IN THE COURT OF APPEAL

AT MOMBASA

(Coram: Hancox, J.A., Platt and Gachuhi, Ag.JJ.A)

CIVIL APPEAL NO. 18 OF 1985

BETWEEN

INTALFRAME LIMITED..... APPELLANT

AND

MEDITERANEAN SHIPPING COMPANY..... RESPONDENT

(Appeal from a ruling of the High Court of Kenya at Mombasa (Bhandari, J.) dated 28th August, 1984

in

Civil Case No. 788 of 1982)

JUDGMENT OF HANCOX, J.A.

On December 12, 1977 a decree was given by the High Court of Tanzania at Dar-es-Salaam ordering that *exparte* judgment be entered for the plaintiff in Civil Case 157 of 1976, for Shs 122,103.30 plus interest and costs. The decree was not issued until January 6, 1982. On March 23, of that year the court certified that the decree remained unexecuted. On the same day Mapigano J ordered the transfer of the decree to Mombasa for execution, and on June 30, the Tanzania High Court re-submitted the certified copies of those documents to this court.

As Bhandari J from whom this appeal is brought, said, the judgment supporting the decree was not registered in this court, but was accepted by the High Court Registry and assigned a case number. Accordingly, Part IV of the former Foreign Judgments Enforcement Act (cap 43 of the Laws of Kenya) ("the Act") (since replaced by the Foreign Judgments (Reciprocal Enforcement) Act, 1984 as from August 31, 1984) was not complied with. Bhandari J, took the view that part IV of the Act, and not part III, which allows the simplified procedure of transferring decrees from certain neighbouring countries, applied.

Accordingly, he held that the decree was wrongly accepted by this court and ordered it to be vacated. The consequential steps in execution which were applied for by Messrs Archer and Wilcock (whom Mr

Barasa represented on the appeal before us), who are on record for the decree holders, Italframe Ltd, on May 11, 1984 and ordered on May 24 were also vacated.

Bhandari J's reasons for holding that part III of the Act did not apply were perfectly clear. He took the view that the words "The High Court of Tanganyika" which were substituted for "Her Majesty's High Court of Tanganyika" by the Statute Law (Miscellaneious Amendments) Act, 1964, which came into force on November 3, 1964, did not mean, and could not be taken to mean, the then new State of the United Republic of Tanzania. This comprised both Tanganyika and Zanzibar, and it is now accepted by both sides, came into being on April 26, 1964. He held that the position had wholly changed since the Act was originally passed while the British Empire existed, that the situation no longer obtained and that consequently the word "Tanganyika" could not be taken to mean Tanzania. He referred to the Kenya High Court decision in *Re Lowenthal and Air France [*1967] EA 75. In that case the judgment, which was from the High Court ofZambia, was registered in Kenya under part II, but Rudd J at P 76 held that:

"The British Protectorate of Nothern Rhodesia attained independence in 1964 and became the independent Republic of Zambia within the Commonwealth. The question is whether the application of Part II of the Act to the superior courts of Northern Rhodesia continued in effect after Zambia became independent so as to apply Part II of the Act to the superior courts of Zambia. In my opinion this question must be answered in the negative. There was clearly a major legal change of status when Zambia became independent and I think it would not be correct or right to say that the superior courts of Zambia are or were, since the independence of Zambia, superior courts of Northern Rhodesia. In my opinion if Part II of the Act could be applied to the courts of Zambia, as to which I would reserve my opinion, it would require legislative action in Kenya to effect the application and I can find no such legislative action which had that effect. For these reasons the present application must succeed."

So in that case, though there was an issue of nomenclature, as Mr Baraza put it when arguing this appeal in front of us, the decision really turned on the fact that there had been a major change of status when the former territory of Northern Rhodesia became the Republic of Zambia in 1964.

Mr Baraza asked us to hold that the draftsman of the 1964 amending Act must have made a mistake and inadventently used the word "Tanganyika". He submitted that the provision in section 6 would make nonsense unless the word "Tanganyika" were

read as Tanzania since by the time it was enacted there was no such country as Tanganyika. This must have been within the knowledge of the draftsman and of Parliament which enacted it.

On the question of the construction of a statute, which would lead to manifest absurdity if interpreted literally, Mr Baraza cited to us several passages from *Halsbury's Laws of England,* 3rd Edition Volume 36. He said that absurdity would result if that part of it which contains section 6 were not applied to Tanzania, because it would then be in-operative, and it must have been the intention of Parliament to apply the less strict system of transferring decrees from neighbouring countries. Once the decree is so transferred it could be executed on persons within the jurisdiction in accordance with the remainder of section 6 and of the ordinary provisions in section 30 to 33 of the Civil Procedure Act, which relate to the transference of decrees within Kenya. It was not a question of reciprocity, he said, (which of course is now rendered essential by the new, 1984, Act) but of a privilege being granted to a neighbouring country to preserve comity between the two. In support of this submission Mr Baraza cited para 582 of *Halsbury,* which I now set out in full:

"582 Statutes must be so construed as to make them operative. If it is possible, the words of a statute must be construed so as to give a sensible meaning to them, *ut res magis valeat quam perat*. A statute must, if possible, be construed in the sense which makes it operative, and nothing short of impossibility so to construe it should allow a court to declare a statute unworkable. Thus where a statute has some meaning, even though it is obscure, or several meanings, even though there is little to choose between them, the courts must decide what meaning the statute is to bear, rather than reject it as a nullity. It is not permissible to treat a statutory provision as void for mere uncertainty. Unless the uncertainable meaning and must therefore be regarded as meaningless. Where the main object and intention of a statue are clear,

it should not be reduced to a nullity by a literal following of language, which may be due to want of skill or knowledge on the part of a draftsman, unless such language is intractable."

Mr Baraza concluded his argument by urging us that his was clearly an instance of a misnomer, that the learned judge was wrong in holding, in effect, that the decree should be deregistration because, on the correct interpretation of the Act, no registration of the Tanzania decree was statutorily necessary in the first place.

It is important to bear in mind the stated purpose of the amending Act of 1964. The preamble to the Act says that its purpose is to promote the revision of the laws by making minor amendments to certain written laws. But the memorandum of objects and reason subtended to the Bill says its purpose is to bring the statute law up to date by removing minor errors, anomalies and anachronisms, and by affecting amendments of a minor nature.

What are the amendments in fact effected by the Act? They are clearly minor in nature, and, with regards to both the Act and to the Fugitive Offenders Pursuit Act, Cap 87, they are made in the context that Kenya had then recently become independent, as had Uganda and Tanganyika shortly before, and therefore quite clearly the reference to "Her Majesty's High Court" and to the "adjoining British Territories", were inappropriate, and anachronisms in the true sense. Further, in the Distress for Rent Act (cap 293), the word "Crown" is replaced by more appropriate language. So the pattern of the amendments, at any rate relating to the title of the courts of former sovereign, or its lands, was that the Independence of Kenya was being given effect to in the language of statutes which had previously referred to the Crown.

An amendment, however, relating to a sovereign country cannot in any sense be regarded as a minor amendment. It is not even in evidence, for instance, that Kenya had recognised the new State of Tanzania, moreover the arguments against construing the words naming the former Crown territory is even stronger than in *Re Lowenthal* (*supra*), because at least there Zambia remained geographically the same as Northern Rhodesia, which cannot be said of Tanzania, which by then included Zanzibar, and was not geographically the same entity.

Furthermore the passage from *Halsbury* cited by Mr Baraza which I do not entirely accept, must be read with paragraph 584 which Mr Baraza omitted to read until we drew his attention to it. It states:

"it is not competent to any court to proceed upon an assumption that Parliament has made a mistake, there being a strong presumption that Parliament does not make mistakes. If blunders are found in legislation, they must be corrected by the legislature, and it is not the function of the court to repair them. Thus, while terms can be introduced into a statute to give effect to its clear intention by remedying mere defects of language and to rectify obvious misprints or misnomers no provision which is not the statute can otherwise be implied to remedy an omission."

This receives support from the case of *Bristol Gaurdians v Bristol Waterworks Co* [1914] AC 379, in which the question arose as to whether the workhouse in Bristol was entitled to a domestic water supply in the same way as a dwelling house, though the former was not mentioned in the Bristol Waterworks Act, 1862. Lord Loreburn LC said, at page 388:-

"Now it is one thing to introduce terms into an Act of Parliament in order to give effect to its clear intention by remedying mere defects of language. It is quite another thing to imply a provision which is not in the statute in order to remedy an omission, without any ground for thinking that you are carrying out that Parliament intended. I ask myself, did Parliament intend that the payment or tender should be a reasonable sum to be fixed if need by the courts? For what the justices are to determine is only the value of the tenant, not the rate or amount to be paid. I have no ground for believing that Parliament meant this curious method. I do not believe it did, and to insert such a provision would be simply making not

interpreting, the law. After all, it is not our function to repair the blunders that are to be found in legislation. They must be correct by the legislature."

The same principle applies, to my mind, in the instant case. We are not here to speculate on whether the draftsman, or Parliament intended to apply part III of the Act to Tanzania. It would be most dangerous for any court to presume to insert in legislation a substantive word naming a new country in a statutory provision. That is for Parliament. In *King-Emperor v Benoari Lal Sarma* [1945] 1 All ER 210 at p 216, Lord Simon said:-

"Again and again, this Board has insisted that in construing enacted words we are not concerned with the policy involved or with the result, injurious or otherwise, which may follow from giving effect to the language used."

Without any disrespects to Mr Baraza's able and persuasive argument I would therefore conclude that Bhandari J was entirely right in his conclusion that part III of the Act had not been shown to apply to Tanzania, and that, as registration under Part IV had not been effected, the purported acceptance of the decree by the Registry was wrong and that it should be vacated.

I would therefore uphold Bhandari J's decision and I would dismiss the appeal from it with costs. As Platt and Gachuhi Ag JJ A are of the same opinion it is so ordered.

Platt Ag JA. The High Court in Mombasa reduced to accept for registration a decree of the High Court of Tanzania , and to permit the execution of it in Kenya. The Registrar of the High Court of Tanzania had sent the decree in Dar-es-Salaam Civil Case No 157 of 1976 which had been decreed by their court of Tanzania at Dar-es-Salaam on December 12, 1977. The decree was issued on January 16, 1982, and the transfer was ordered in March 1982, by a judge of the High Court, the tansfer actually taking place on June 30, 1982. The Registrar of the High Court in Mombasa, having acted upon this matter in June 1984, a process server called at the offices of Ocean Freight Company Limited, and served a notice to show cause why execution should not be levied. Ocean Freight Ltd is the agent in Kenya of the Mediteranean Shipping Company, the defendant in the Tanzania suit, against whom judgment had been obtained by the plaintiff Italframe Limited. The Defendant protested ignorance of any such suit or judgment against it, and on July 20, 1984, applied to the High Court to set aside the registration. After a careful ruling, the High Court acceded to the request by the Defendant, and set aside the registration, together with all orders made in pursuance of the application for execution. It is from these orders of the High Court that Italframe Limited has appealed. The main contention is that the learned judge misdirected himself in law in holding that part III of the Foreign Judgments Enforcement Act (Cap 43), and in particular section 6, did not apply to the decree of the High Court of Tanzania. Consequently the learned judge had wrongly directed the Register to refuse to accept the decree for execution.

Part III of the Foreign Judgments Enforcement Act is headed.

"Execution in Kenya of Decrees and Warrants of Certain Neighbouring Countries."

The "certain neighbouring countries" are specified in section 6 of the Act as being Zanzibar, Uganda, Nyasaland and Tanganyika. The courts in those neighbouring countries in which a decree might be obtained are described as Her Britannic Majesty's Court for Zanzibar, herMmajesty High Court of Uganda, Her Majesty's Court of Nyasaland or Majesty's Court of Tanganyika or any court subordinate to those courts. Then in 1964 by the Amending Act 19 of 1964, the words "Her Majesty" describing the High Court of Tanganyika were deleted. So, of the four courts mentioned in section 6,7 and 8 of the Act Majesty's title remained except for the High Court of Tanganyika.

Mr Baraza submitted in general that there was no real deference between the styles of the High Court; that is to say it did not matter whether the High Court at Dar-es-Salaam was referred to as the high court of Tanganyika or the high court of Tanzania. In developing his argument however, he drew attention to the fact that the state known as Tanganyika had gone through a political change, because of its union with the state of Zanzibar, so that on April 26, 1964 there came into being the United Republic of Tanzania. The court was entitled, he said to take judicial notice of the historical fact; and I think there was no real dispute that that was so. But as a result of the birth of the United Republic of Tanzania, Mr Baraza submitted that the amendment in the Amendment Act No 19 of 1964 to the Foreign Judgments

Enforcement Act (Cap 43), was very much behind the times and should be treated as being an error. This error, Mr Baraza claimed, had only been put right by the amendments in Act No 4 of 1984. The position now is that arrangements have been made to accept decrees from the high court of Tanzania.

On the other hand, Mr Satish Gautama submitted that it was not right for the court to speculate why the legislature in 1964 concerned itself with the high court of Tanganyika. He maintained that the basis of executing foreign judgments was the reciprocal advantage gained by the states, which had agreed to execute each other's judgments. It was not to be supposed that decrees of the High Court of Tanganyika did not exist, or that the Act as amended in 1964 could not operate to advantage. Therefore the learned judge was right.

It is no doubt true, that the basic principle upon

which neighbouring or other states provide for the enforcement of foreign judgments, is one of the reciprocity and the advantage to be gained therefrom. That is clear from the preamble of Chapter 43; the Act is one to make provision for the enforcement elsewhere of judgments obtained in Kenya. Part III of the Act refers to the situation where Her Majesty had established courts in the four neighbouring countries named, in which situation there was inbuilt reciprocity. Indeed, as far as those countries immediately neighbouring Kenya are concerned, there was at one time a common currency and an organization providing common services. But as the learned judge pointed out, once these countries became independent states, it was for them to establish such relations with their neighbours as they desired. In the High Court of Kenya, Rudd J (as he then was) faced that situation in *Re Lowenthal and Air France* [1967] EA at p 75. The question was whether the application of part II of the Foreign Judgments Enforcement Act to the superior courts of Northern Rhodesia, continued in effect after Zambia became independent, so as to apply part II of the Act to the superior courts of Zambia. Rudd J answered that question in the negative. He pointed out there was a major legal change of status when Zambia became independent, and therefore it could not be right to say that superior courts of Zambia were the same as the superior courts in Northern Rhodesia. He was of the opinion that legislative action in Kenya would be needed to provide that part II of the Act applied to the superior courts of the new state of Zambia. With respect to the learned judge I would entirely agree.

But it was urged that the situation in Tanzania was not simply that Tanzania had

gained independence. With respect, I would have thought that the situation was even more difficult than that sort of change. Here two states joined together, and as we know from history, this came about as a result of revolution in Zanzibar. Despite the union of these two states, Zanzibar retained its own President, Parliament and system of courts, though there were a number of union matters. It was certainly not a case where union affected a common judicial system throughout the two states. Each one had its own Chief Justice. The question then for the independent Republic of Kenya, was whether it should have a specific reciprocal arrangement with the mainland, which had been known as Tanganyika, and another with the Island known as Zanzibar. There was no rush to put these new relations to the test, but what the amending Act of 1964 achieved, was to accept decrees from superior and other courts of independent Tanganyika. After 1962, the High Court of Tanganyika was not Her Majesty's Court. Therefore it was not wrong to amend the Act, so as to reflect the changed circumstances in Tanganyika before Tanganyika joined Zanzibar to form the United Republic of Tanzania. After the union, it appears that sometime was taken to recognise the High court of Tanzania.

It is of interest to observe what the reciprocal arrangements were in Tanzania. In Chapter 8 of the Laws of Tanzania will be found the provisions of the Foreign Judgments (Reciprocal Enforcement) Ordinance, which deals with the registration of foreign judgments. This chapter was dealt with in supplements between 1966 and 1970. But it still retained traces of original ordinance of 1935 referring to Tanganyika "the Territory". It was well known that it was then called Tanganyika Territory which was administered under mandate from the League of Nations and later United Nations. In the definition section the following appears:-

"Judgments given in the superior courts in the Territory" means judgments given in the High Court of

Tanganyika and includes any judgments given in any courts on appeals against any judgments so given."

It is clear therefore that the High Court of Tanganyika was an entity up to 1970. But when one observes the state of the ordinance after the 1974 supplement that definition now reads:-

"Judgments given in the superior courts in 'the Territory' means judgments given in he High Court of Tanzania and includes any judgments given in any courts on appeals against any judgments so given."

It follows that the High Court of Tanzania had become an entity of that name between 1970 and 1974.

The exact equivalent of part III of chapter 43 in Kenya, will not be found in chapter 8 of the Laws of Tanzania, but in chapter 7 of those laws. Chapter 7 is called Judgments Extension Ordinance which made provision for the execution in the Tanganyika Territory of the decrees and warrants of the civil courts of the Neighbouring Colony and Protectorates. In chapter 7 section 2 there is the equivalent of section 6 which Mr Baraza referred to in Chapter 43, Laws of Kenya, and it is in very much the same style. It refers to the case of a decree having been obtained or entered up in Her Majesty's High Courtof Kenya Colony and Protectorate, the High court of Uganda protectorate, the High Court of Nyasaland or Her Britannic Majesty's Courts of Zanzibar, including the Courts of His Highness the Sultan of Zanzibar. It provides that such as a decree may be transferred to Her Majesty's High Court of Tanganyika for execution. That was the position up to the Supplement of 1970. But in the supplement of 1974 the modern names now appear, namely: the High Court of Kenya, the High Court of Uganda, the High Court of Malawi and the High Court of Zanzibar. Decrees of these courts may be transferred to the High Court of Tanzania. It is thus clear that it was not wrong for the Legislature in Kenya in 1964 to provide for decrees being transferred from the High Court of Tanganyika and that position continued until about 1974. After that, the political structure in the United Republic of Tanzania was clarified, and the High Court was recognised as the High Court of Tanzania, even though that Court's jurisdiction was limited to mainland Tanzania, in view of the fact that there still existed the High Court of Zanzibar. It is on this analysis of the situation that one can see the real force of Mr Baraza's question: "What is in a name?" The

answer to the question is that the constitutional structure giving authority to the High Court of Tanzania was the United Republic of Tanzania and was not simply the Republic of Tanganyika. It is this change in its constitutional authority which requires other states to decide whether they will enter into reciprocal arrangements.

Applying that approach to the facts of this case, the amending Act Number 19 of 1964 was proposed in the form of a Bill, before April 26, 1964, the date on which the United Republic of Tanzania came into being. The amending Act became operative towards the end of 1964 after the Act of Union: but the High Court of Tanganyika continued to be provided for in the United Republic's own legislation until after 1970. It appears that the High Court of Tanzania came into being sometime before 1974. The suit in the High Court in Dar-es-Salaam was filed in 1976 and the judgment was entered in December 1977. It is clear therefore that by the time the suit was filed and the decree given, the documents of the High court were correctly entitled "The High Court of Tanzania at Dar-es-Salaam." Yet the legislature in Kenya did not deal with this change until 1984. It is a curious aspect of the legislation covering enforcement of foreign judgments, both in Kenya and the United Republic of Tanzania, that there seems to be a time gap between a constitutional change and reciprocal legislation. But it will be understood that the transfer of decrees may well take place a long time after the decree was given. In the present case whilst judgment was given in December 1977 the decree was only drawn up in June 1982 and the order for its transfer was made in June 1982. Before the amending Act of 1964, different periods applied to the enforcement of foreign judgments. In part II, Cap 43, an application had to be made within 12 months after the date of judgment or for such longer periods as may be allowed by the courts. Under part III no period was laid down. In part IV the period was six years after the date of judgment. The question would then arise whether a state would continue to enforce decrees from the High court or superior court of another country, which emanated from the constitutional predecessors of the current High court or superior courts. In this context it is interesting to note how the legislation in Tanzania both in chapter 7 and chapter 8 attempted to cover the historical changes from the superior courts of the Territory to the High Court of Tanganyika, and chapter 7 which is particularly relevant to part III of chapter 43 in Kenya,

shows the progress from Her Majesty's Courts in the neighbouring countries to the various High Court in those countries. It follows that judgments given by the High Court of Tanganyika could still be transferred for execution to Kenya even after the High Court in the United Republic had become the High Court of Tanzania.

But the trap is, that the converse does not hold good; that is to say, that whilst provision is made for enforcement of decrees of the High Court of Tanganyika, that provision does not permit the enforcement of decrees in Kenya of the High Court of Tanzania.

This analysis illustrates the general principle that it is not for the court to assume a mistake in an act of parliament. This was pointed out by Grove, J in *Richards vs McBride* (1881) 8 QBD 119 at page 122. He observed:-

"We cannot assume a mistake in an Act of Parliament. If we do so, we should render many Acts uncertain by putting different constructions on them according to our individual conjectures. Draftsmen of the Act have made a mistake. If so, the remedy is for the legislature to amend it."

(See *Craies on Statute Law* 17th Ed Cap 20, *Halsbury's Laws of England*, 3rd Ed Volume 36 paragraph 584). It is not the business of the courts to speculate on the policy intended by the draftsman. It is the duty of the court to give a sensible meaning to the words of the statute which, if possible, makes it operative. It was perfectly possible to give operative meaning to the words "The High Court of Tanganyika" in 1964 and for many years thereafter. But unfortunately it was not possible until 1984 to include in those words the High Court of Tanzania. Therefore I agree that this appeal should be dismissed with costs to the Respondents.

Gachuhi Ag JA I have read the judgment of Hancox JA and of Platt Ag JA in draft form. I agree with the reasoning therein in dismissing the appeal. I have nothing to add.

Dated at Nairobi this 7th day of February, 1986.

A.R.W. HANCOX

.....

JUDGE OF APPEAL

H.G. PLATT

.....

AG. JUDGE OF APPEAL

J.M. GACHUHI

.....

A.G. JUDGE OF APPEAL

I certify that this is a true copy of the original

DEPUTY REGISTRAR