aside decrees and judgments ex-parte. Though the application for review before the learned judge arose from an ex-parte judgment, we do not think that the course of action taken by the judge can be attributed to confusion in the application of the provisions of Order XLII Rule 1 and Order IX Rule 13 of the Code. These provisions are distinctly different. Rule 13 (1) of Order IX provides that in a case where a decree is passed ex-parte against a defendant, he may apply to the court by which the decree was passed for an order to set aside the decree. If the court is satisfied that summons was not served on the defendant or that for sufficient cause the defendant was prevented from appearing in court when the case was called on for hearing, the court may set aside the decree or judgment. In this case, though the ex-parte judgment was passed against the defendant, it is the appellant and not the defendant who applied for review. In that situation, the circumstances in this case being different, we find no basis for confusing the powers of the court for setting aside ex-parte judgment with those pertaining to review of judgment and decree.

In the upshot, for the foregoing reasons, we are satisfied that the learned judge wrongly exercised jurisdiction in dealing with the purported application for review. In view of such glaring and serious irregularity and impropriety involved in the proceedings before the learned judge in the application for review, the decision of 5.2.1998, granting the application for review

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and any subsequent proceedings were a complete nullity. In the event, by invoking revisional powers of the Court, we make an order quashing all the proceedings from the application for extension of time to apply for review on 30.5.1997, to the judgment of the High Court (Kileo, J.) of 13.12.2000, the subject of this appeal. For the sake of clarity, the judgment of the High Court of 13.4.1995, for what it is worth, still remains valid.

DATED at DAR ES SALAAM this 11th day of November, 2002.

A.S.L.RAMADHANI
JUSTICE OF APPEAL

D.Z. LUBUVA
JUSTICE OF APPEAL

K.S.K.LUGAKINGIRA
JUSTICE OF APPEAL

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

(F.L.K. WAMBALI)
DEPUTY REGISTRAR