conference held under sub-rule (1) of Rule 3 or is substantially unprepared to participate in such conference, the court shall make such orders against the defaulting or un-prepared party, agent or advocate as it deems fit, including an order for costs, unless there are exceptional circumstances for not making such orders.

It is abundantly clear to us that a judge can only act under that sub-rule if a party, its recognized agent and its advocate are all absent from a conference and without a good cause. In this case the party's advocate was present. So, the learned judge could not have acted under that sub-rule at all. That alone is enough to dispose of the matter but since a number of learned judges have done what was done in this case, we think we are duty bound to go further to settle this question once and for all, hopefully.

We have to consider what order a judge could give in case a party, its recognized agent and its advocate are all absent? That sub-rule provides that *a court shall make such orders against a defaulting or unprepared party, agent or advocate as it deems fit, including an order for costs*. Admittedly, there is not a list of the sort of orders that might be given. Equally, the court is given a very wide discretion of what orders it could give. The question is can a court order a default judgment? We think not. The clause "*including an order for costs*" indicates to us that the legislature regarded costs to be more serious than *"such orders"* a court could deem fit to give. It is abundantly obvious that a default judgment, and when it is against the defaulting party, is by far more serious than costs. So, default judgment cannot be given in such a situation.

Mr Mjindo referred us to a document titled "Notice of Mediation" whose paragraph 5 provides for default judgments. We do not know under what provision of the law that Notice of Mediation was made and, therefore, we cannot say that it has any legal value worth of consideration by this Court or any Court of law at all. So, the learned judge should not have considered that notice and use it to give a default judgment. We do not intend to say anything more on that

Notice of Mediation. We think that under Order VIIIA, rule 5, in case of a defaulting or an unprepared party, a court could give any of the following orders, that is to say:

(a) to adjourn the matter to another day; or

(b) that the mater should go for a hearing before another judge.

The court could also order costs together with any of the two orders mentioned above.

So, for the reasons given above we quash the default judgment of 15 June 1999, by Mackanja, J., and we order that the matter be placed before another judge for the hearing of the suit. The appeal is, therefore, allowed with costs.

LAEMTHONG RICE COMPANY LTD v. PRINCIPAL SECRETARY, MINISTRY OF FINANCE

COURT OF APPEAL OF TANZANIA
AT ZANZIBAR

(Kisanga, Ramadhani and Lugakingira, JJ.A.)

CIVIL APPEAL No. 91 OF 1998

(From the Ruling of the High Court of Zanzibar at Vuga, Dourado, J., dated 26 August 1998, in Miscellaneous Civil Application No. 2 of 1997)

Appeals – Leave to appeal – Whether leave to appeal may be granted by the court suo motu.

Civil Practice and Procedure – Correction of errors – Errors committed by parties in drawing up documents – Whether section 130 of the Civil Procedure Decree applies to correction of such errors – Procedure to follow in rendering corrections.

Court of Appeal Rules – Rule 43(a) of the Court of Appeal Rules providing for mode of applying for leave to appeal – Whether the rule makes it necessary to apply for leave to appeal – Whether overrides or adds to section 5(1)(c) of the Appellate Jurisdiction Act 1979 – Whether a judge can grant leave to appeal suo motu.

Limitation – Acknowledgment of time-barred debt and promise to pay it – Whether may give rise to a fresh period of limitation – Sections 19 and 29(a) of the Limitation Decree and section 25 of the Contract Decree.

Contract – Acknowledgment of time-barred debt with promise to pay – Whether may give rise to a fresh period of limitation – Section 25 of the Contract Decree Chapter 149.

Civil Practice and Procedure – Judge revokes and replaces his ex-parte judgment – Whether proper for a judge to do so – Principle of functus officio.

Civil Practice and Procedure – Decrees – Parties re-negotiate the court's decree – Whether there is any legal basis or precedent for such re-negotiation.

Civil Practice and Procedure – Litigant doubling as counsel for himself – Whether accords with accepted practice.

The appellant sued the respondent to recover a balance of price for goods sold and delivered. Upon the respondent failing to appear the High Court gave an *ex-parte* judgment in favour of the appellant. Then the appellant applied for setting aside the *ex-parte* judgment. The presiding judge made no order setting the ex-parte judgment aside; instead he permitted the parties to re-negotiate on the decretal amount. When no settlement could be reached the advocate for the appellant applied to the court to "restore" the *ex-parte* judgment. On 2 March the court purported to restore the judgment that had never been set aside. The restoration inspired the appellant to apply for execution of the decree. This was followed by an application for stay of execution made by the respondent and an application for review of the court's ruling that purportedly restored the *ex-parte* judgment. On 9 April the trial judge granted the application for stay and on 18 June he rejected the application for review. On 27 July the judge vacated the order for stay, ordering execution to proceed, but immediately suspended execution for a month to allow further negotiations. Since at the expiration of the month no settlement had been reached the judge ruled that the appellant be paid USD 15.5 million in full settlement. The court also ruled that if the decree holder

wished to appeal to the Court of Appeal permission was thereby granted. The appellant appealed to Court of Appeal against this ruling, without applying for leave to appeal, challenging the trial judge for variation of his earlier judgment and for not ordering execution of the decree.

Counsel for the respondent raised two preliminary objections, namely that there was no decree attached to the record of appeal and that leave to appeal had not been obtained because leave cannot be granted *suo motu*. With regard to the appeal itself counsel for the respondent submitted that the suit was time-barred. On the first ground of appeal counsel for appellant argued that the trial judge erred in permitting negotiations on the amount payable as if there was no judgment and decree, pointing out that since a decree existed the court had no further role to play but to execute that decree, because the judge was then *functus officio*.

Held: (i) While section 130 of the Civil Procedure Decree like section 96 of the Mainland's Civil Procedure Code 1966, applies to the correction of clerical and arithmetical mistakes in judgments, decrees or orders arising therein from any accidental slip or omission, the provision does not, however, apply to errors committed by the parties in drawing up documents, which should be amendable by the party concerned on application to the court;

(ii) Where, as in this case, the mistake occurs in a document prepared for presentation to the court, the application to amend should be made to this Court;

(iii) Section 5(1)(c) of the Appellate Jurisdiction Act 1979 does not predicate the grant of leave to appeal upon application being made; in other words, it does not exclude leave being granted *suo motu*;

(iv) What is required under section 5(1)(c) of that Act is leave of the High Court or Court of Appeal; it matters not how that leave is obtained but it would all depend on the circumstances of each case;

(v) Rule 43 of the Court of Appeal Rules 1979, provides for the mode of application for leave to appeal which is either informally or formally by chamber application, but not for the necessity to apply; the Rule does not add to or override the parent Act;

(vi) Since the judge did not wish the decree holder to go through a time-consuming application for leave to appeal and because an appeal was inevitable, he was right in granting leave to appeal *suo motu*;

(vii) Although the acknowledgment of debt was made after the expiration of the time of limitation, it was still capable of giving rise to a fresh period of limitation if section 19 of the Limitation Decree is read with section 29(a) of the same, and section 25 of the Contract Decree Chapter 149;

(viii) According to section 25(1)(c) of the Contract Decree an acknowledgment of debt made after the expiration of the period of limitation would give rise to a fresh period of limitation if it is coupled with a promise to pay the debt;

(ix) The Ministry's letter dated 15 July 1996 was an acknowledgment coupled with a promise to pay the debt within the meaning of section 25(1)(c) of the Contract Decree and therefore operated to give a fresh start to the period of limitation from the date of that letter, and since the suit was instituted only six months later, it was in time;

(x) Re-negotiation of the court's decree is something unheard of, hence what happened in this case was without basis in law or precedent; it was a travesty of the law and the whole exercise was illegal and incredible;

(xi) A judge becomes *functus officio* once he has given his original order and cannot depart from it in the absence of an application for review;

(xii) It does not accord with accepted practice for a litigant, which essentially Mr Patel was, to double as counsel for himself; it was improper for Mr Patel to assume the role he did in the High Court.

Appeal allowed

Cases referred to:

1) *Jewels and Antiques (T) Ltd v. NASACO* [1993] T.L.R. 107
2) *Zee Hotel Management Group v. Minister of Finance* [1997] T.L.R. 265
3) *Bibi Kisoko Medard v. Minister for Lands* [1983] T.L.R. 250
4) *Republic v. Philips* (1844) 1 Cox CC 17
5) *Robinson v. Palmar* (1851) 2 All ER 223
6) *Re West Hopetown Tea Company (1886)* ILR 9 All 180

7) *Akena Adoko Chambers v. Mohamed Maganga* [1980] T.L.R. 134
8) *The Registered Trustees Social Action Trust Fund v. Happy Sausages Ltd,* Civil Application Number 40 of 2000 (unreported)

Statutory provisions referred to:

1. Appellate Jurisdiction Act 1979, section 5(1)(c)
2. Limitation Decree sections 19 and 29(a)
3. Contract Decree Chapter 149, section 25
4. Mainland's Civil Procedure Code 1966, section 96
6. Civil Procedure Decree section 130
7. Court of Appeal Rules 1979, rule 43
8. Court Rules rule 43(*a*)
9. Zanzibar Limitation Decree (Chapter 12), Item 40 of the Schedule t

Dr Masumbuko Lamwa, for the Appellant

Dr Tenga, assisted by *Mr Mulamula,* for the Respondent

JUDGMENT

(Dated 18 December 2000)

Lugakingira, J.A.: In this appeal it is sought to quash the ruling of the High Court of Zanzibar made on 26 August 1998, which purported to revoke and replace an *ex-parte* judgment of that Court entered on 15 May 1997 in Civil Case Number 4 of 1997. That was a suit alleging breach of contract and instituted by the appellant. The appellant is an enterprise incorporated in Thailand with its registered office at 610/5-6 Songwad Road, Samphantwongse, in the City of Bangkok. A Zanzibar-based advocate, Mr Ajar Patel, appeared for the appellant in the High Court as agent under a Power of Attorney. The respondent was sued on behalf of the Government of Zanzibar.

On or about 23 July 1985, the respondent entered into a contract with the appellant company for the supply of 39 900 tonnes of rice worth USD 12 935 685. It was agreed that the price or any balance thereof would carry compound interest at 25% page A until full payment.

The rice was dully delivered in three shipments between 1986 and 1988 and there was part payment of the agreed price. The balance and the accumulated interest amounted to USD 69 044 651-24 as at January 1997. Efforts to secure settlement of the debt proved fruitless although the respondent did not deny the debt but actually acknowledged it on 15 July 1996. The appellant therefore instituted these proceedings in the High Court claiming the said sum of USD 69 044 651-24 together with interest thereon at 25% page A from 1 January 1997 until full payment. The respondent, though duly represented by the Attorney General's Chambers in Zanzibar, failed to file any defence due to his lack of co-operation with the Chambers. This led to the Chambers withdrawing in frustration and to an *ex-parte* judgment being entered on 16 May upon the evidence of Mr Patel.

Following this event, the respondent engaged the services of an advocate, Mr Theophan Mulamula, who filed Miscellaneous Application Number 47 of 1997 to set aside the *ex-parte* judgment. When the application came on for hearing on 22 July Mr Patel had this to say:

> We agree to set aside the *ex-parte* judgment on condition the parties re-negotiate the decretal amount and come to a satisfactory agreement within three months.

That marked the beginning of the problems of this case. The presiding judge (Dahoma, J.) made no order setting the *ex-parte* judgment aside, he adjourned the hearing of the application and fixed a mention for 17 December, to permit re-negotiation of the decretal amount as suggested by Mr Patel. Although the matter was mentioned three times thereafter, it was reported on each occasion that an agreement had not been reached. On 20 February 1998, the same Mr Patel applied to the court to "restore" the *ex parte* judgment for failure of a settlement.

Therefore, on 2 March, Dahoma, J. purported to restore the judgment although it had never been set aside. We consider it desirable to set out some portions of the ruling of 2 March in order to illustrate generally the ineptitude and confusion that characterized the proceedings before the High Court. The learned judge said:

> In the course of hearing the application to set aside *ex-parte* judgment there was a suggestion from the parties to adjourn the hearing of the application on condition that the parties re-negotiate the decretal amount and come to a satisfaction (*sic*) agreement within three months. This Court agreed to adjourn the application pending negotiations for settlement.
>
> The plaintiff has not been successful to meet the defendant and negotiate settlement and since there was no possibility of meeting the defendant, he prayed the *ex-parte* judgment be restored.
>
> Upon the best consideration that I have been able to give the case before this Court and regretting that the anticipated settlement has not been achieved and I see no prospect of such settlement or an end of it, I arrived at the following conclusion:
>
> It is ordered that the *ex-parte* judgment delivered on 16 May 1997 be restored.

Since the judgment had never been set aside, and the first of the above portions confirms this, the position is that the judgment remained throughout unaffected until it was purportedly restored. All the same, the above ruling gave rise to three matters. First, the appellant applied for execution of the decree on 3 April and listed the following assets for attachment: (i) all assets, wherever situate, of the People's Bank of Zanzibar; (ii) all ships belonging to the Zanzibar Port Authority/ State; (iii) Bwawani Hotel buildings; and (iv) such other assets, to be identified, of the judgment-debtor to the extent of the decretal amount. Second and third, on 7 April, Mr Mulamula applied for stay of execution of the decree vide Miscellaneous Application Number 31 of 1998 and for review of Justice Dahoma's ruling vide Miscellaneous Application Number 32 of 1998. On 9 April for a mention in order to fix "a firm date ... for the parties to get together ... to reach

agreement and pay the first installment." While fruitless negotiations were going on, Dourado, J. rejected the application for review on 18 June. On 27 July, he vacated the order for stay, ordering execution to proceed, but immediately suspended execution for a month to allow further negotiations.

At the expiration of the month, on 26 August, Mr Patel reported that agreement had not been reached and prayed for execution to proceed. Mr Mulamula confirmed the failure of negotiations. In attendance also was Mr Omar Sheha, the Principal Secretary (Finance), who added that the last figure the respondent was prepared to offer was USD 15.5 million. Mr Patel rejected it and said: "We don't agree. They are not in good faith, pay USD 20 million first. Then we talk." It seems the judge had reached the limit of his patience for he proceeded to write and deliver the following interesting ruling:

> I trust that I will never have to deal with a case like this. What is not in dispute is that the Zanzibar Government through the Minister of Finance ordered the rice and took delivery. What is in dispute is the amount to be paid.
>
> In the Memo of Understanding signed on 16 October 1991 the Minister of Finance acknowledged that USD 20 million was to be paid. It was witnessed by the page S. Mr Omar Sheha and the then Director of Finance Mr Julian Rafael. Later Minister Amina Salum said she signed it in error. This is unbelievable.
>
> In attempting to settle the matter Minister of Finance offered to pay USD 11 million plus interest at Euro rates – 30%. In response Laemthong rejected this and made a counter proposal of USD 102 645 097-18. First instalment USD 20 182 377-21. Balance of USD 82 462 719-92. This is an over-inflated claim which no one could support. The inflated figure includes interest at 25% page A Nowhere in the world could one earn this rate on dollar transactions.
>
> In order to get the matter settled once and for all I asked Mr Omar Sheha how far was the Government prepared to go above his faxed offer of 11 million dollars. He said his final offer was USD 15.5 million.

> I order that this amount be paid in full settlement.
>
> If not execution to proceed but not against Government funds with the People's Bank or against Government funds held abroad.
>
> I do not wish to deal with this case again. So if Decree-holder wishes to appeal to the Court of Appeal, permission is hereby given.
>
> Dated this 26 August 1998.
>
> Sgd.: W. Dourado
>
> Judge
>
> Supplementary order: USD 500 000 to be paid within 60 days. Balance will be worked out and presented to Court for approval.
>
> Dated 26 August 1998
>
> Sgd.: W. Dourado
>
> Judge

Pursuant to this ruling, Mr Patel drafted a decree which expressly states that the *ex-parte* judgment dated 16 May 1997 "is hereby revoked". The decree was signed by the judge. It is this ruling and decree which are the subject of appeal. The appeal was lodged by Mr Patel listing two grounds:

1. The trial judge erred in law and ought not to have varied his earlier judgment dated 16 May 1997.
2. The trial judge erred in law and ought to have ordered the execution as per the appellant's application dated 3 April 98.

The appeallant hence prays that the judgment dated 16 May 1997 be restored and that the High Court be directed to order its execution as per the appellant's application.

When the matter first came on for hearing at Zanzibar on 1 December 1999, Mr Patel appeared for the appellant while Dr Ringo Tenga appeared for the respondent assisted by Mr Mulamula. Something unusual then happened. An officer of the appellant company (one

Mr Chu) informed the court that the appellant had withdrawn instructions from Mr Patel and protested Mr Patel's appearance. There was an unpleasant tug-of-war, Mr Patel resisting his dismissal. Eventually Mr Patel withdrew and the hearing was adjourned to enable the appellant engage another counsel. The court next sat at Dar es Salaam on 17 March 2000 when the appellant was represented by Dr Masumbuko Lamwai. Dr Lamwai applied for an adjournment in order to prepare and file a supplementary record of appeal as the record filed by Mr Patel was incomprehensible and also contained some errors. In particular the notice of appeal and the extracted decree wrongly cited Miscellaneous Application Number 47 of 1998 as the proceeding in which the contested ruling was made. This error had earlier prompted Mr Mulamula to lodge a notice of preliminary objections to the appeal, first to the effect that the contested order was not attached.

The second objection was that the appellant had not applied for leave to appeal. After hearing Dr Lamwai, however, Dr Tenga conceded that the record of appeal was in serious confusion and acceded to Dr Lamwai's application, stating that he was in the circumstances not pressing the preliminary objections. Permission was accordingly granted to Dr Lamwai to file a supplementary record incorporating the necessary amendments.

The next sitting was at Zanzibar on 22 August and by then a supplementary record had been filed containing, among other things, a notice of appeal and a decree which cited Miscellaneous Application Number 2 of 1997 as the proceeding in which the impugned ruling was made, as well as Civil Case Number 4 of 1997 as the parent suit. It is necessary to explain here what happened in the High Court. Apart from the parent suit for which a record was opened, there were seven (7) interlocutory applications in the suit for which separate records were opened. For instance, Misc. Application Number 2 of 1997 was an application by Mr Patel for leave to appear as an agent for the appellant, while Misc. Application Number 47 of 1998 was an application to refer the dispute to an arbitrator. Each of these had its own file as did the rest. Because of his multiplicity of records,

parts of proceedings in one matter were transacted in the record of another matter. Hence, the proceedings culminating in the contested ruling, and the ruling itself, were transacted in the record for Misc. Application Number 2 of 1997 rather than the parent record of Civil Case Number 4 of 1997. What Dr Lamwai did, therefore, was to extract and put together in the supplementary record of appeal and the extracted decree duly amended to reflect the correct proceeding where they occurred or derived from.

It was a bit of a surprise to the court, therefore, when, despite Dr Lamwai's efforts, Dr Tenga reactivated the preliminary objections. He argued, first, that the decree was still not attached because the one on record still cited the wrong proceeding and, second, that leave to appeal had not been obtained because leave cannot be granted *suo motu*. He submitted in connection with the first objection that under section 130 of the Civil Procedure Decree (Chapter 8 of the Laws of Zanzibar), clerical errors may be corrected at any time by the court and cited *Jewels and Antiques (T) Ltd v. NASACO* (1), to support his argument. He charged that Dr Lamwai had, despite the adjournment, not appeared before the High Court to apply for corrections.

As regards the second objection, he cited *Zee Hotel Management Group v. Minister of Finance* (2). In reply Dr Lamwai referred to the confused nature of the record filed by Mr Patel and argued that since the matter was now on appeal, it was beyond the High Court to make corrections. On the second objection, he observed that the law was silent as to whether leave to appeal cannot be granted *suo motu*. Alternatively, he submitted that the order appealed from, after revoking the *ex-parte* judgment, gave rise to an original decree which was appealable without leave.

At the conclusion of arguments we promptly overruled Dr Tenga's objections and promised to give our reasons in this judgment. Meanwhile, we directed learned counsel to present written submission on the substantive appeal. Both counsel lodged their submissions in the time set by the court but Dr Lwamwai did not reply to the submissions

from the opposite side. We propose first to give reasons for overruling Dr Tenga's objections.

As stated, Mr Patel's appeal record was seriously and frustratingly confused. The use of eight files where one could have sufficed for all matters was a telling factor in the unfortunate state of that record. Bearing that in mind, we think, with respect, Dr Tenga's first objection is rather surprising. The extracted order or decree is now headed "Miscellaneous Application Number 2 of 1997" because the ruling from which it derives was made in that record. This was demonstrated to us beyond doubt when Dr Lamwai invited us at the hearing to look at the original record. That in the confused record of appeal the same order is headed "High Court Miscellaneous Application Number 47 of 1998", was certainly an error, and no doubt Mr Patel's error while drafting the decree; he made the same error on the notice of appeal. These, in our view, are not errors for correction by the High Court. Section 130 of the Civil Procedure Decree like section 96 of the Mainland's Civil Procedure Code, 1996, applies to the correction of clerical and arithmetical mistakes in judgments, decrees or orders or errors arising therein from any accidental slip or omission; that is to say, errors of the court involving the meaning or intendment of the judgment, decree or order which the court meant to pronounce.

The provision does not, however, apply to errors committed by the parties in drawing up documents, which should, to our understanding, be amendable by the party concerned on application to the court. Where, as in this case, the mistake occurs in a document prepared for presentation to this Court, the application to amend should be made to this Court. The case of *Jewels and Antiques*, while deciding that correction of errors is not subject to limitation of time, is not authority for the courts to correct errors committed by the parties. There was therefore no need for Dr Lamwai to return to the High Court for that purpose. Moreover, we think it would have been misleading and a misrepresentation of the true position to show simply that the documents in question related to a decision in Civil Case Number 4 of 1997 without citing Miscellaneous Application Number 2 of 1997

in whose record the decision was actually made. You cannot get away from reference to Miscellaneous Application Number 2 of 1997 without retrying the case all over. We were therefore satisfied that Dr Lamwai proceeded correctly as he did and that a proper decree was on record.

The second objection is no less surprising. The objection arose because, if one reverts to the ruling of Dourado, J., leave to appeal was granted *suo motu*. According to Dr Tenga, this was not proper leave but there should have been an application for it. We think that is straining section 5(1)(c) of the Appellate Jurisdiction Act 1979 which is relevant on this subject. The provision reads:

> (1) In civil proceedings, except where provided by any other written law for the time being in force, an appeal shall lie to the Court of Appeal :
>
> (c) with leave of the High Court or the Court of Appeal, against every other decree, order, judgment, decision or finding of the High Court.

We agree with Dr Lamwai that the provision does not predicate the grant of leave upon application being made; in other words, it does not exclude leave being granted *suo motu*. If the Legislature had intended otherwise, it could easily have said so. We see no reason to tamper with the liberality of the provision and to read into it a limitation which is not there, but we think whether or not there ought to be an application would depend on the circumstances of each case. In this case the judge well knew that this decision was unacceptable to the appellant which was therefore likely to appeal. He knew this because he made the ruling in defiance to Mr Patel's rejection of the respondent's offer. He did not wish the decree-holder to go through a time-consuming application for leave to appeal since an appeal was inevitable. We cannot fault the learned judge for being true to reality but we commend his action. This is not to say that we are unaware of rule 43(*a*) of the Court Rules which is also relevant in the matter. It states:

(a) where an appeal lies with the leave of the High Court, an application for leave may be made informally, when the decision against which it is desired to appeal is given, or by chamber summons according to the practice of the High Court, within fourteen days of the decision.

As a general rule, the provisions of a subsidiary legislation cannot override or add to the parent Act. In this case, too, rule 43 does not purport to add to the Act. It merely provides for the mode of application, for example either informally or by chamber summons, but not for the necessity to apply. The *Zee Hotel Management* case to which we were referred, is no authority in this context but it will be revisited in a fitting context later. We do not, on the other hand, have to go into whether the substituted decree became the original decree as the more burning question is whether it was a decree in the first place. The second objection is, in short, similarly untenable. What is required under section 5(1)(*c*) is leave of the High Court or the Court of Appeal; it matters not how that leave is obtained but it would all depend on the circumstances of each case. The circumstances of this case, not least the defiant manner is which the ruling was made, justified the step taken by the trial judge.

We now turn to the appeal. In his submissions Dr Tenga raised a question of limitation which it is necessary to consider first. As indicated earlier, Dr Lamwai did not reply to those submissions, so we did not have the advantage of his views on the matter, Dr Tenga points out that according to the plaint, the rice was supplied between 1986 and 1988. The suit was instituted on 22 January 1997. He draws attention to Item 40 of the Schedule to the Zanzibar Limitation Decree (Chapter 12), according to which the limitation period for a suit for the price of goods sold and delivered is three years from the date of delivery. Since this suit was instituted well over three years after 1988, he submits that it was hopelessly time-barred and should have been dismissed as required by section 3 of the said Decree. That provision states:

3(1) Subject to the provisions contained in sections 4 to 25 (inclusive), every suit instituted after the period of limitation prescribed therefor by the Schedule shall be dismissed although limitation has not been set up as a defence.

(1) A suit is instituted, in ordinary cases, when the plaint is presented to the proper officer; in the case of a pauper, when his application for leave to sue as a pauper is made; and, in the case of a claim against a company which is being wound up by the court, when the claimant first sends in his claim to the official liquidator.

Dr Tenga further argues that although the respondent acknowledged the debt in 1996, the acknowledgement was of no effect because it came after the period of limitation had expired. He relies on section 19(1) which states:

(1) Where, *before the expiration of the period prescribed* for a suit in respect of any property or right an acknowledgement of liability in respect of such property or right has been made in writing signed by the party against whom such property or right is claimed, or by some person through whom he derives title or liability, a fresh period of limitation shall be computed from the time when the acknowledgement was so signed. [emphasis supplied]

Generally, Dr Tenga argues that on the ground of limitation alone, the High Court had no jurisdiction to entertain the suit and invites this Court to hold so. The consent of the parties to the proceedings in ignorance of the law did not, he emphasizes, give jurisdiction to the High Court.

We are grateful to learned counsel for raising this issue and for his arguments in connection thereto. Indeed under Item 40 of the Schedule to the Limitation Decree the period of limitation for the price of goods sold and delivered, where no fixed period of credit is agreed upon, is three years from the date of the delivery of the goods; similarly under Item 41, the period is three years from the expiry of the agreed period of credit. In this case the moneys were "payable 360" days from date of Bill of Lading for each of the shipments effected." This, we believe, brings the suit under Item 41.

In all respects, the period of limitation had apparently long expired when the suit was instituted and this judgment would have been incomplete without addressing this issue. The question now is whether Dr Tenga's submissions prevail. Unfortunately, they do not. Although the acknowledgement of debt was made after the expiration of the time of limitation, it was still capable of giving rise to a fresh period of limitation if section 19 of the Limitation Decree is read with section 29(a) of the same and section 25 of the Contract Decree (Chapter 149). The former provides:

> 29. Nothing in this Decree shall:
>
> (a) affect the provisions of section 25 of the Contract Decree.

In turn, section 25(1)(c) of the Contract Decree states thus:

> 25(1) An agreement made without consideration is void, unless
>
> (c) it is a promise, made in writing and signed by a person to be charged therewith, or by his agent generally or specially authorized in that behalf, to pay wholly or in part a debt of which the creditor might have enforced payment but for the law for the limitation of suits. [emphasis mine]

According to this provision, an acknowledgement of debt made after the expiration of the period of limitation would give rise to a fresh period of limitation if it is coupled *with a promise* to pay the debt. **Chitaley and Rao** (Volume I, (38 ed), page 640 note 9), makes this observation in comments on section 19 of the Indian Limitation Act 1908 and says:

> Under this section an acknowledgement of liability in respect of a debt must be made before the expiry of the period of limitation, in order to give a fresh start of the limitation in respect of such debt. But by virtue of section 25 clause 3 of the Contract Act [equivalent] of Zanzibar's section 25(1)(c) cited above] a fresh period of limitation for a debt can be obtained even after the expiration of the original period, if there is a promise to pay such debt.

It is further stated on page 642:

> ... a promise under section 25 Clause 3 of the Contract Act need not be express. It may be implied; only, it must be implied otherwise than by a mere acknowledgement of liability. It is a matter of construction of each document whether it amounts to a mere acknowledgement of liability or contains a promise within the meaning of section 25 Clause 3 of the Contract Act.

In the case before us, the respondent wrote to the appellant company on 15 July 1996 acknowledging the debt; the question is whether the acknowledgement was coupled with a promise to pay so as to bring it within the ambit of section 25(1)(*c*) of the Contract Decree. We think it was, and for the avoidance of doubt, we set out the most pertinent part of the communication.

> ... we wish to kindly confirm that our letter of January 1996 is still valid and that the Government is committed to pay the debt. In this respect we wish to suggest the repayment period indicated in our previous letter be shifted to September 1996 and that your representative be advised to visit Zanzibar during September or October subject to prior confirmation [emphasis mine].

The letter was duly signed for the Principal Secretary and copied to another Ministry concerned in the affair. This letter is not a mere acknowledgement of liability, it is an express commitment to pay the debt as per the clause we have emphasized. Although the schedule of payment was subject to re-negotiation, that did not take away from the promise to pay. This letter, in our view, was an acknowledgement coupled with a promise to pay within the meaning of section 25(1)(*c*) of the Contract Decree. It therefore operated to give a fresh start to the period of limitation from 15 July 1996, the date it was signed. Since the suit was instituted on 22 January 1997, for example six months later, we are satisfied, and so hold, that it was in time. We will therefore proceed to the grounds of appeal.

The first ground is the basic one, the second being consequential to it. It takes issue with the ruling of Dourado, J. which purported

to revoke and replace his *ex-parte* judgment passed a year earlier. Dr Lamwai tries to demonstrate in his submissions that the *ex-parte* judgment and decree existed up to 26 August 1998 when the contentious ruling was made. He therefore argues that the trial judge erred in permitting negotiations on the amount payable as if there was no judgment and decree. He says that since a decree existed, the court had no more role to play, but to execute that decree, because it was then *functus officio*. He refers to *Bibi Kisoko Medard v. Minister for Lands* (3), as well as *Zee Hotel Management* (above), the latter being a case on all fours with the instant case.

Dr Tenga first takes issue with the record of appeal, stating that it is incomplete. We see no significance in this complaint since we were not disadvantaged by any omission in the record in the preparation of this judgment. If, however, the record was not to learned counsel's satisfaction, he was at liberty to file a supplementary record in accordance with rule 92(1) and (2). As regards the appeal, Dr Tenga's basic argument is that "the parties willingly abandoned the decree granted ... and were willing to re-negotiate the decretal amount." In his view, therefore, the contested decree was a consent decree. He refers to the application for review and contends that it was not concluded, but only conditionally rejected, and therefore concludes that the principle of *functus officio* does not arise in this case; the decree was in a sense yet to be finally determined. Regarding the second ground, he argues that given the existence of applications which sought to challenge the validity of the *ex-parte* judgment, it would have been unlawful for the High Court to order execution of the judgment.

The nature of the grounds of appeal permits that they be taken together. The arguments of learned counsel translate into the questions, namely, whether the *ex-parte* decree existed until it was purportedly revoked or whether it was properly vacated and replaced with a negotiated one.

On the first question, we are in agreement with Dr Lamwai that the original decree was in existence until it was purportedly revoked

and replaced. The review of the events carried out earlier in this Judgment demonstrates that position. We only differ with the learned counsel where he also contends that there was no application for review, for an application there was, save that it was directed at the ruling of Dahoma, J. which purported to restore the judgment.

Besides, Dr Tenga, although contending that "the parties willingly abandoned the decree," actually concedes that the decree subsisted for he also observes that "the court constantly gave conditional directives and orders which constantly produced the wrong illusion that the matter was *sub judice* and would be amenable to further consideration despite the existence of an Order of the Court." It is also curious for Dr Tenga to suggest that the application for review was not concluded merely because its rejection was followed by proposals for further negotiations. In our view, those proposals had no effect on the finality of the rejection, but that was yet another instance of the inadmissible acts in the proceedings. The moment the judge ruled rejecting the application, he was *functus officio* and could not, as it were, reopen the review exercise. In all considerations, therefore, the decree subsisted until it was purportedly revoked and replaced.

The above observation applies to the second issue: the parties could not re-negotiate the court's decree. That is something unheard of, hence what happened in this case was without basis in law or precedent; it was a travesty of the law. The trial judge promoted encouraged and even compelled re-negotiation of the decretal amount already granted by him. There is no provision in the Civil Procedure Decree which authorizes or countenances such negotiations but the whole exercise was illegal and incredible. Even if an agreement were reached, but there was actually none, it would have been void and of no effect. The only aspect which can be negotiated is the mode and manner of satisfying a decree but not the content of it.

When a decision is made and communicated to the parties, that marks the end of the court's duty. Oversights, errors of substance and after thoughts are not unheard of but, however burdening to the

conscience, the court cannot *suo motu* revisit its decision and replace it with another. The law appreciates this fully and provides in its body the machinery for remedying injustices. They include review, revision and appeal, and even setting an ex-parte decision aside. The justification for denying power to resume decisions is obvious. If decisions were to be altered at the maker's pleasure, there would be no certainty of judgment, an essential attribute of any credible system of justice. Trials would be a farce and decisions would be meaningless.

The handling of this case was, without exaggeration, farcical. We are particularly disturbed that this had to happen in this case, not so long after the same judge was warned against the same mistake. In *Zee Hotel Management* already referred to, and in which the present respondent was also respondent, the judge varied *suo motu* an order previously made by him in a scenario not unlike the present. The court took the opportunity to warn him that he was *functus officio* once he had given his original order and could not depart from it in the absence of an application for review. It beats imagination that he was soon at it again. The decisions of the court are meant to be followed except where they can be distinguished. We are satisfied that the judge was grossly in error when he revoked and replaced the *ex-parte* judgment.

Finally, we are unable to agree with Dr Tenga that there existed applications which militated against execution of the judgment. The application to set the judgment aside was admittedly never heard and, as already shown, the judgment was never set aside. However, the application suffered annihilation, if that be the appropriate term, in the course of Dahoma J.'s contradictory ruling of 2 March, 1998. In that ruling the judge first correctly observed that the application was adjourned to permit the parties to re-negotiate the decretal amount. But later on he changed course and treated the application as having been heard and the judgment as having been set aside for he went on to "restore" the judgment. Therefore, as far as the High Court was concerned, that was the end of that application.

The application to review Dahoma J.'s ruling was, as already seen, rejected by Dourado, J. as early as 18 June 1997. The application to refer the dispute to arbitration was misconceived as it came after judgment was entered. It was undoubtedly an alternative device to re-negotiate the decretal amount. The application to stay execution was first granted, then vacated and execution ordered to proceed, but execution was suspended for one month to enable yet more negotiations. At the expiration of the month, the contested ruling was made. The remaining applications are irrelevant and need not be mentioned. These events, in our view, do not testify to the High Court's inability to proceed with execution but the court simply did not wish to.

Before concluding, we wish to comment on another matter raised by Dr Tenga. It is about Mr Patel's role before the High Court. Mr Patel was granted leave to act as agent for the appellant but in no time he became agent, witness and advocate, all in one. This matter has exercised our minds. We think it does not accord with accepted practice for a litigant, which essentially Mr Patel, was, to double as counsel for himself. The position has apparently been inconsistent but we think this view represents the dominant thinking. From *R. v. Philips* (4) in England, to the Canadian case of *Robinson v. Palmer* (5), and the Indian case of *Re West Hopetown Tea Company* (6), the position is that where a barrister appears as a litigant in person, he does so as any ordinary member of the public and must not address the court from the advocates' table or in robes. The High Court in this country took the same position in *Akena Adoko Chambers v. Mohamed Maganga* (7) and that decision was approved recently by this Court in *The Registered Trustees Social Action Trust Fund v. Happy Sausages Ltd* (8) where the court further suggested some reasons for that position.

In the light of these instructive examples, we share Dr Tenga's discomfort and wish to state that it was improper for Mr Patel to assume the role he did in the High Court. As a party to the suit, he should have instructed another counsel to appear for him rather than

become counsel to himself. It is indeed tempting to add that Mr Patel was equally responsible for the difficulties of this case. It is he who, surprisingly, first came up with the suggestion to re-negotiate the decretal amount and kept up his enthusiasm to the very end. In the end we have difficulty judging how useful he was to his principal's cause. For the reasons we have endeavored to state, we find merit in this appeal and allow the same. The ruling of 26 August 1998 is quashed and set aside, and the High Court is directed to proceed and execute the *ex-parte* judgment of 16 May 1997. The appellant is granted costs here and below but it is directed that with the High Court proceedings, the expenses only of Mr Patel as a litigant will be reimbursed.

IDDI NZIMANO *v.* NATIONAL BANK OF COMMERCE

HIGH COURT OF TANZANIA
AT TABORA
(Mwita, J.)

CIVIL REFERENCE No. 2 OF 2000

(From the decision of the Court of Resident Magistrate at Tabora, Taxing Master)

Civil Practical and Procedure – Taxation – Whether taxing master may take into account unreceipted items – Rule 67 of the Advocates' Remuneration and Taxation of Costs Rules 1991 (GN Number 151 of 1991).

Civil Practice and Procedure – Taxation – Circumstances in which the court may remit matter to taxing master for review.

In March 1990 the respondent sued the applicant in the High Court to recover TZS. 998 699 being accumulated interest and loan extended to the applicant. On 22 December 1992 the matter was transferred to the Court of the Resident Magistrate where it

was filed as Civil Case Number 50 of 1992. On 2 December 1994 judgment was entered in favour of the applicant. The appeal by the respondent to the High Court was partly allowed and partly dismissed with an order that each party bear the costs of the appeal. A subsequent appeal by the respondent to the Court of Appeal was struck out on 4 December 1998. The applicant then filed his bill of costs on 12 December 1999 praying that it be taxed at TZS. 5 550 990. The taxing master taxed the bill at TZS. 232 500. The applicant referred the matter to the High Court. In his application for reference the applicant had three rounds: (a) that the taxing master erred in taxing off all the items prior to 1992; (b) the taxing master erred in taxing off travelling expenses from Dar es Salaam to Tabora and back and (c) the taxing master erred in taxing off 50% for items not supported by receipts.

Held: (i) The taxing master was entitled to tax off the Dar es Salaam – Tabora – Dar es Salaam travelling expenses as the applicant had given his residential address as Manyema Street, opposite Jumaa Mosque, Tabora, and had given no notice of change of address.

(ii) There is no provision in the rules stipulating that the taxing master must award 50% of all items not supported by receipts or vouchers.

(iii) As the taxing master was not in possession of the original record of the High Court between 1 March 1990 and 22 December 1992 which showed appearances, the taxing master did not have reasonably sufficient material before him on the basis of which he could act;

Order accordingly

Cases referred to:

(1) *Zuberi v. Returning Officer* [1973] EA 33

(2) *Thomas James Arthur v. Nyeri Electricity Undertaking* [1961] EA 492

(3) *Ali Nyanganda v. Emilian Kihwili* [1967] HCD n 177

Statutory provisions referred to:

1. Items – Rule of the Advocates' Remuneration and Taxation of Costs Rules 19N1 (G.N. Number 151 of 1991)