IN THE COURT OF APPEAL OF TANZANIA
AT MWANZA

(CORAM: LUBUVA, J.A., MROSO, J.A., And RUTAKANGWA, J.A.)

TBR CIVIL APPLICATION NO. 1 OF 2005

GEORGE HUMBA..... APPLICATION

VERSUS

JAMES M. KASUKA ..... RESPONDENT

(Application for correction of Clerical and Arithmetical Errors in the Ruling of the Court (Mnzavas, J.A. (as he then was) dated 13.12.1996 in Civil Appeal No. 26 of 1996 and in the Ruling of the Court (Makame, J.A.) dated 27.3.2002 in Tabora Civil Application No. 2 of 1997

RULING OF THE COURT

21 February & 16 March 2007

MROSO, J.A.:

In a suit filed in the High Court at Tabora by the applicant he was awarded TShs. 114,000/= against the respondent. That was a judgment of 3rd September, 1988. The respondent was not happy with that judgment and appealed to this Court in Civil Appeal No. 35 of 1990. The Court – Ramadhani, Mnzavas, JJA and Mapigano, Ag. JA – decided that the applicant should be paid compensation for a house which the respondent obtained under a void agreement. The

Court could not assess the quantum of the compensation because of escalating devaluation of the shilling. So, it directed the High Court to assess the value of the house and pay the applicant less measne profits to which the respondent would be entitled.

After the matter was remitted to the High Court it was ruled that the applicant would be entitled to TShs. 11,686,199.25 as compensation. But the respondent did not accept the assessment and again appealed to this Court. The Court – Mnzavas, Mfalila and Lubuva, JJJA – dismissed the appeal and said the High Court had assessed the sum of Tshs. 1,686,199.25 as compensation. That, obviously, was not correct. That amount was some 10,000,000/= less than the amount assessed by the High Court. This decision by the Court was handed down on 13th December, 1996.

Some nine and a half years after the Court of Appeal decision with the incorrect figure of the amount of compensation due the applicant, he woke up from a long "slumber" and realized that there was an error in the figure regarding the amount of compensation due to him. So, he filed an application by Notice of Motion to this Court

seeking correction of a clerical error in the Judgment of the Court dated 13th December 1996 so that the amount of compensation due to him would read Tshs. 11,686,199.25 instead of Tshs. 1,686,199.25 as appears in the Judgment.

Two days before the date which was fixed for hearing of the application the respondent through his advocates, Galati Law Chambers, lodged a notice of Preliminary Objection to the application, giving the following grounds:-

(i) That the notice of motion lodged by the applicant is incurably defective and therefore should be struck out as it offends the mandatory provisions of section 44 (1) and 44 (2) of the Advocates Act, Cap. 34 of the Revised Edition, 2002.

(ii) That the application was hopelessly time barred.

At the hearing of the Preliminary Objection the applicant was represented by Mr. Kayaga, learned advocate, and the Respondent had the able services of Mr. Galati, learned advocate.

Mr. Galati started with the second ground of objection. He argued that although Rule 40 of the Court Rules, 1979, henceforth the Rules, does not provide a time limit within which an application for correction of a clerical or arithmetical error in a judgment must be made, yet it must be made within reasonable time. It cannot be open to a party to make an application for correction of errors or mistakes of that kind at any time. It could not be an open–ended affair otherwise there would not be finality in litigation. An application of that kind should be prompt, and the more obvious the mistake the more necessary it would be to take prompt action. He submitted that no acceptable reasons were given for the inordinate delay and that the application should be struck out.

Mr. Kayaga on the other hand counter-argued that Rule 40 (1) of the Rules fixes no time limit. The application can be made at any time when the mistake or error is discovered provided it is before execution. He referred the Court to several cases which he believed supported his submission. Some of the cases he cited are **NBC Holding Corporation and Another vs. Agricultural and Industrial Lubricants Supplies Limited and 2 Others,** Civil

Application No. 42 of 2000 (unreported); **Sebastian Stephen Minja vs. Tanzania Harbours Authority,** Civil Application No. 107 of 2000 (unreported) and **Jewels and Antiques (T) Limited vs. National Shipping Agencies Limited** [1994] TLR 107 at p. 110.

Rule 40 (1) of the Rules says:-

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

A casual reading of the provision would give the impression that there is no time limit at all and that an application under the rule

can be made at any time whatever. But obviously common sense will show that time cannot be infinite or there would not be finality in litigation. It is in that reasoning that this Court in the **NBC Holding** case said –

> "... where the Rules do not provide time limit the Court steps in to fill the gap. Thus, for instance, in **Abood's** case ... the Court was faced with a situation where the Rules did not stipulate the period within which an interested person may apply to the Court under rule 40 of the Rules for the correction of errors in its judgment. The Court, recognizing that there has to be finality of judicial proceedings, ruled that applications to the Court for the purpose of correcting errors must be made before the execution of the decree in question is completed; an interested person cannot be allowed an indefinite delay in making such application."

We know from **Abood S. Abood v. Mariam M. Salehe and Another,** Civil Application No. 30 of 1993 (unreported) which was cited in **The NBC Holding Corporation** case that even under Rule 40 of the Rules, despite the use of the words *"at any time",* there is a stage beyond which an application for correction of accidental mistakes or errors in a judgment can no longer be entertained. Mr. Kayaga was correct, therefore, that the watershed period is where execution of the judgment or order has been completed.

Mr. Kayaga explained that the error in the judgment of the Court in Civil Appeal No. 26 of 1996 of 13th December, 1996 went unnoticed until they were in the process of execution when it was discovered. On the authority of **Abood** and **NBC Holding Corporation** cases referred to earlier the application to correct the error could still be made although regrettably nearly ten years had passed. The second ground of objection is dismissed. Now, to the first ground of objection.

Mr. Galati submitted that since the notice of motion which was filed by Mr. Kayaga did not show who prepared it, the Court Registry

should not have accepted it for filing. The omission rendered the notice of motion incompetent and it should be struck out. He cited the cases of **Juma Hewa Bulugu v. Hamida Mussa Mukasamoo,** High Court at Mwanza Civil Revision No. 17 of 1998 (unreported) and **Ashura Abdulkadri v. The Director Tilapia Hotel** (CA) (Mza) Civil Application No. 2 of 2005 (unreported), in support of his submission, and that Rule 45 of the Rules must be read with section 44 (1) of Cap. 341 of the Laws.

Mr. Kayaga on the other hand said that applications to the Court are governed by Rule 45 of the Rules which is self-sufficient. The Rule does not require a Notice of Motion to have an endorsement bearing the name of the person who prepares the document. On his part he cited the cases of **Atlantic Electric Limited v. Morogoro Region Cooperation Union (1984) Limited** [1993] TLR 12, **East African Development Bank v. Blue Line Enterprises,** Civil Application No. 57 of 2004 (CA) (unreported) and **Matsushita Electric Co. (EA) Limited v. Charles George t/a C.G. Traders,** Civil Application No. 71 of 2001 (CA) (unreported).

Section 44 (1) of The Advocates Act, Cap. 341 R.E. 2002 provides as follows:-

> "44 (1) Every person who draws or prepares any instrument in contravention of section 43 shall endorse or cause to be endorsed thereon his name and address; and any such person omitting so to do or falsely endorsing or causing to be endorsed any of the said requirements shall be liable on conviction to a fine not exceeding two hundred shillings.
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> (2) It shall not be lawful for any registering authority to accept or recognize any instrument unless it purports to bear the name of the person who prepared it endorsed

thereon". (Our underlining for noting)

Section 43 of the Act which is referred to in section 44 (1) provides for a penalty for persons who are unqualified and who prepare certain instruments. It may be instructive to quote subsection (1) of section 43. It reads:-

"43 (1) Any unqualified person who, unless he proves that the act was not done for, or in expectation of any fee, gain or reward, either directly or indirectly, draws or prepares any instrument –

(a) relating to movable or unmovable property or any legal proceeding;

(b) for or in relation to the formation of any limited liability company whether private or public;

(c) for or in relation to the making of a deed of partnership or the dissolution of a partnership,

shall be liable on conviction to a fine not exceeding one million shillings or twelve months imprisonment or both and shall be incapable of maintaining any action for any costs in respect of the drawing or preparation of such instrument or any matter connected therewith."

It seems that if section 43 (1) provides for a punishment for unqualified persons who do the things specified in the section, it is curious, and perhaps nonsensical, that section 44 provides as it does.

When we looked at section 44 (1) of the Advocates Ordinance, Cap. 341 in the Revised Laws it seemed to make sense in comparison with the same section in the Revised Edition, 2002. It says:-

> "44 (1) Every person who draws or prepares any instrument as is mentioned in the preceding section ..."

Be it as it may. Assuming that section 44 (1) in the Advocates Ordinance, Cap. 341 of the Revised Laws is the correct version and it refers to instruments as mentioned in s. 43 (1), we would then say that the section deals with unqualified persons who prepare those documents for gain, fee, or reward, which was not the case here. Surely, Mr. Kayaga could not be an unqualified person for purposes of preparing the Notice of Motion and the accompanying affidavit for filing in court.

The **Juma Hewa Bulugu** case cited by Mr. Galati is distinguishable from the present case. In that case a plaint appeared to have been plaintiff in person but he did not indicate that he was the one who drew it. The High Court in that case, we think correctly, ruled that the person who drew the plaint should have indicated on it that it was drawn by him and the address should have been shown in order to comply with Section 44 of the Advocates' Ordinance, Cap.

341. In the present case, the notice of motion shows a legible signature of Mr. Kayaga as advocate for the applicant and that it was signed at Tabora on 9th May, 2005. At any rate, Mr. Kayaga, as already pointed out, was not an unqualified person who is the targeted person in section 43 of the Act, Cap. 341 of the Revised Edition, 2002.

The **Ashura Abdukadri** case related to a claim that a jurat in an affidavit did not show where it was sworn and the Court held that that she was required to endorse the affidavit by signing her name thereon. Again the deponent in the **Ashura** case was a lay person who could fall into the category of an unqualified person as provided in section 43 quoted supra.

We are of the considered view that the first ground of objection cannot be sustained and we dismiss it. In effect, the whole of the grounds of preliminary objection have been dismissed with costs.

DATED at MWANZA this 16th day of March, 2007.

D. Z. LUBUVA
JUSTICE OF APPEAL

J. A. MROSO
JUSTICE OF APPEAL

E.M.K. RUTAKANGWA
JUSTICE OF APPEAL

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

(S. M. RUMANYIKA)
DEPUTY REGISTRAR