IN THE SUPREME COURT OF UGANDA

AT MENGO

(CORAM: MANYINDO, D.C.J., ODER, J.S.C., AND PLATT, J.S.C.)

CIVIL APPLICATION NO.28 OF 1992

B E T W E E N

ADAM VASSILIADIS :::::::::::::::::::::::::::::::::::: APPLICANT

A N D

LIBYAN ARAB (U) BANK)
FOR FOREIGN TRADE AND) :::::::::::::::::::::::::: RESPONDENT
DEVELOPMENT LIMITED)

(An application for correction of Judgment in Supreme Court Civil Appeal No. 10 of 1990 dated 19th April, 1991 - Manyindo D.C.J., Oder, J.S.C. and Seaton J.S.C.- arising from the Judgment and Decree of the High Court of Uganda (Okello J.) dated 12th March, 1990 in H.C.C. Suit No. 847 of 1990)

RULING OF THE COURT

The applicant was the successful appellant in Civil Appeal No. 10 of 1990 which was heard by this Court in January, 1991. The Respondent in this application was the unsuccessful respondent in the appeal.

The appeal arose out of Civil Suit No.847/90 in the High Court of Uganda at Kampala, in which the applicant was the plaintiff. In the suit the applicant sued the respondent as the defendant for specific performance and damages for alleged breach of an agreement of sale of a block of flats on Plot. 12 Rhashid Khamis Road, Kampala (hereinafter "the suit property"). BY that agreement the respondent sold the suit property to the applicant. It was alleged in the suit that the respondent had been in breach of the agreement. The suit was heard and dismissed by Okello J. on the grounds that the applicant was not entitled to have the suit property transferred in his names because the agreement of sale was subject to the provisions of the Land Transfer Act (LTA) which required prior consent of the Minister. It had been alleged by the respondent that as no such consent had been obtained before the agreement was completed, the agreement was unenforceable and, therefore, the appellant was not entitled to recover any remedy.

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The applicant appealed against the dismissal of the suit on two grounds; namel that:-

1. The Learned trial judge erred in fact and in law in holding that that the contract for the purchase of the suit property by the appallant was illegal and unforceable.

2. The learned trial judge erred in failing to make a finding as to the damages awardable.

The Memorandum also prayed for an order that:-

(a) the appeal be allowed with costs in this court and the court below;

(b) the respondent transfers the suit property to the plaintiff (present applicant);

(c) the respondent pays to the plaintiff Shs.5,325,800/= and such further amount by way of mesne profits from November, 1989 till the appellant is put in possession, general damages and interest as prayed in the High Court. This Court allowed the appeal with costs, but did not make an order for specific performance nor did it make an order regarding damages.

The application is by Notice of Motion, brought under Rule 35 (1) of the Rules of this Court. The motion states as follows:-

> ".....the Advocates for the above named Applicant will move the court that on the ground set out hereinunder the Court be pleased;
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> (a) to correct an ommission in its judgment that:-
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> (i) the title to the suit property be transferred to the applicant/ appellant;
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> (ii) the case be remitted to the High Court for determination and assessment of the damages the applicant/ appellant is entitle to having regard to the judgment of this Court; and
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> (b) to provide for the costs of and incidental to this application.

The ground for the application is that no such order was made and the correction is necessary to give effect to what was the .....

- court's intention when allowing the appeal upon finding that the

.../3

contract of sale between the Applicant and the Respondent the subject matter of the suit, was enforceable.

This application will be supported by the Affidavit of D.T. Nkurunziza, Esq., Sworn on the 29th day of July, 1992 annexed here to ....."

When the hearing of the application commenced, Mr. Owiny-Dollo, learned Counsel for the respondent, took a preliminary objection against prayer (a) (ii) of the application, on the grounds that an informal application to the same effect made earlier by the applicant on 13th February, 1992 had been considered and rejected by this Court on the grounds that during the hearing of the appeal the ground concerning damages was abandoned by the applicant's counsel.

Consequently, in Mr. Owiny-Dollo's view, there was no slip on the part of the Court in its judgment of 19th April, 1991 in that regard. Accordingly, Mr. Owiny-Dollo contended, the applicant was not entitled to argue in this application for remission of the case for assessment of damages.

This preliminary objection was resisted by Mr. Mulenga S.C. Learned Counsel for the applicant, who submitted that the applicant's advocates wrote to the Register of this Court on 6th February, 1992, requesting him to put the matter before the Court in order for it to correct its judgment. The Registrar wrote back on 10th February, 1992, inviting the applicant's Counsel to appear and address the Court on the matter.
Counsel, in fact, appeared on 13th February, 1992 as had been suggested by the Registrar, but did not address the Court, and what transpired on that date did not amount to a disposal of the application. What was abandoned by the applicant's Counsel on that date was the request for the Court to correct its judgment on its own motion. The present application was, therefore, in order.

Thereafter, Mr. Owiny-Dollo conceded, rightly so in our view, that the present application should proceed and be heard on the merit. But before the hearing could proceed, Mr.Owiny-Dollo stated that the respondent had

.../4

had also lodged an application subsequent to the present one, as Civil Application No. 42 of 1992, by which the respondent sought a recall and review of this Court's Judgment in the appeal in question. The learned Counsel submitted that the respondent's application should be heard first because if it was successful, the decision of the Court in the appeal would be reversed, thereby disposing of the present application. Mr. Mulenga S.C. objected to the submission of the learned counsel for the respondent that the respondent's application should be heard first. We agreed with him and ordered for the hearing of the present application to proceed forthwith, and it did.

In addition to what is stated in the Notice of motion, the ground of the application is further explained in the following paragraphs of the affidavit of Didas T. Nkurunziza Esq:

> "4. That at the hearing of the said appeal Mr. J.N. Mulenga S.C. who conducted the same for the appellant (applicant herein) assisted by myself sought, in the course of arguing the 2nd ground of appeal, to persuade the Court to evaluate the evidence on record and assess the damages to be awarded but was told by the Hon. Deputy Chief Justice, presiding over the court at the hearing that if the appellant succeeded on the 1st ground of appeal the court would remit the case back to the High Court for assessing damages whereupon he abandoned the arrangement.
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> 5. That in its judgment made and delivered on the 19th April, 1991, the Court upheld the 1st ground of appeal aforesaid and allowed the appeal with costs of the appeal and of the suit in the High Court but omited to order that:-
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> (i) the respondent transfers the suit property to the appellant.
>
> (ii) the case be remitted to the High Court for assessment of damages

(iii) that in my humble opinion when this Honourable Court allowed the appeal as aforesaid, it must have intended that the Appellant be able to enforce the contract of sale through specific performance and obtaining damages arising from the breach thereof."

In his affidavit in reply, Mr. Owiny-Dollo (who did not act for the respondent in the appeal) stated, inter alia, as follows:-

"3. I have also read the judgment of the court in the appeal giving rise to this application.

6. I have also carefully perused the Court's judgment, and found that the judge was alive to the issue of damages, but the case was decided inclusively, in our view deliberately on the grounds of insufficiency of evidence on record to identify the mailo owner.

7. I believe the Court actively declined to make orders for damages and specific performance as it was alive to the issue of public policy protecting an African proprietor and in effect was leaving the door open."

Mr. Mulenga S.C. Learned Counsel for the applicant submitted that the 1st ground of appeal having been upheld, it followed that the agreement was legal and enforceable. The Order prayed for in the appeal that the suit property be transferred to the applicant was a necessary consequence upon the decision of the Court. But, unfortunately, the order was not made. The Learned Counsel contended that the order was not refused. The judgment of the Court did not suggest that the applicant was not entitled to such an order. In the Learned Counsel's opinion, such an order was over-looked accidentally not deliberately. Consequently, the slip that occured can be corrected under rule 35 (i). This is a proper case where the Court should make an order to give effect to its judgment.

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The learned Counsel then informed the court that two months after the judgment in the appeal was delivered, the suti property was handed over to the applicant, but that the title was not transferred.

Regarding what transpired during the hearing of the appeal, Mr. Mulenga S.C. referred to paragraph four of Mr. Nkurunziza's affidavit. He then explained that when he was arguing around two of the appeal, the court prevailed upon him not to persue that ground since that issue would be referred back to the High Court for determination if the appeal succeeded on ground one. Consequently, he abandoned arguing ground two. It was not that the applicant was abandoning the suit and the claim for damages. The Court's suggestion which persuaded the Learned Counsel not to continue with his argument in support of the claim for damages showed the Court's intention that assessment of damages would be referred back to the High Court. There was no cogent reason to suggest that the Court would decide otherwise.

Referring to the affidavit in reply of Mr. Owiny-Dollo, Mr. Mulenga S.C. submitted that it was wrong to suggest that the Court would deliberately decide to give an inclusive judgment in view of the general principle that a Court on hearing a case should decide conclusively and grant to the successful party all remedies he is entitled.to,so that matters are completely decided and determined. Where it does not do so, it can only be accidental, not deliberate. Mr. Mulenga, S.C. then concluded his submissions, firstly that having regard to substance of the Court's judgments in the appeal in question to the effect that the contract was legal and enforceable and to the prayer on appeal for an order to transfer the suit property to the applicant there was not doubt that such an order would have been made if the court had adverted to it. Secondly, that having regard to the nature of the judgment and

j t to the intimation by the Court that the case would be remitted to the High Court in the event of success on ground one of the appeal,

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nere could be no doubt that the court so intended and it would have made the order prayed for if it had averted to the matter. Mr. Mulenga S.C. relied on certain decided cases for his submission, namely: RANIGA V. JIVRAJ (1965) E.A. 700, Page 703; Lakhamshi Brothers vs Raja and sons (1966)E.A. 313; and Zituma Kawuma vs George Mwa Lurum, Supreme Court of Uganda Civil Appeal No. 3 of 1992 (unreported.)

Mr. Ownyi-Dollo, learned Counsel for the respondent, submitted in reply to the effect that an order for specific performance would not give effec to the intention of the court, which was that it was unable to say that Musoke was African in view of the provisions of LTA. The Court deliberately did not find that Musoke was an African. It would, therefore, defeat the purpose of the LTA for the Court, to order for a transfer of the suti property to the applicant. In the circumstances; the Learned Counsel contended, there had not been any slip on the part of this Court. Secondly, the Learned Counsel submitted that the record of proceedings in the appeal does no bear out Mr. Mulenga' s contention that he abandoned the ground concerning damages on intimation of the Court. Counsel having abandoned that fround during the appeal, it cannot now be said that it was a slip by the Court under rule 35 (i).

There is no doubt, that this Court has power under rule 35 (i) of the Rules of this Court to correct

> "a clerical or arithmetical mistake in an judgment of the court or any error arising there in from an accidental slip or omission at any time, whether before or after the judgment has been embodied in an order..... so as to give effect to what was the intention of the Court when Judgment was given"

The Court also has inherent powers, which is preserved by Rule 1 (3)

> "to make such orders as may be necessary for the ends of Justice or to prevent abuse of the process of the Court."

These powers were recently considered by this Court in the case of Zaituna Kawuma (Supra), in which the Court said this:-

"These powers are not unique in our Court. In England similar powers exist under R.20 and R11 of the Rules of the Supreme Court ("the English RSC") and in the inherent jurisdiction of the Court. In Kenya, they resided in the former Court of Appeal by virtue of Section 3 (2) of the Appellate Jurisdiction Act, 162 and R.13 (2) of the Eastern African Court Appeal Rules 1954. Such rule as R.35 (i) of our RSC and O.20 r.11 of the Ehglish RSC is commonly referred to as "the slip rule" and an order made under it is called "slip order."

Counsel for the defendant/applicant has drawn our attention to some instances of the exercise of these powers by English Courts and by the then Court of Appeal of East Africa on an application that same before it by way of motion that arose out of Civil Proceedings in Kenya. We are also aware of our own decision in Stirling Civil Engineering (U) Ltd versus Margaret Zirumira and others. Civil Appeal No of 1991 (unrported) in which a slip was corrected under rule 35 .....".

Other cases to which the court referred with approval were:- Mutual Shipping Co-op of New York vs Bayshore shipping Co-op of Monrovia (1985) ALL ER. 520: and Vallabhadas Karsandas Raghiga Mansuklal Jivaj and others (1965) EA 700

In the V. Karsandas case (Supra) it was held inter alia, that:

(i) "Slip orders" may be made to rectify omissions resulting from the failure of counsel to make some particular application.

(ii) A slip order will only be made where the Court is fully satisfied that it is giving effect to the intention of the Court at the time when the judgment was given or in the case of a matter which was overlooked, Where it is satisfied beyond doubts as to the order which it would have made had the

matter been brought to its attention.

In Lakhamshi Brothers (Supra) Sir, Charles Newhold P. said this:-

> "Indeed there has been a multitude of decisions by this Court on what is know generally as the slip rule in which the inherent jurisdiction of the Court ot recall a judgment in order to give effect to its manifest intention has been held to exist. The circumstances, however, of the exercise of any such jurisdiction are very clearly circumscribed. Broadly these circumstamces are where the Court is asked in the application subsequent to the judgment to give effect to the intention of the Court when it gave its judgment or to give effect to what clearly would have been the intention of the Court had the matter not inadvertently been omitted. I would here refer to the words of this Court given in the Raniga Case (1965) E.A. at P. 703 as follows:
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> "A Court will of course, only apply the slip rule where, it is fully satisfied that it is giving effect to the intention of the Court at the time when judgment was given or in the case of a matter which was over-looked. Where it is satisfied, beyond doubt, as to the order which it would have made had the matter been brought to its attention.
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> These are the circumstances in which this Court will exercise its jurisdiction and recall its judgment, that is, only in order to give effect to its intention or to give effect to what clearly would have been its intention had there not been an omission in relation to the particular matter."

In the instant case, we are being asked to apply the slip rule and order for specific performance for the reasons referred to in the application and argued by Mr. Mulenga S.C. Whether the slip rule applies to the instant case depends on what the courts intention was in its judgment allowing the appeal. The circumstances in which ground one of the appeal was allowed are briefly as follows:

The respondent was a non-African for purposes of the LTA. It agreed to sell the suit property to the applicant, also a non-African. The suit property was an unexpired term of a lease out of Mailo Land property. The names which appeared on the relevant Mailo Title. Kibuga Block 9 Plot. 152 (exhibit D.8) as those of the original registered proprietor of the Mailo Land - who was registered on 16th November, 1935 - are "SEMU T. MUSOKE", marked as decease. The columns for"Father's name" and "Clan" were blank. The next names which appeared on the Mailo Land Title and which were apparently entered on 7th February, 1986 were ROBERT EDISON KANYERA." Whose father and clan were indicated as "Semutenywa Musoke" and "Mpindi" respectively.

It was the respondent's case at the trial of the suit and on appeal that the LTA was applicable to the contract of sale of the suit property between the respondent and the present applicant because "Semu T. Musoke" the person whose names appeared in Exhibit D.8 as the registered proprietor of the Mailo Land from which the leasehold in respect of the suit property was granted an African. But the respondent did not adduce any evidence to show that "Musoke" was, in fact an African.

On the basis of several previous decision in which the application of the provisions of the LTA were considered, and which this Court felt obliged to follow, it held that the contract of sale of the suit property between the applicant and the respondent for sale of the suit property to the former was subject to the provisions of the LTA and that if Musoke was an African the consent of the Minister was required before the contract was completed. Such previous decisions included: Shamtilal N. Patel vs Registrar of Titles (1949) 16. EACA 46; Motibhai Manji vs Khursid Begun (1957) E.A. 101 and Ngakwila vs Lalani (1972) E.A. 382

In summary, the effect of these decided cases is that where the LTA applies, a contract of sale made before the consent of the Minister is obtained is illegal and void ab initio. Section 4 makes it an offence

to contravene the provisions of the LTA.

In the instant case the fate of the contract of sale in question depended on whether "MUsoke" was or was not an African for purposes of the LTA. In the Lower Court the learned trial judge drew an inference from the definition of "Mailo" in the Buganda Native Laws, 1908 and held that "Musoke" was an African. Consequently, the sale agreement in question was null and void for not having been made in accordance with the requirements of the LTA.

In the appeal, however, this court came to the conclusion that in the absence of conclusive evidence that "Musoke" was an African the contract could not be held to be null and void. This is what the Court said:

> "Since it is the bank's case that Musoke was an African, the burden of proof lay on it. As it is no evidence was adduced to that effect. Before us Mr. Kiyingi, learned counsel for the bank, attempted to adduce additional evidence under Rule 29 (i) (b) of the Rules of this Court. The additional evidence was in the form of affidavit of Mrs. Elue, the Chief Registrar of Titles. But since leave on the Court had not been obtained, Counsel abandoned the attempt. In the circumstances, there was no jurisfification for reaching the conclusion that Musoke, the registered owner of the Mailo Land from which the lease-hold interest under consideration was granted, was an african. The name "Musoke" is an African name..... the name above without more was not sufficient proof on the balance of probability that the person so named was an African. The learned Counsel erred in relying on the statute of 1908 as substitute for evidence. It would follow, therefore, that the basis for the application of section 2 of the LTA did not exist. If this view is correct,it seem that the agreement of sale in this case was not illegal under RTA.
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> .....
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> .....

> In the result having allowed the only ground of appeal to the effect that the agreement of sale of the suit property by the bank to the Appellant was not illegal under the provisions of Section 2 of the LTA....."

Turning to the present application, the position as we see it is this. The applicant's prayer to the Court to correct its judgment so as to order specific performance can be granted only if "Musoke" the registered Mailo owner was a non-African. But if, on the other hand, he was an African, the Court would not grant the remedy of specific performance which would contravene the provisions of the LTA. Since there was no evidence from the respondent bank proving that "Musoke" was an African and similary, there was no evidence on the part of the applicant indicating that "Musoke" was not an African the position in our view, was left open.

In the circumstances, we considered that an order for specific performance the enforcement of which would have the effect of contravening the provisions of the LTA should not be made. That is still our view. The Court cannot, therefore, make an order the consequencies of which would lead to the commission of an offence, because if Musoke was an African then the Minister cannot in law give consent to transfer at this stage in view of the authorities cited above.

In the circumstances, we think that the matter should be referred to the Registrar of Titles to ascertain the status Musoke. The Registrar of Titles should thereafter advise the Minister accordingly.

With regard to damages, we think that the applicant would be entitled to them if he was entitled to specific performance; but not otherwise. It would follow, therefore, that we would order for remission of the case to the High Court for assessment of damages only if the applicant's transfer was registrable. So, we were right not to make an order for damages because the respondent bank committed no breach of the contract because they could not have passed on title without the consent of the Minister.

../13

We would also like to observe that the records of Manyindo, DCJ, and Oder, JSC, bear out Mr. Nkurunziza's claim in his affidavit that at the hearing of the appeal the Court suggested to Mr. Mulenga, SC, that if - the appellant succeeded on the first ground of appeal, we would automatically remit the case to the High Court for assessment of damages.

In the circumstances we would refuse this application and the remedies sought by it. The application is, therefore, dismissed with costs. However, the following orders are also hereby made:-

(a) The parties hereto should refer the matter to the Registrar of Titles together with any evidence that may assist the Registrar in deciding whether Musoke was or was not an African.

(b) The Registrar of Titles should then refer the matter to the Minister for his decision.

(c) A copy of this Ruling and Orders should be forwarded to the Registrar of Titles and the Minister.

Platt, JSC, did not sign this Ruling although he was in the Coram that heard the application. This was because he had not been a member of the pannel that heard the appeal, which included Seaton, JSC, (now deceased).

DATED at Mengo This 12th day of January 1993

S.T.MANYINDO
DEPUTY CHIEF JUSTICE

A. H. ODER
JUSTICE OF THE SUPREME COURT

H. G. PLATT
JUSTICE OF THE SUPREME COURT

I CERTIFY THAT THIS IS A TRUE COPY OF THE ORIGINAL.

B.F.B. BABIGUMIRA
REGISTRAR SUPREME COURT.