IN THE HIGH COURT OF TANZANIA

(DAR ES SALAAM DISTRICT REGISTRY)

AT DAR ES SALAAM

CIVIL APPEAL No. 31 OF 2020

STANLEY RUNYORO..... APPELLANT

VERSUS

MS CAMPASS CONSTRUCTION CO. LTD .....RESPONDENT

(Appeal from the decision of the Court of Resident Magistrates' of Kinondoni at Kinondoni)

(Mshomba- Esq, RM.)

Dated 5th December, 2019

in

Misc. Civil Application No. 179 of 2019

JUDGEMENT

17th November & 8th December 2020

AK. Rwizile, J

This appeal traces its origins in Civil Case No. 74 of 2018. On 26th July 2019, upon hearing of the same, Kiliwa -RM entered a judgement for the respondent.

Few months later, it was discovered that the judgement had clerical and arithmetic errors because it made a misdescription of the appellant herein and made unspecified amount of compensation to be paid to her, and had an order that the case be dismissed with costs.

The respondent therefore filed Misc. Civil Application No. 179 of 2019, for correcting the same. It was filed under section 96 of Civil Procedure Code. The application was as it is usually the case, assigned to the Magistrate who heard the original case. But at some stage before it was heard, it was re-assigned to Mshomba-RM. Upon hearing the application, he made two findings; that the name be properly read as *Stanley Runyoro*, and the amount of money payable to the (applicant then) respondent herein, was intended to be 20,000,000/= as principal sum, 30,000,000/= being penalty, and 12% interest. The appellant was aggrieved, hence this appeal. Represented by Mr. Dickson Sanga, of A & D Law Attorneys, filed 9 grounds of appeal. The respondent was represented by Mr. Deogratius Tesha of Trustworth Attorneys. The grounds of appeal are as follows;

I. *That the trial Court erred in law and fact in determining the matter despite the fact that it was functus officio*
II. *That the trial court erred in law and fact for holding that the respondent is entitled to compensation to the tune of 20,000,000/=, being specific damages and 30,000,000/= being general damages while in fact the counter-claim was left undetermined as no legal issues were raised in respect of the counter-claim*
III. *That the trial court erred in law and fact for holding in favour of the respondent without any justifiable and fair reasons*

IV. *That the court erred in law and fact by awarding the respondent with specific damages to the tune of 20,000,000/=without justification*

V. *That the trial court erred in law and fact for exercising the discretion unjudicial in awarding the respondent general damages to the tune of 30,000,000/= as material facts were not pleaded and not proved by the respondent.*

VI. *That the trial court erred in law and fact for shifting the file for review to another magistrate without fair and justifiable reasons while in fact the presiding magistrate was present in office*

VII. *That the trial court erred in law and fact in awarding the respondent both the principal sum and penalty without adducing any fair and just reasons*

VIII. *That the trial court erred in law and fact for holding in favour of the respondent basing on assumptions that the predecessor magistrate had in mind what the successor magistrate held*

IX. *That the court erred in law and fact for failing to consider that the applicant was able to prove his case on balance of probabilities, hence the appellant was entitled to compensation of 13,296,666/= as claimed in the plaint and proved during the hearing.*

The appeal was heard through written submissions. The appellant's submission consolidated 3rd, 6th ,7th and 8th grounds of appeal. The rest were argued separately. Mr. Sanga submitting on the first ground was of the view that there cannot be a departure from court's own decision unless by applying for review. Otherwise, he submitted, the court becomes *functus officio.*

The principle, according to him, was stated in the case of **Zee Hotel Management Group and others versus Minister of Finance and others** [1997] TLR 266. The court was also referred to the cases of **MPS Oil Tanzania Ltd & 2 others vs Citibank Tanzania Ltd**, **Laethong Rice Company Ltd vs Principal Secretary Ministry of Finance** [2002] TLR 389 and **Maxcom Africa PLC vs UDA, Rapid Transit PLC,** Commercial Application No. 34 of 2018. According to the learned advocate, an application filed under section 96 of the CPC was changed into a review without an application. He said, an application for review ought to have been filed under order XLII of the CPC.

When submitted on the second ground of appeal, he was of the view that the court decided a matter by awarding 20,000,000/= and 30,000,000/= as specific and general damages respectively, without framing issues, which is contrary to order XX Rule 4 of the CPC. It was in his view that determination of the same, left out the counter-claim. The court was as well, asked to refer to the case of **Abdallah Hassan vs Juma Hamis Sakiboko**, Civil Appeal No. 22 of 2007.

Mr. Sanga submitted on the 4th ground as well, that specific damages can only be awarded when specifically pleaded and proved as it was in **Christopher Kamugisha and Gaudiosus Ishengoma vs Usaca saccos and 4 others**, Land Case No. 325 of 2013. He submitted further that the amount of specific damages awarded was without proof and general damages were not substantiated because the same was not pleaded.

It was the view of the learned counsel that the 4th and 5th grounds of appeal have merit and this appeal be allowed basing on findings of the case of **Efficient Freighter(T) Ltd vs Lilian Kanema**, Commercial Case No. 33 of 2009, where it was decided that there must be sufficient evidence as necessary and appropriate to support the claim.

Submitting on the last ground of appeal, the learned counsel was clear that specific damages must be pleaded and proved. According to him, the appellant, pleaded and proved payment of 13, 296, 666/=, by tendering exhibit P1 and P2. He further, said the same was to be awarded for the appellant because his evidence was not challenged. This court was therefore asked to find that the court altered its own judgement when it was *functus officio.*

On party of the respondent, Mr. Tesha learned counsel argued the 1st, 2nd, 4th ,6th and 9th, the rest of the grounds were held to be a repetition. Arguing this appeal for the respondent, it was submitted on ground one that section 96 of the CPC empowers courts to correct clerical and arithmetic mistakes in the judgements, decrees and orders, or errors from accidental slip or omission for ends of justice. According to his argument, it was therefore proper for the respondent to apply for corrections of the decree. The learned counsel asked this court to refer to the case of **Finca Microfinance vs Robert Matiku**, Misc. Civil Application No. 52 of 2020 HC, (unreported). The learned counsel went on submitting that basing on the errors stated, the application made under section 96 of the CPC, its determination came in form of a review.

He said this was correct as held in the case of **Jobos & Co. Ltd vs Serengeti Breweries Ltd**, Misc. Application No. 658 of 2017 HC (unreported).

Making an argument on the second ground of appeal, it was submitted that the counter-claim as held was from the same transaction that is why the two were consolidated on whether there was a contract and whether it was breached leading to reliefs that were granted.

It was his view that based on page 5 of the judgement in Civil Case No. 78, the respondent was entitled to damages. He opined that the magistrate in Misc. Civil Application 179 of 2019 relied on similar findings. It was according to him, that the counter-claim was left undetermined is baseless.

The learned counsel was brief on the 4th ground. He supported the findings based on the application for review, in that the trial court made the amendment of the judgement. The court trotted, along the law and evidence to award 20,000,000/= as specific damages.

In respect of the 6th ground of appeal, the learned counsel was of the considered view that, the record is clear. On 7th November 2019, he submitted, the application was re-assigned to Mshomba-RM for the purpose of clearing the backlog. Therefore, he said, this ground of appeal has no merit.

He lastly submitted on the 9th ground that, because the trial magistrate entertained an application for correcting errors in the judgement and decree. It was his submission that the judgement has to contain an objective evaluation of evidence brought before the court.

This involves a proper consideration of the evidence at the balance of probabilities as held in the case of **D.B Shapriya and Co. Ltd vs Mek One General Trader and Another**, Civil Appeal No. 197 of 2016. HC (unreported).

According to him, the original judgement at Page 3 to 6, there was evidence evaluation leading to a finding that the case was proved at the balance of probabilities. He asked this court to dismiss this appeal with costs.

Having given a careful thought of the submissions, let me now delve into the gist of this appeal. The issue to be determined is whether there is a difference between an application brought under section 96 and that brought under order XLII of the CPC. Section 96 of the CPC where the impugned application was pegged states that;

> *Clerical or arithmetical mistakes in judgments, decrees or orders, or errors arising therein from any accidental slip or omission may, at any time, be corrected by the court either of its own motion or on the application of any of the parties.*

This section aims at amending the judgements, decrees and orders. It may be made by the court of its own motion or on application by the party. Here it is restricted as its wording goes to minor errors arising from the slip or omission. It may take a form of correcting matters that are not to be contested. It falls I, think under the so-called *slip rule*. This can be made at any time. In the case of **Jewels and Antinques (T) Ltd. versus National Shipping Agencies Co. Ltd.** (1994) TLR 107, the Court held:

As per Section 96 of the Civil Procedure Code, 1966, clerical and arithmetical mistakes may be corrected at any time, applications to correct the same therefore, are not subject to any limitation of time.

However, in the case of **Vallabhidas Karsandas Raniga versus Mansukhlal Jivraji and Others** (1965) E.A. 700. The then Court of Appeal of Eastern Africa considered the applicability of the Slip Rule and made the following remarks;

'*Slip Orders' may be made to rectify omissions resulting from the failure of counsel to make some particular application*

That is why, I think, it can be done by the court itself upon realizing such omissions or arithmetical mistakes. With respect, it is different from an application made under order XLII of the CPC, because that falls under review. To apply for review, one has to do so under order XLII (1) which states as follows;

Any person considering himself aggrieved-

(a) by a decree or order from which an appeal is allowed, but from which no appeal has been preferred; or

(b) by a decree or order from which no appeal is allowed,

and who, from the discovery of new and important matter or evidence which, after the exercise of due diligence, was not within his knowledge or could not be produced by him at the time when the

decree was passed or order made, or on account of some mistake or error apparent on the face of the record, or for any other sufficient reason, desires to obtain a review of the decree passed or order made against him, may apply for a review of judgment to the court which passed the decree or made the order.

It is gathered from the above that in review one has to have ***first***, discovered a new and important matter or evidence, ***second,*** there must be an error apparent on the face of the record, or ***third,*** in any other sufficient reason so warranting, ***fourth***, the application must be done by any person considered aggrieved by the decision. This means, there can be no *suo motto* review as it is the case on *slip applications* made under section 96.

Turning back to the matter before this court, the respondent approached the trial court for its decision in Civil case No. 74 of 2018. He did so upon discovering that the same had made a wrong description of the appellant. second that it had not made orders sufficient to let him enjoy the judgement. She filed an application under section 96 asking for correction of the same. The decision of the court apart from correcting the name of the appellant, it went a heard and analysed the existing evidence and made restitution as it saw fit basing on the facts of the case brought before it.

The last thing, which relates with the first ground of appeal, is, was the court justified to treat the application brought under section 96 of CPC as an application for review. The answer to this can be traced from the pleadings brought before it. The chamber summons contained one main prayer stated as follows;

That this honourable court be pleased to correct the clerical and arithmetic errors in the judgement and decree in Civil case No. 74 of 2018

It is trite law that any formal application brought before the court, is commenced with the chamber summons. The same should be supported with the affidavit of the applicant, these days, albeit strange lawyers have taken the duty of applicants to swear affidavits as Mr. Kikoti did in this application. The chamber summons bears prayers sought while the affidavit supports the prayers made in form of evidence. Under order XIX of the CPC, prayers are not expected in the affidavit. Mr. Kikoti's affidavit had the following information in respect of this the application. The most relevant part starts from paragraphs 3 to 7 as follows;

3. that upon being supplied with the copy of the judgement and decree, we came to realize that there are errors in the copy of the judgement and decree

4. that the name of the plaintiff in civil case no. 74 of 2018 before Hon. C. Kiliwa at Kinondoni District Court was erroneously typed as STANLY RUHONYO instead of STANLY RUNYORO

5. that the copy of the judgement at page 5 paragraph 3, the court found out the applicant herein who was the defendant in the main case is entitled to actual compensation.

6. that the copy of the decree and judgement on the stated case above, does not state the exact figures of the amount awarded

rather than stating that applicant here in is entitled to compensation.

7. that, it is in the best interest of justice that the application be granted

Following the hearing as shown before, the learned Resident magistrate made some analysis of evidence and found out as follows at page 6 of the ruling

From the above, in giving the said order of the court, the predecessor resident Magistrate in the file (Hon. C. Kiliwa, RM), had in mind award of the said testified sum for penalty and principal sum as well as the accruing interest all in favour of the defendant (the applicant) as put clear by the predecessor resident magistrate in the respective file. Being the case, the amount payable according to the judgement of the court dated 26/07/2019 is: Tsh. 20,000,000/= being principal sum, Tsh.30,000,000/= being penalty and interest of 12%

No doubt, basing on the nature of the application, as shown, the chamber summons asked for correction of the clerical and arithmetic errors in the judgement and decree. The learned resident magistrate with respect, did not correct errors but reviewed the judgement and made a finding that the application was under section 96 and order XLII of the CPC. He treated that as an apparent error on the face of the record worth correction, in the manner he did.

In my considered view, there is a difference between "*slip application* "made under section 96 and an application for review made under order XLII of the CPC. I am convinced that the trial court was wrong to treat the application brought before him, as an application for review. This means what he did was not within his powers since he was not properly moved. Based on the fact that parties are bound by their pleadings, the material submitted before the court, did not warrant what the court did. I hold, that was not correct.

But if I am wrong, and it is otherwise found that the trial court was justified to treat that application as for review, still, the learned resident Magistrate, who heard the application had no jurisdiction. I am saying so because, Civil case No. 74 of 2018 was decided by Mr. Kiliwa-Rm on 26th July 2019. The impugned application was filed on 12th September 2019. This period does not exceed six months from the date it was pronounced. It is on record that on filing this application, Kiliwa RM was still at the station and was assigned the matter for hearing. It was reassigned to Mshomba RM for backlog clearance in total disregard of XLII rule 5 of the CPC. For easy reference it states;

> *5.- (1) Where the judge or judges, or any one of the judges, who passed the decree or made the order, a review of which is applied for, continues or continue attached to the court at the time when the application for a review is presented, and is not or are not precluded by absence or other cause for a period of six months next after the application from considering the decree or order to which the application refers, such judge or judges or any of them shall hear the*

application, and no other judge or judges of the court shall hear the same.

(2) For the purposes of this rule and rule 6, "judge" includes a magistrate.

From the above, it is crystal clear that in the presence of Kiliwa RM, at the station, other magistrates had not jurisdiction to hear the application for review. I am therefore convinced that despite making argument on strenuous matters by the learned counsel for the appellant, still this appeal is found meritorious. It is allowed with no order as to costs. The decision of the trial court is quashed and all orders set aside except that of correcting the name of the appellant.

AK Rwizile
JUDGE
08.12.2020

Delivered, in the presence of Mr. Sanga for the appellant, the respondent is absent.

AK Rwizile
JUDGE
08.12.2020