IN THE COURT OF APPEAL OF TANZANIA

AT DAR ES SALAAM

(CORAM: RAMADHANI, C.J., RUTAKANGWA, J.A., LUANDA, J.A. MJASIRI, J.A. And MANDIA, J.A.)

CIVIL REVISION NO. 10 OF 2010

KARATA ERNEST AND OTHERS ..... PLAINTIFFS/DECREE HOLDERS
VERSUS
ATTORNEY GENERAL ..... DEFENDANT/JUDGMENT DEBTOR

(Arising from the Decision of the High Court of Tanzania At Dar es Salaam)

dated 9th day of November, 2010
in
Civil Case No. 95 of 2003

REASONS FOR RULING OF THE COURT

15 & 29 DECEMBER, 2010
RUTAKANGWA, J.A.:

For reasons which will soon become apparent, we cannot do better than preface our reasons by a quotation from the instructive judgment of Sir Charles Newbold, P., in the case of **MUKISA BISCUIT MANUFACTURING CO. LTD. v WEST END DISTRIBUTORS LTD** [1969] E.A. 696, at page 100. He said:

> *"The first matter relates to the increasing practice of raising points, which should be argued in the normal*

> *manner, quite improperly by way of preliminary objection.* ***A preliminary objection is in the nature of what used to be a demurrer. It raises a pure point of law which is argued on the assumption that all the facts pleaded by the other side are correct. It cannot be raised if any fact has to be ascertained or if what is sought is the exercise of judicial discretion.*** *The improper raising of points by way of preliminary objection does nothing but unnecessarily increase costs* ***and, on occasion, confuse issues.*** *This improper practice should stop."* [Emphasis is ours].

This has been the position of the law since then, which we unreservedly subscribe to. We accordingly urge all to strictly adhere to it at all times, in the course of administering justice.

To appreciate the driving force behind our resort to the above quotation, we think the following background to these **suo motu** revision proceedings is essential. On 9th May, 2003, one Ernest Karata and six others, on behalf of themselves and 10,931 former Tanzanian employees of the former East African Community, instituted Civil Case No. 95 of 2003 in the High Court of Tanzania at

Dar es Salaam (henceforth the suit), against the Attorney General of the United Republic of Tanzania. They were claiming from the Defendant payments in respect of "*pension, provident fund, unpaid and cessation of service benefits (the terminal benefits)*", due to them by virtue of their former employment. These were well articulated in paragraphs 6 and 7 of the Plaint.

Initially, the Defendant vehemently resisted these claims and prayed the High Court to dismiss the suit in its entirety. However, on 20th September, 2005, as a result of out of court negotiations, the parties to the suit reached a lawful compromise. The agreement to settle, which was executed on 20th September, 2005, was filed in the High Court on 21st September, 2005. As a consequence, a "*consent judgment*", definitely under Order XXIII, Rule 3 of the Civil Procedure Code, Cap. 33 RE 2002, (henceforth the C.P.C.), was entered for the Plaintiffs.

For the conclusive determination of these proceedings, the details of this *"Deed of Settlement"* are not of moment here. Suffice it to say that the Plaintiffs agreed to withdraw all their claims in the suit against the Defendant. On his part, the Defendant agreed to pay not only the Plaintiffs but also all former employees of the former Community, *"all their claims according to their individual records"*. It was further agreed that *"such payments shall constitute final settlement of all claims from the Tanzania ex-employees of the defunct Community". A compromise decree followed out of this "consent judgment".* Unfortunately, however, the parties to the suit appear now to have locked horns with each other over the execution, discharge and/or satisfaction of this compromise decree.

Ordinarily, execution of decrees passed by the High Court is governed by sections 31 to 55 and Order XXI of the C.P.C. However, in suits involving the government, the application of Order XXI has been expressly disallowed in execution of decrees against it, by Rule

2 A of the same Order. Instead, the execution process is governed by Section 16 of the Government Proceedings Act, Cap 5 R.E. 2002, (hereinafter the Act).

Section 16 of the Act reads thus:-

"16 – (1) Where in any civil proceedings by or against the Government, any order, including an order as to costs, is made by a Court in favour of a person against the Government or against an officer of the Government as such, ***the proper officer of the Court shall, on an application in that behalf made by or on behalf of that person, issue to that person a certificate containing particulars of the order:*** *Provided that if the court so directs, a separate certificate shall be issued with respect to the costs to be paid to the applicant.*

(2) If the order provides for the payment of money by way of damages or other relief, or of costs, ***the certificate shall state the amount so payable*** *and the Permanent Secretary to the*

Treasury or such other Government accounting officer as may be appropriate shall, subject as hereinafter provided, pay to the person entitled or to his advocate the amount appearing by the certificate to be due to him together with any interest, lawfully due thereon: Provided that the court by which any such order as is mentioned in this section is made or any court to which an appeal against the order lies, may, if it considers it reasonable to do so direct that, pending an appeal or other legal proceedings payment or part of any amount so payable shall be suspended and if the certificate has not been issued may order any such directions to be inserted therein."

[Emphasis is ours].

In this particular case, the Plaintiffs/Decree- holders opted to lodge a formal application. This application, by chamber summons, was made under sections 15 and 16 of the Act and 0.XXI, rule 2A of

the C.P.C. Apart from costs of the application, the plaintiffs were seeking only one main relief. This was:-

> *"That the Hon. Court be pleased to issue to the Decree Holders/Applicants certificate for the amounts payable to the Decree Holders/Applicants as particularized in the attached two lists* ***or otherwise as the Court may find."*** [Emphasis is ours]

By way of preliminary objection, the Defendant/Judgment-Debtor challenged the competence of the application. Among the four points of objection raised in the notice of preliminary objection, the first one read thus:-

> *"1) The reliefs sought in the chamber summons are untenable* ***in law and facts."*** [Emphasis is ours].

At the outset we showed that it is trite law that a point of preliminary objection cannot be raised if any fact has to be

ascertained in the course of deciding it. It only *"consists of a point of law which has been pleaded, or which arises by clear implication out of the pleadings."* Obvious examples include: objection to the jurisdiction of the court; a plea of limitation; when the court has been wrongly moved either by non-citation or wrong citation of the enabling provisions of the law; where an appeal is lodged when there is no right of appeal; where an appeal is instituted without a valid notice of appeal or without leave or a certificate where one is statutorily required; where the appeal is supported by a patently incurably defective copy of the decree appealed from; etc. All these are clear pure points of law.

All the same, where a taken point of objection is premised on issues of mixed facts and law that point does not deserve consideration at all as a preliminary point of objection. It ought to be argued in the *"normal manner"* when deliberating on the merits or otherwise of the concerned legal proceedings. On this premise, therefore, it is our considered opinion that the above reproduced point of objection was **prima facie** legally untenable. However, the

learned High Court judge heard detailed submissions for and against it in which varied disputed issues of facts were canvassed by both sides for decision of the Court at that stage.

In the High Court, the Decree-holders were represented by Mr. Jotham Mtango Andrew Lukwaro and Mr. Charles Semgalawe, learned advocates. Mr. Gabriel P. Malata, learned Senior State Attorney, had represented the Attorney General/Judgment-Debtor.

Leaving aside arguments in relation to some hotly contested issues of facts on who were the actual beneficiaries under the compromise decree, and the exact decretal amount as well as to what extent the same had been satisfied, Mr. Malata submitted on the legal issue of whether or not the "*consent judgment*" was a judgment in law for the purposes of sections 15 and 16 of the Act.

It was the contention of Mr. Malata that these two sections, under which the application for a certificate had been preferred,

applied only to judgments resulting from a full trial and not to any other judgment. For this reason, he urged the learned High Court judge to hold that he lacked jurisdiction to entertain the application.

On their part, the learned advocates for the Decree-holders, maintained that the point of preliminary objection was misconceived. To them, they were only seeking a certificate for the amount payable under the compromise decree, to the Decree-holders as particularized in the lists attached to the chamber summons and not from the judgment of the High Court as such.

Admittedly, the mingled issues of facts and law born of the improperly raised point of preliminary objection, placed counsel for both sides and the learned judge in "*an Alice- in- Wonderland*", situation, so to say. The end result, in our respectful opinion, was sheer confusion as Sir Charles Newbold had predicted in the **MUKISA** case (supra).

Dealing with the legal issue raised by counsel for both sides, the learned judge, after a thorough study of pertinent authorities, ruled that the "*consent judgment*" was a judgment in law and fell within the purview of sections 15 and 16 of the Act. He accordingly rejected the arguments of Mr. Malata which he labelled "*strange in our civil practice.*" We entirely agree with him on this. That being the case we would have expected him to close the issue after overruling the objection. Unfortunately, he did not do so. He then embarked on what appears to us to be a nerve-racking exercise to determine "*whether or not the applicants properly invoked the provisions of ss.15 (1) and 16 (1) and (2) of Cap. 5 in this application now under consideration.*"

While going through this process, the learned judge found himself, facing "intermingled facts", as he put it, in the matter, and this led him to have recourse to the Deed of Settlement to ascertain and interpret, some disputed basic facts contained therein.

At the end of the day, he convinced himself that the Applicants/Decree-holders had not properly invoked ss 15 and 16 of the Act. He predicated this conclusion on his finding that the listed particulars they wanted to be incorporated in the certificate were at variance with the court order or compromise decree. To him, acceding to the prayers of the Applicants, would have amounted to doing "*violence to s.16 (1) and (2) of Cap. 5.*"

As to the alternative prayer that the Court issue them with a certificate with the particulars it would have found proper to meet the justice of the application, the learned judge found himself to have no discretion to do that.

For the above reasons, the learned High Court Judge ruled the application to be incompetent and struck it out.

That decision was not well received by the Applicants. The heat, anger, mistrust and frustration it generated was plainly

reflected in their public statements to the media. Acting under section 4 (3) of the Appellate Jurisdiction Act, Cap. 141 R.E 2002, the Court called for the records of the High Court in order to satisfy itself as to the correctness, legality or propriety of the findings or orders of the learned High Court Judge and/ or as to the regularity of these proceedings.

These revision proceedings were heard **inter partes.** Representation for the parties was the same as in the High Court. Mr. Lukwaro addressed us on behalf of the Decree – holders, while Mr. Malata did so for the Judgment-Debtor.

Briefly but to the point, Mr. Lukwaro argued that the learned High Court Judge erred in law in failing to exercise his jurisdiction after rejecting the point of preliminary objection raised by the Judgment Debtor challenging the competence of the application. He accordingly urged us to quash and set aside that part of the High Court ruling to the effect that the Applicants had wrongly invoked ss.

15 and 16 of the Act and remit the record to the High Court for the determination of the application on merit by another judge.

On his part, Mr. Malata at first adamantly maintained that the learned judge, although he had rejected his point of preliminary objection, rightly struck out the application on the basis of the reasons contained in the ruling. On whether or not the learned High Court Judge was correct in not hearing the parties after he had rejected the point of preliminary objection, after some wavering, he conceded that he was not.

After hearing counsel for both sides, we upheld Mr. Lukwaro on his submission. We quashed that part of the High Court ruling striking out the application and ordered the substantive application to be heard on merit as soon as possible but by another judge. We reserved our full reasons for the order. These reasons are embodied in this ruling.

As we have already adequately demonstrated, it is undisputed that what was before Utamwa J., was an application by the decree-holders for a certificate to be presented to the Permanent Secretary, Treasury, for the satisfaction and/or full discharge of the decree in their favour. The application was made under sections 15 and 16 of Act as shown already. The provisions of these two sections are plain and in our considered opinion if the involved parties are acting in good faith, their implementation by either the Court and/or the Permanent Secretary, ought not to present any difficulties, once the validity of the decree has been established or is not disputed.

The law directs that any decree-holder desiring to execute a decree in his favour against the government, must apply to the court, which of course issued the decree, under section 16(1) of the Act, instead of following the processes under Order XXI of the C.P.C., for a certificate. Such an application, from our plain reading of this provision, as is the case under Order XXI, Rule 9 of the C.P.C., need

not necessarily be a formal one, that is by chamber summons supported by affidavits. A written request or even an informal request in court, since there are no special forms specified for the purpose, would in our settled minds, suffice to meet the just ends of the application. As the learned High Court judge rightly observed in his ruling "*this certificate ... plays the role of a decree in a suit involving private persons, which said decree must always tally with the judgment or order giving right to the decree holder*". We are not aware of any legal requirement for one to file a formal application in order to be supplied with a copy of the decree.

We have also found ourselves in full agreement with the learned judge's observations to the effect that "*the process under Cap. 5 is a more simplified one than the one provided under Order XXI of Cap. 33 for the benefit of the decree holders.*"

With those observations in mind, we have to quickly point out that section 16(1) imposes a mandatory duty on the proper officer to issue a certificate of the court order or decree against the

government. The only prominent condition being that the certificate must contain the **particulars** of the order. Another condition imposed in subsection (2) is that if the order provides for the payment of money, **the certificate shall state the amount so payable.** The particulars envisaged under these provisions, in our view, should be the same as those spelt out in O.XXI, rule 6 of the C.P.C. on the contents of decrees. What we need to emphasize here is that these details or particulars **can only be obtained from the order of the court** and not from the application letter, chamber summons and affidavits, etc. It goes without saying, therefore, that if the learned High Court judge had directed his mind to this fact, in our respectful opinion, he would not have found himself bogged down in the "*intermingled facts*" raised by the parties which unfortunately made him lose sight of the wood for the trees.

Before departing from the provisions of section 16, we wish to note that under the mandatory provisions of subsection (2), once **a proper certificate** has been issued and presented to the Permanent

Secretary, subject to the proviso therein, the latter has a duty to pay the amount appearing on the certificate. If **any dispute** arises between the parties relating to the execution, discharge or satisfaction of the court order, **at any stage,** then that dispute must be determined by the executing court under section 38 of the C.P.C. For the benefit of the executing courts we wish to go further and say this.

Although ordinarily the trial court has the duty to determine the quantum which the judgment-debtor is bound to pay under the decree, where it has left out that question open for consideration subsequently, the executing court has the jurisdiction to determine the quantum under this section and dispose of the issue. See, **MULLA ON THE CODE OF CIVIL PROCEDURE ACT V OF** 1908, 15th ed. at pg.397 of Vol. 1.

From the above discussion, it is clear that the Decree-holders had correctly exercised their right under s.16 of the Act, and applied

to the trial High Court to be issued with a certificate. It is our finding that there was no non citation or wrong citation of the enabling legal provisions. The High Court, therefore, was seized with the necessary jurisdiction, to issue the sought certificate. Definitely it was not bound by the superfluous lists filed by the applicants. If it found good reasons to reject them, it would have acted on the alternative prayer and determined the application on merit in accordance with the dictates of section 16 (1) and (2) of the Act. This is only because section 16 directs that the certificate should only contain **the particulars of the order.**

All said and done, we find and hold that the High Court had been properly moved to issue a certificate under s.16 of the Act. The learned judge, therefore, erred in law in failing to exercise his jurisdiction to hear and determine the application on merit. That is why we did set aside his order striking out the application for being incompetent and we restored it and ordered that it be heard and

determined forthwith by another judge. We make no orders on costs.

It is so ordered.

DATED at DAR ES SALAAM this 22nd day of December, 2010.

A.S.L. RAMADHANI
CHIEF JUSTICE

E.M.K. RUTAKANGWA
JUSTICE OF APPEAL

B.M. LUANDA
JUSTICE OF APPEAL

S. MJASIRI
JUSTICE OF APPEAL

W.S. MANDIA
JUSTICE OF APPEAL

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

J.S. MGETTA
DEPUTY REGISTRAR
COURT OF APPEAL