Sapra Studio v Kenya National Properties Limited

Court of Appeal, at Nairobi April 25, 1985

Hancox, Nyarangi JJA & Chesoni Ag JA

Civil Appeal No 68 of 1983

(Appeal from the High Court at Nairobi, Brar J, High Court Civil Case No 539 of 1980)

April 25, 1985, Hancox JA delivered the following Judgment.

On February 1, 1961, a company known as Mutos Limited leased shop and office accommodation on the ground and first floors respectively of Mutos Building at LR 209/612, Kimathi Street, Nairobi (the premises) to the Kenya Cold Storage Company Limited for a term of fifteen years to expire on November 7, 1975. In 1965 the unexpired portion of this lease was assigned to the Kenya Cold Storage Company (1964) Ltd by an assignment in which Mutos Limited joined as a party. In 1973 the premises were acquired, presumably purchased, by Kenya National properties Ltd, who were the defendants in the action before Brar J, and are the respondents to this appeal from his decision.

The respondents had acquired the premises subject to the remainder of the lease to Kenya Cold Storage (1964) Ltd; and they had in turn sub-leased part of them to Sapra Studio, the appellants in this appeal, for a term of five years which was also due to expire on November 7, 1975; though it seems from the evidence of Mr Sapra, the appellant's only witness before Brar J, that Sapra had occupied the premises as early as 1967.

By 1975 Sapra were desirous of becoming the direct tenants of Kenya National properties (Kenya National), and, so it seems from the exhibited correspondence to which Mr Esmail, appearing for Sapra, referred us in detail, in particular the letters from the Industrial and Commercial Development Corporation, (Kenya National's managing agents) on August 4 and 14, 1975, that Kenya National were equally happy for Sapra to be their direct tenants "after the expiry of our present lease with M/s Kenya Cold Storage (1964) Limited" on November 7, 1975. After that date Sapra continued to occupy the premises, supposedly in a different capacity, and paid their rent direct to Kenya National, and it was accepted by them for about six months. Unfortunately, as Lord Denning would doubtless describe it, Kenya Cold Storage, then threw a spanner into the works. They were also clients of Mr Esmail's firm, a fact which has occasionally led to confusion in understanding the correspondence, and by their advocate's letter of November 18, 1975, they contended that the lease to them fell within the definition of a controlled tenancy in section 2(1) of the Landlord and Tenant (Shops, Hotels and Catering Establishments) Act, cap 301, by reason in particular of clause 4(d) of the 1961 lease. As a result they purported to continue to pay rent to Kenya National and claimed that Sapra were their subtenants and obliged to pay rent to them. Though this was refuted by Kenya National's advocates in their letter of May 21, 1976, it appears that as a result either of suits filed or threatened to be filed by Kenya Cold Storage (still represented by Esmail and Esmail), of which an example is shown by the plaint filed in High Court Civil Suit 1978 of 1978, (exhibit 12), Sapra "were compelled" to occupy the premises as sub-tenants at a much higher rent of Kshs 10,750 per month. For a time, at least they paid this to Messrs Kaplan and Stratton as stakeholders pending the outcome of the suit which Kenya Cold Storage filed against Kenya National in High Court Civil Case 1556 of 1976. In that suit they claimed declarations that their tenancy

was a controlled tenancy (as they had previously contended) and that they were still the monthly tenant of Kenya National at a rent of Ksh 9,174.40 per month.

In July, 1978, Todd J, granted the declarations which Kenya Cold Storage had sought and that event gave rise to the contention of the respondents in this case that any agreement which they had made to let the premises to the plaintiff was void, or at least voidable, on the ground of mutual mistake, namely:-

"The mistaken assumption or belief held by both the plaintiff and the defendant that the lease of Kenya Cold Storage (1964) Ltd of whom the plaintiff was subtenant, would expire on or about November 7, 1975."

Mr Esmail made great play as to the distinction between the terms "lease" and "tenancy", a matter on which we had to give a ruling in the course of his submissions, with reference to the definition of the latter term in section 2 of the Act. In this connection he referred to Porter, JA's judgment in African Universal Merchandise Ltd v Kulia Investment Ltd Civil Appeal 8 of 1980, and also submitted that the mistake specified in paragraph 6 of the defence, which I have just set out, was "factually incorrect", inasmuch as the lease between Kenya Cold Storage and Kenya National did expire on November 7, 1975. What happened as a result of Todd, J's decision, was that the premises were declared to be within the Act and thus Kenya Cold Storage became, thereafter, a statutory tenant, and so the relationship of landlord and tenant continued to subsist between those two parties. Accordingly, Mr Esmail submitted, there was no mistake at all and the judge was wrong in finding, as he did, that the contract between Sapra and Kenya National was void for that reason. Moreover the judge was also wrong in holding that even if it was not void, it was only valid and enforceable on termination of the lease to Kenya Cold Storage, because, if that had been a condition precedent, as alleged by the respondents in their defence, Sapra would not have sent the rent for the months of November and December, 1975, in advance, only two days after the offer of the tenancy to them on August 14th, as is shown in exhibit 3.

Mr Esmail further argued that no misapprehension could have existed in the minds of the respondents, or indeed of the appellant, because in all the correspondence to which we were referred the word "lease" is used in relation to the formal registered lease between Kenya National (as the successor to Mutos Ltd) and Kenya Cold Storage of February 6, 1961, whereas the word "tenant" or "tenancy" (and, sometimes, letting is used in respect of the relationship that was intended to exist between Kenya National and Sapra. Furthermore Kenya National, as was admitted by Mr Mumali, their managing agents' Chief Valuer, in evidence were throughout acting on advice from their advocates, who wrote on at least two occasions to Esmail and Esmail, as advocates for Kenya Cold Storage, and because of this the defence of mutual or common mistake is not open to them, on the authority of Soper v Arnold [1887] 37 Ch D, 96, and of Rodgers v Ingham {1876] 3 Ch D 351 per James, LJ at p 357.

Mr Esmail was able to reduce the grounds put forward in his memorandum of appeal to the various head of his submissions. Grounds 4, 5 and 9 relate to his contention that thee was no mistake, since the lease did in fact expire on November 7, 1975; ground 1 and 3 that the mistake, if any, was one of law (contrary to the learned judge's finding); ground 6 is the contention that Kenya National were acting on legal advice, which presumably also embraces ground 7; ground 8 relates to the point as to the condition precedent, which Mr Esmail said was inadequately dealt with by the judge; and grounds 10 and 11 relate to his submission that any such condition precedent was waived (as alleged in paragraph 2 of the reply). Finally, under ground 12, Mr Esmail submitted that the first declaration sought in the counterclaim, and granted by the judge, should not in any event have been granted because of the claim in paragraph 13 thereof for rescission of the agreement, which of course presupposes that there was an agreement which was capable of recessions. These heads of the appeal do not wholly coincide with the eight issues determined by Brar, J, but I think it can fairly be said that they cover all the issues canvassed in the High Court.

Mr Wamae displayed considerably skill in resisting Mr Esmail's arguments. First he submitted that even if there is a formal distinction between the two terms "lease" and "tenancy", in reality they relate to one and the same state of affairs, that is to say the existence of the relationship of landlord (lessor) and tenant (lessee). This is supported, Mr Wamae said, by the definition of lease in Stroud's Judicial Dictionary, 4th

edition which says:

"the word 'lease' does not in law import a written instrument (per Abinger CB in Bridland v Shapter, 8 LJ Ex, 246)."

And by its description in "words and phrases legally defined" 2nd edition:-

"An instrument in proper form by which the condition, of a contrary letting are finally ascertained."

and further one:

"Lease "includes an under-lease and any tenancy or agreement for lease, underlease or tenancy (Land Registration Act, 1925, section 3)."

To this I would add a reference to the definition in Jowitt's Dictionary of English Law, Second Edition, which points out that the term is derived form the French verb "laisser" meaning to let and that a lease is in effect a conveyance or grant of the possession of property to last for a term of years, or other fixed period, or at will. (I note in this connection the similarity of the definition of "tenancy" in Words and Phrases Legally Defined, Second Edition at page 174 to which Mr Wamae referred us). But as Chesoni Ag JA, pointed out in the course of the argument, the definition I have cited from Words and Phrases", like most of the other definitions set out in that work are in relation to specific statutes, and the governing one here, if it can be said to govern, is contained in section 2 of the Act.

Mr Wamae further submitted that the evidence and correspondence showed, contrary to Mr Esmail's argument on this aspect of the case, that the two words were being used interchangeably, neither being a term of art, and that there was no magic in the use of one term as opposed to the other.

I must admit that in the minds of many people, and probably in those of some lawyers when they are not specifically adverting to any point which hinges on one or other of the two terms, the term "lease" connotes a formal instrument or document and the term "tenancy" connotes a les formal document, and is wide enough to embrace the relationship between the two parties concerned. This, indeed, is indicated by the definition of "tenancy" in section 2 of the Act to which I have recently referred. Nevertheless the looser meaning contended for by Mr Wamae has received some degree of judicial sanctity in the following passage from the judgment of Chitty, J, in Re Negus (1895) 1 Ch 73, in which he was dealing with the issue on an appeal from a taxation of a solicitor's bill, as to whether the item concerned was a lease or an agreement for a lease. He said, at p 78:

"It is quite unnecessary for me to enter into a dissertation on the term "lease",

though I will state shortly that the term "lease" is used in strict law so as to include any demise, for any period however short or however long, and it is sufficient for this purpose to refer to the Statute of Frauds (29 Car 2, c 3), the first section of which, as is well known, enacts that all leases by parol, and not put in writing and signed by the parties making or creating the same or their agents thereunto lawfully authorized by writing, shall have the force and effect of leases or estates at will only. The term "lease" is well known to the old lawyers and, I hope, to the modern one. Then comes the 2nd section, which contains a well known exception, though it still speaks of the excepted things as "leases": "Except all leases not exceeding the term of three years from the making thereof.". I need not read the rest. So that the Statutes of Frauds shews upon the very face of it that that which is a demise for a term not exceeding three years still is properly called at law a "lease," and that a lease may be made without any document whatever, but simply by word of mouth."

This authoritative pronouncement, then, would support Mr Wamae's view as to the interchangeability of the two terms.

But we are not here dealing with the niceties of the distinction between a lease and tenancy. It may be that the words were used loosely in the correspondence leading up to the intended direct relationship between

Sapra and Kenya National in the latter part of 1975, but, in my judgment, whichever term was being used at the time, neither of the parties was under any misapprehension as to the fact that there was in existence a relationship, hallowed by a formal written instrument, between Kenya National and Kenya Cold Storage, one which, in the contemplation of at least one of those two parties, and also in the contemplation of Sapra, was due to terminate on the November 7, 1975. In my view, therefore, it matters not which of the two terms was being used in relation to the two sets of circumstances. As Mr Wamae very sensibly said, the conduct of the parties indicated that any reference to the expiration of the lease to Kenya Cold Storage on November 7, 1975, included not only the ceasing of the registered lease, but also the ceasing of the relationship of landlord and tenant between Kenya Cold Storage and Kenya National. Any other conclusion, he said, would be absurd because had Sapra and Kenya National thought otherwise they would not have agreed on a direct tenancy thereafter. The fact they did so is only explainable on the basis of the termination of the previous relationship between Kenya Cold Storage and Kenya National.

As Chesoni Ag, remarked during the course of the submissions, it is a fallacy to say that the judgment of Todd J, changed anything. The actual state of affairs did not change, and in my opinion Todd J's judgment was only declaratory of the state of affairs. Mr Wamae countered this by saying that he did not quarrel with the view that Todd, J did not create the controlled tenancy between Kenya National and Kenya Cold Storage, but his argument was that until Todd, J so declared the legal position that parties continued to labour under the misapprehension, or mistake, that the premises were not controlled, when in fact they were so controlled. Thus the mistake was as to the existence of a private right, the right in question being that of Sapra to obtain a lease pursuant to the concluded agreement therefore. As is demonstrated by the passage Mr Wamae cited from Halsbury's Laws of England, 3rd edition, paragraph 1656, ignorance of a private right, even though it be the result of a matter of law, does not amount to a mistake of law. Properly regarded, he said, Todd, J's decision was relevant only to the discovery of the mistake. In view of the judgments in Solle v Butcher (infra) I do not agree with this argument, attractive though it is, but, before coming to that case, I propose to deal briefly with the other authorities to which Mr Wamae referred.

Mr Wamae commented that both Rogers v Ingham and Soper v Arnold (supra), (to which Mr Esmail had referred in support of his contention that the defence of mistake is not available if the party concerned has acted on legal advice) were distinguishable, because they both related to the recovery of money, whereas here there was an agreement relating to real property of which specific performance could, but for the controlled tenancy that was declared to exist, be ordered. In the former case he relied on the judgment of Mellish LJ at page 357, where he said:-

"There is no doubt as to the rule of law that money paid with a full knowledge of all the facts, although it may be under a mistake of law on the part of both parties, cannot be recovered back; and I think it is equally clear that, as a general rule, the court of equity did not, in such cases, interfere with the courts of law. Nothing, in my opinion, would be more mischievous than for us to say that money paid, for instance, under a mercantile contract according to the construction which the parties themselves put upon that contract, might years afterwards, be recovered, because perhaps some court of justice, upon a similar contract, gave it a different construction from that which the parties had put on it."

In the latter case Mr Wamae referred to the judgment of James, LJ at pages 99 and 100 where he pointed out that the contract had been avoided on a different ground from the mistake that was subsequently discovered as to the vendor's title. Properly understood, in my view, the former passage support Mr Esmail's case, and in the latter it is clear that the mistake had nothing to do with the rescission of the contract.

The question for our decision really is whether there was a common or mutual mistake which entitles Kenya National to say that there was no contract at all between Sapra and themselves. The learned judge basing himself very largely on the decision in Bell v Lever Bros [1932] AC 1, which is set out at length in Chitty on Contracts 23rd Edition Volume 1 at pages 95 and 96, held that there was such a mistake, and that it was one of fact, and I quote from that portion of his judgment:-

'The common mistaken assumption of both parties was as to the existence of a fact which formed an

essential and integral element of the subject matter of the agreement and I think it was sufficiently fundamental to avoid the contract."

Mr Wamae supported this passage by a reference to the evidence of Mr Sapra: which I also set out:-

"I agree I approached the defendants for a direct lease sometime in August 1975. It was confirmed by Mr Mumali that the lease was expiring in November 1975. Mr Mumali believed that the Kenya Cold Storage lease was expiring in November 1975 and said that he would deal directly with the sub-tenants. I had the knowledge of the expiry of the lease so I agreed with Mr Mumali's belief."

This passage however supports Mr Esmail's contention that there was no misapprehension on the part of the appellant Sapra, and, therefore, no mutual mistake.

Nevertheless, said Mr Wamae, the parties contracted on the basis of a certain state of affairs and a different state of affairs obtained. Accordingly he asked us to uphold the learned judge's decision dismissing the suit. An added factor in his favour was that any lease, according to the passage he quoted from Stroud, must have a certain beginning and a certain ending (Marshall v Berridge [1881] 19 Ch D 233), and thus the expiry of the lease to Kenya Cold Storage on November 7, 1975, would lend further credence to the belief which the parties then held. In my view the circumstances of Bell v Lever Brothers were different from those obtaining in the instant case. In that case there was misapprehension by the company as to an existing fact, namely the loyalty of the directors of its subsidiary company, whereas they had been enriching themselves while they were supposed to have been serving the company, a matter entitling the company to dismiss them without the compensation that they were paid. In any event the majority of the House of Lords which held that the contract to pay compensation was not avoided by the mistake, was itself divided as to the reasons for so holding.

A closer case to the present is Sole v Butcher [1949] 2 All ER 1107 in which the county court had held that the flat in question was within the Rent Restriction Acts 1920 & 1939, whereas both the landlord and the tenant had entered into the lease on the basis that it was not at a rental of ?250 per annum. The restricted rent was ?140 per annum, that being the rent at which it had been let by the landlord's predecessor to tenants before the 1939-1945 war. The premises had however been damaged during the war and the landlord proposed to reconstruct them. The reconstruction that he carried out left the area and exterior of the flat unchanged, but reorganized the interior, in particular by subtracting form the main bedroom a space which was then incorporated into the dining room as an alcove or recess. If the reconstructed flat remained the same dwelling then the Rent Restriction Acts would have applied and the rent could only have been increased by serving a statutory notice of increase. If it had become a different flat and had changed its identity it would not have been within the Rent Acts. The danger of the premises being within those Acts was present to the parties' minds before the lease was entered into, but both concluded that the identity of the premises had changed. Subsequently the tenant sued for a declaration that the standard rent was only ?140 a year and for recovery of the rent overpaid. The Court of Appeal by a majority held that the parties had contracted on a common misapprehension, so as to amount to a mutual mistake of fact on a matter of fundamental importance, and that the lease would be set aside.

It will be observed that the majority of the court in Solle v Butcher held that the mistake was clearly one of fact, namely as to whether the identity or character of the flat had changed or not, so as to lead to the result in law that it was within the Acts and the lease was liable to be set aside, that is to say that it was voidable and not void. This is clear from the judgment of Denning LJ (as he then was) at page 1117 of the report, as follows:-

"Let me first consider mistakes which render a contract a nullity. All previous decisions on this subject must now be read in the light of Bell v Lever Brothers Ltd (14). The correct interpretation of that case, to my mind, is that once a contract has been made, that is to say, once the parties, whatever their inmost states of mind have to all outward appearances agreed with sufficient certainty in the same terms on the same subject matter, then the contract is good unless and until it is set aside for breach of some condition expressed or implied in it, or for fraud, or on some equitable ground."

“Nor do I think the contract in Nocholson and Venn v Smith Marriott (18) was void from the beginning. Applying these principles it is clear that here there was a contract. The parties agreed in the same terms on the same subject matter. It is true that the landlord was under a mistake which was to him fundamental. He would not for one moment have considered letting the flat for seven years if it meant that he could only charge ?140 a year for it. He made the fundamental mistake of believing that the rent he could charge was not limited to a controlled rent, but, whether it was his own mistake or a mistake common to both him and the tenant, it is not a ground for saying that the lease was form the beginning a nullity. Any other view would lead to remarkable results, for it would mean that in the many cases where the parties mistakenly think the house is outside the Rent Acts when it is really within them, the tenancy would be a nullity, and the tenant would have to go, with the result that tenants would not dare to seek to have their rents reduced to the permitted amounts lest they should be turned out.”

Jenkins LJ, however, in his dissenting judgment, highlighted the distinction between a mistake of fact and one of law. He said, at pages 1126 and 1127:-

“I see nothing in the evidence inconsistent with his explanation of the mistake, but, whether the parties failed to ask themselves the right question or, having asked it, answered it wrongly, I find it impossible to hold that a mutual mistake of the character here involved affords a good ground for rescission … The landlord meant to grant and the tenant meant to take a lease in the terms in which the lease was actually granted of the premises which the lease as granted actually comprised. They knew all the material facts bearing on the effect of the Rent Restrictions Act on a lease of these premises, but they mutually misapprehended the effect which in that state of facts those Acts would have on such a lease. That is a mistake of law of a kind which, so far as I am aware, has never yet been held to afford good ground for rescission. It is a mistake, not as to the subject-matter, nature or purport of the contract entered into, nor as to any question of private rights affecting the basis of the contract entered into: see Cooper v Phibbs (6); but simply a mistake as to the effect of certain public statutes on the contract made, being in all respects precisely the contract the parties intended to make.”

That passage seems to me to cover this case, and differentiates it from the latter part of Mr Wamae’s quotations from Halsbury’s Law of England (infra) which refers to a mistake arising through ignorance of a private right. I think the learned judge misapprehended the effect of Solle v Butcher when he said;

“I find that because the same mistake was made by both the plaintiff and the defendant in wrongly assuming that the head tenant’s lease was to expire on November 7, the agreement for direct tenancy to the plaintiff was void and unenforceable but if I am wrong in my finding than in my view such agreement was valid and enforceable only upon termination of the head tenant’s lease and there was no waiver of that condition on the part of the defendant. Since there was no either expiry in November 1974 or at any other time until the suit premises were vacated by the plaintiff in 1979, the agreement became invalid and unenforceable for those reasons. On the question of rescission of the agreement (agreed issue No 8), as the mutual mistake was as to the belief in the existence of a state of fact it was liable to be rescinded at the suit of either party: see Solle v Butcher (supra).”

The position in fact was exactly as the parties thought it to be: that the lease to Kenya Cold Storage would expire on November 7, 1975. The mistake they made was as to the effect of a public statute, namely the Landlord and Tenant (Shops, Hotel & Catering Establishments) Act (cap 301) and it was that which led them to conclude the agreement for a direct tenancy to Sapra. As is stated in Halsbury’s Laws of England, 3rd edition, Volume 26 at page 895, cited by Mr Wamae:

“As a general rule relief will not be granted on the ground of mistake if the mistake is one of law as distinguished from one of fact. The distinction between the mistakes of law and mistakes must, if the grant of relief is to be prevented, be one of the general law, such, for example, as the legal interpretation of a contract or the construction of a statute.” In my judgment therefore ground 2 of the memorandum of appeal, that the mistake was one of law, is entitled to succeed and the agreement for the future tenancy was not avoided as the respondents claimed. It would, in any event, not have been void, but only voidable, and therefore valid until disclaimed – (see Denning, LJ (supra) had the mistake been one as to a fundamental fact. In my opinion, however, the contract between the parties to this appeal was not avoided

and subsisted at the date of the action.

It is not therefore necessary for me to consider the other grounds of appeal, grouped as they were by Mr Esmail under various headings. I would allow the appeal on ground 2 and I would therefore set aside the judgment of Brar J dismissing the action with costs and giving judgment to the respondents and former defendants on their counterclaim. I would give judgment for the appellants on the claim.

There remains, however, the troublesome matter of damages, which the trial judge, Brar J, assessed, in the event of the appeal being allowed, at the difference between thirty-five months rent at Kshs 10,750 and the sum stated in the agreement, Kshs 5,400 per month, plus the amount of legal costs incurred by the appellant, (presumably in defending Civil Case no 1998 of 1978), which Mr Sapra gave in evidence as amounting to Kshs 19,950, giving a total of Kshs 207,200 altogether. The quantum of damages are at large because of the respondent's notice of cross appeal filed on October 26, 1984, and this issue was argued at length before us on the adjourned hearing.

Mr Wamae submitted on the cross appeal first, that even if the main appeal was successful we should hold that the appellant had not suffered any damage, Sapra would thus presumably only be entitled to nominal damages, secondly , that if Sapra has suffered any damage this should be limited to the amount of rent actually paid, that, again I presume, is the five months rent at Kshs 5,400 per month which Sapra paid to the respondents and which is referred to in Esmail and Esmail's letter to them of September 11, 1979, making Kshs 27,000 and thirdly, if those propositions are wrong, we should consider, strictly against Sapra, what kind of lease it would have obtained from the respondents and for how long, bearing in mind that Sapra at no time replied to the notice of increase of the rent dated June 27, 1975, as in paragraph 4 thereof, neither did Sapra refer the matter to the Tribunal established under the Act for the purpose of determining a fair rent for the premises. If they were acting in good faith the only possible reason they did not oppose was because they believed the Kenya Cold Storage tenancy was coming to an end. If they were not acting in good faith then Sapra must have known all along about the application of the Act to that tenancy.

Mr Wamae said that the respondents, even though mistaken, if they were mistaken, as to the effect of the law, had acted in good faith throughout whereas Sapra was seeking to extract the maximum possible sum in damages from the situation, particularly as it had not taken any steps such as I have just outlined. I would only note in this connection at this stage, that, although Sapra were not apparently being legally advised at the material time, they now have the same firm of advocates as the Kenya Cold Storage Company (1964) Limited had, and that it was they who acted for that company in suing the respondent in High Court Civil Case 1556 of 1976, and in suing Sapra in High Court Civil Case 1978 of 1978,. By a further coincidence Esmail and Esmail issued the notice of increase of rent to Sapra, on behalf of Kenya Cold Storage, before the question of their becoming the direct tenant of the respondents was discussed in August, 1975. The first authority in support of Mr Wamae's submissions was J W Cafes Ltd v Brownlow Trust Ltd [1950] 1 All ER 894. This followed Bain v Fothergill [1874] LR 7 HL 200, which, in turn, adopted the rule in Flureau v Thornhill, [1776] 96 ER 635, which was to the effect that where on a contract of sale the title proves to be defective, the purchaser cannot, in the absence of fraud or of bad faith, recover as damages more than the expense that he has incurred in an action for breach of the contract. In other words he does not get damages for the loss of his bargain. Thus in Flureau v Thornhill, the plaintiff could not recover the loss he alleged he had incurred by selling stocks in order to raise the purchase money. In explaining Bain v Fothergill in JW Cafes v Brownlow, Lord Goddard, CJ, said that the reasons for the rule are that the complications of the law of real property are so great that it is assumed that the parties contracted on the basis that it may be impossible for a vendor, or even a lessor, to implement. In Bain v Fothergill Lord Chelmsford said, at page 203:-

"But it must be borne in mind that this question as to damages depends, as Baron Alderson said in Hadley v Baxendale, upon what "may reasonably be supposed to have been in the contemplation of both parties at the time they made the contract as the probable result of the breach of it." Now, although the purchaser in Engel v Fitch, when he entered into the contract, may have contemplated a resale at an advance, it is not at all likely that the loss of this profit should have occurred to the vendor as the probable result of the breach of his contract. The judges were no doubt influenced by the fact of the profitable resale having

actually taken place, and were, in consequence, drawn aside from considering what must have been in the minds of both parties at the precise time when they made the contract."

This is the emphasis on the contemplation of both of the parties which I regard as of some assistance to Mr Wamae on the issue of how the damages should be measured in this case. Before leaving Bain v Forthergill I will repeat the citation from the speech of Lord Hatherley, which is partially reproduced in McGregor on Damages, 13th edition, paragraph 663, to which Mr Esmail, in replying generally on the main appeal and on the cross-appeal, drew our attention. It is as follows:-

"The foundation of the rule (is) … that, having regard to the very nature of this transaction in the dealings of mankind in the purchase and sale of real estates, it is recognized on all hands that the purchaser knows on his part that there must be some degree of uncertainty as to whether, with all the complications of our law a good title can be effectively made by his vendor; and taking the property with that knowledge, he is not to be held entitled to recover any loss on the bargain he may have made, if in effect it should turn out that the vendor is incapable of completing his contract in consequence of his defective title."

When the case report is consulted it will be seen that Lord Hetherley continued:-

"All that he is entitled to is the expense he may have been put to in investigating the matter. He has a right also to take the estate and complete the purchase with that defective title if he thinks proper so to do, but he is held to have bargained with the vendor upon the footing that he (the vendee) shall not be entitled, under all circumstances, to have that contract completed, and therefore he is not put in a position under such a contract to make a resale before the matter has been fully investigated, and before it is ascertained whether or not the title of his vendor is a good one."

It would almost seem, therefore, that under the old common law in England there was an implied condition that the contract to sell should the subject to the vendor being able to show a good title. This, I think, follows from this passage from Lock v Furze [1866] LR 1 CP 441, another case to which Mr Esmail referred and decided before Bain v Fothergill, at page 453 per Blackburn J.

"Where the carrying out of the contract would give one of the contracting parties the enjoyment of a particular thing, and he has lost it, the damages he would be entitled to would be the value of that which he has lost. From that general rule so laid down by Parke, B, there is an exception, the reason for which no doubt is this, that, from the complicated nature of our law of real property, no man can be certain that he has a perfect title to his estate, and therefore it is a prudent thing to make it part of every bargain for the sale of real property, that, if the vendor fails to make a good title according to the conditions, he shall not be liable to reimburse the intended purchaser the full measure of damages which would be awarded to him in an ordinary case; but that the bargain should be off, and the purchaser take back the amount of deposit he has paid, together with interest, and the expenses of investigating the title, if any."

Mr Esmail submitted that the rule in Flureau v Thornhill, and in Bain v Fothergill, did not apply to executory contracts, that is to say one where some future act is to be done, (which is in fieri) as it was put in Lock v Furze), which were expressly distinguished from the Flureau v Thornhill principle by Channell B in Lock v Furze in the following passage:-

"I take the indisputable rule of law to be , that, where a man enters into a contract, and fails to perform it, he must make compensation to the extent of injury sustained by the person with whom he has contracted. Several cases were adverted to in the court below which have no very close application to this case. Where a contract is in fieri, and the vendee chooses to rescind the contract, and sue for money had and received, he recovers only the money he has actually paid, viz the amount in the vendor's hands. So, again, if he elects to affirm the contract, and to sue for the breach, he is entitled only to nominal damages. The present case is perfectly distinguishable from those. The defendant is not sued in respect of a contract which is in fieri or which has been rescinded."

Next Mr Esmail said that the situation in this case was in reality a breach of the covenant for quiet enjoyment, and was thus quite apart from the defective title situation in Bain v Fothergill, a proposition

which would appear to gain support from a later passage in the same edition of McGregor on Damages at paragraphs 714 to 715, in which the learned author points out that once the lease has been executive there can be no question of a suit for specific performance, and that if thereafter the lessee has been compelled to give up possession he can recover damages, under the normal rule, for loss of his bargain and is not confined to the restrictive rule in Bain v Fothergill. From this followed Mr Esmail's third proposition, that the cases relating to defective title were all decided against the background of the complex land situation in nineteenth century England and could not reasonably be applied to a set of circumstances such as obtain in this case, particularly in view of the proviso to section 3(1) of the Judicature Act, cap 8. Moreover the defect in the respondent's capacity to grant a direct lease in this case was not a defect in Thornhill, but a statutory impediment, as to which of the parties had troubled to look out for it, there is no uncertainty at all.

It was plain for all to see in cap 301 that the main tenants had a statutory right of occupation after their lease expired. That right is a creature of statute, as were the wife's right in Wroth v Tyler [1973] 1 All ER 897 per Megarry J at page 918F.

Fourthly, Mr Esmail submitted, the rule in Bain v Fothergill only applied where there was no default, in the sense of fraud or bad faith on the part of the vendor or landlord, and here it could be said that the respondents had taken no steps to try to determine the main or head tenancy under section 4 of the Act. That did not happen until 1978 when the respondents purported to determine Sapra's tenancy, not, be it noted, that of the Cold Storage Company, to whom alone the Act was applicable, with effect from June 1, 1978.

Finally, on the issue of quantum, Mr Esmail said that Sapra minimized their damages by remaining in the premises instead of seeking more expensive accommodation elsewhere, and the respondent at no stage in the proceedings before the judge produced any evidence to rebut that on behalf of the appellant that Kshs 10,750 per month was a reasonable sum to pay by way of rent. For my part I regard this as a telling point on behalf of the appellant. The closest the only defence witness, Mr Mumali, who was the respondent's valuer, came to dealing with this issue was then he said:

"If I had known that Sapra Studio were paying Kshs 10,750 per month to Kenya Cold Storage, I would not have agreed to let the premises to it at the monthly rental of Kshs of 5,400.

Mr Wamae protested at the late introduction by Mr Esmail of the issue of breach of the covenant for quiet enjoyment.

The distinction between the two situations he said was shown clearly at paragraph 705 of McGregor and Damages. It was a straightforward breach of the agreement to execute the lease contemplated in August, 1975, the reason for which was assuming good faith by Sapra, a mistake as to the law to which they contributed. Why, therefore, should they obtain relief beyond the actual expense to which they had been put?

I think it is important to place the sequence of events in this case in their proper perspective. It is common ground that Kenya Cold Storage and Sapra were respectively the tenant and sub-tenant of the premises owned by Kenya National and managed by ICDC under a valid lease and sublease until November 7, 1975. In June of that year Kenya Cold Storage, as lessees, had issued a statutory notice to increase Sapra's rent. In August Sapra negotiated directly with Kenya National for a lease, on the expiry of both the previous lease and the sub-lease at a rent of Kshs 5,400 per month, instead of Kshs 10,500 demanded by Kenya Cold Storage. They were notified by Kenya National on September 17, 1975, that their lease expired and their tenancy would be terminated on November 7. Yet Kenya Cold Storage did nothing about it until after the supposed expiry of the tenancy. In other words they allowed their contractual tenancy to expire on November 7, before writing to ICDC as Kenya National's agents setting out their contentions as to the statutory tenancy on November 18, and that only in response to a reminder on November 11 from ICDC.

Nothing, however could be done, or, at any rate, nothing was done to get rid of Sapra until after the

decision of Todd, J, in July 1978 that Kenya Cold Storage were statutorily protected and that they were accordingly still the tenants of Kenya National. While the situation remained in limbo the increased rent was paid by Sapra to Messrs Kaplan & Stratton as stakeholders. It was said in Wroth v Tyler (supra), by Megarry, J, that the vendor (and Lord Goddard said in JW Cafes v Browlow Trust that he could see no difference between a proposed vendor and a proposed lessor in actions respecting real property) must do his best to obtain all necessary consents to the sale, even to the point of taking proceedings to oust, for instance, a trespasser, but he continued at page 913:-

"I do not think that the vendor will usually be required to embark on difficult or uncertain litigation in order to secure any requisite consent or obtain vacant possession. Where the outcome of any litigation depends on disputed facts, the court would be slow to make a decree of specific performance against the vendor which would require him to undertake such a case, the vendor cannot know where the litigation will end. If he succeeds at first instance, the defendant may carry him to appeal; if he fails at first instance, the purchaser may say that there ought to be an appeal."

Nevertheless, litigation was embarked upon, but by Kenya Cold Storage, not Kenya National. With all respect to Mr Esmail, I do not regard this as a case of an infringement of the covenant for quiet enjoyment (which, as McGregor says, operates equally in leases as in sales of property) because the quiet enjoyment of the premises by Sapra was never infringed. Neither was it a defective title of the kind that was obtained in the earlier English cases. The defect existed as a result of an overlooked statutory provision rather than of confusion over land law. Similarly in Wroth v Tyler Megarry J took the view, at page 917, that the existence of the wife's unregistered charge did not amount to a defect in title. Neither in my opinion, can the defect be said to have been as a result of a deliberate act or omission on the part of Kenya National or their managing agents. This, in my judgment, is where the case of Day v Singleton, [1899] 2 Ch 320, also referred to by Mr Esmail, becomes relevant. In that case the representative of the deceased purchaser of the leasehold property concerned deliberately induced the lessor to refuse his consent to the sale, thus preventing it from taking place. At page 328 and 329 of the report, Lord Lindley MR said:-

"Having regard to this circumstance, we do not think that Bain v Fothergill covers this case. There the vendors did all they could to obtain the lessors' consent to the assignment, and they failed to obtain it. The first question submitted to the judges shows that what was being considered was the rule as to damages on the sale of real estate where a vendor without his default is unable to make a good title. Lord Chelmsford's speech is addressed to that question; and his observations on fraud are part of his comment on Hopkins v Grazebook, which had decided that the exceptional rule laid down in Flureau v Thornhill did not apply where the vendor knew that he had not a good title, although he believed he could not get one, and had in fact an equitable title. Neither Lord Chelmsford's speech nor Lord Hatherley's is an authority for the application of that exceptional rule to the case of a vendor who can make good title but will not, or will not do what he can do and ought to do in order to obtain one."

Admittedly he goes on to say that the anomalous rule in Bain v Fothergill was based upon the difficulties of showing a good title to property in England, but, to my mind, there is a difference between the situation where some blame attaches to the vendor or lessor on the ground of his conduct, and one where there is a genuine indvertence as to the applicability of a statutory provision. Neither do I agree with Mr Esmail that this was not executory contract. No lease was ever granted because, as Mr Mumali said:-

"I first came to know that I could not give direct lease to Sapra sometime in November, 1975. I learnt through a letter dated November 18, 1975 from Messrs Esmail and Esmail…"

It is true Sapra remained in the premises, but in a different character from that contemplated in the agreement between Kenya National and Sapra, so that that agreement was never perfected by the grant of a lease, but remained executory. Moreover, there is something repugnant to my mind in awarding substantial damages for a situation which was not clarified until Todd, J's judgment in July 1978, one in which the respondents were not acting fraudulently or mala fides and for which both parties bore a share of the responsibility. There is the added factor, that the defendants did not compel him to remain in the premises and that:-

“If the defendants had not negotiated the lease to me we still would have remained at the same place.”

Again it would seem contrary to principle to award substantial damages for a situation in which the Sapra would have continued to act as they did whether or not they had the direct lease from Kenya National.

Accordingly, notwithstanding the distinctions that undoubtedly exist between this and the Bain v Fothergill group of cases, though these distinctions are not as great as Mr Esmail would have us believe, in my judgment the appellants should not have the difference between the rent paid and that agreed for the thirty-five months stated by Brar J, because this cannot be said, under the rule in Hadley v Baxendale [1854] 9 Exch 341 to have reasonably been supposed to have been in the contemplation of both parties at the time they made the contract as the probable result of a breach of it. They should have as their measure of damages, in my judgment at any rate, a refund of the rent Sapra continued to pay to Kenya National for five months after November 7, 1975, that is, as I understand it, Kshs 27,000, plus the advocates’ costs they incurred, which clearly flowed as a direct result of the legal situation in which they became embroiled, that is to say Kshs 19,750. I would also give them relatively nominal damages of Kshs 2,000 for the respondents’ involuntary breach of their agreement with Sapra.

I would therefore, as I said, allow the appeal on liability on ground 2 of the memorandum in the main appeal. I would also allow the cross-appeal to the extent of substituting for the judge’s notional figure the total of the three months I have just set out, namely Kshs 48,750. I would award the costs of the appeal and three quarters of the costs of the proceedings in the High Court to the appellant. I would award the costs of the cross-appeal to the respondents. As Nyarangi JA, agrees the orders will be as proposed in this judgment. Nyarangi JA.

The judgment prepared by Hancox JA, which I have read in draft deals with all the facts and the submissions of the advocates on those facts and the law.

The material lease created a tenancy as the term is defined in section 2(1) of the Landlord and Tenant (Shops, Hotels and Catering Establishments) cap 301 (the Act). In common parlance, a lease is an agreement which gives rise to a relationship of landlord and tenant (real property) or lessor or lessee (real or personal property). Tenancy means an interest in reality which passes to the tenant (one who holds or possesses land or tenements by any kind of right or title etc): see Black’s Law Dictionary, 5th Edition, pages 800 and 1313. In my view the definition of the term ‘lease’ and ‘tenancy’ given above is the more accurate one in as much as it distinguishes one term from the other as does the Act which does not allow interchangeability of the two terms. On the evidence, there was a mutual mistake of law arising from a misapprehension on the part of both parties of the status under the Act of M/s Kenya Cold Storage (1964) Ltd. On the evidence the only inference which could properly be drawn is that the parties did not fully appreciate the position of M/s Cold Storage (1964) Ltd; Solle v Butcher [1949] 2 All ER 1107 at page 116 letter D.

In Bell v Lever Bros [1932] AC 161 the mutual mistake related to quality of the services contract which is a matter of fact and therefore not concerned with a status as was the mutual mistake of the parties to this action.

As regards the damages to which the appellant is entitled, I would refer to the judgment in JW Cafes Ltd v Brown Low Trust Ltd [1950] 1 All ER 894 where two other earlier cases ie Bain v Fotherhill and Flureau v Thornhill were referred to and then relate it all to the relevant provision in the Act which accorded a statutory right to M/s Cold Storage (1964) Ltd. The rule in Bain v Fotherhill has to be applied subject to the relevant provision in the Act and consequently no question of difference between the rent paid and the rent agreed for the period of 35 months would arise because that would not simply have been in the contemplation of the parties at the time they made the contract as the likely consequence of a breach of the contract. The appellant’s damages should therefore be assessed on the rent of the Kshs 27,000 plus the necessary costs incurred of Kshs 19,750. I would agree with Hancox JA, that nominal damages of Kshs2,000 be paid to the respondents for the voluntary breach of the agreement with Sapra.

I too would allow the appeal on liability on grounds 2 of the memorandum of appeal, also allow the cross-

appeal to the extent suggested by Hancox JA, and I agree with the order proposed by Hancox JA on costs.

Chesoni JA.

I have had the advantage of reading the draft judgment of Hancox JA which sets out in detail the history, facts and arguments advanced before this court in this case.

The appellant and respondent knew or must have known that the lease of the premises LR No 209/612 along Kimathi Street Nairobi in favour of M/s Cold Storage (1964) Ltd and granted by the respondent landlord would expire on November 7, 1975, and, it did expire on that date. That was a question of fact and there was no mistake about it between the parties.

The parties overlooked the difference between a lease and the relationship which arises there from which is a tenancy. The lease created a tenancy which came within the armbit of the Landlord and Tenant (Shops, Hotels and Catering Establishments) Act, (cap 301). That tenancy was controlled under section 2(1) of the Act and it did not come to an end at the expiry, on November 7, 1975, of the instrument creating it.

While Mr Esmail maintained that there is a difference between the two terms “lease” and “tenancy” Mr Wamae argued that they meant the same thing, and, even if they did not , they were used by the parties interchangeably. With respect to Mr Wamae these two terms are different as each has its own meaning. What each means is one thing and how one person may use or understand them is another. I would adopt for each of these two words the meaning given in the 5th Edition of Black’s Law Dictionary and say that a lease is an agreement or instrument which gives rise to the relationship of landlord and tenant in real property or lessor and lessee in real or personal property. It is a contract for exclusive possession of lands or tenements for determinate period. It is a conveyance of interest in real property usually in consideration of rent or other recompense, for life, specified period of year or at will. I agree with the following further statement:

“When used with reference to tangible personal property, word “lease” means a contract by which one owning such property grants to another the right to possess, use and enjoy it for specified period of time in exchange for periodic payment of stipulated price, referred to as rent. The person who conveys is termed the “lessor”, and the person to whom conveyed, the “lessee,” and when the lessor conveys lands or tenements to a lessee, he is said to lease, demise, or let them.”

A lease then creates a tenancy. In other words it gives the exclusive possession so, as the learned authors of the said dictionary say, a tenancy involves an interest in reality which passes to the tenant, and a possession exclusive even of that of the landlord, except as the lease permits the landlord’s entry, and saving his right to enter to demand rent or to make repairs. Tenancy means possession or occupancy of land or premises under a lease.

To me it is apparent that when the respondent agreed to grant a direct lease to the appellant after November, 7, 1975 and the appellant agreed to take that lease both parties were mistaken as to the position of the head tenant, M/s Cold Storage (1964) Ltd, as a protected tenant under the Landlord and Tenant (1964) (Shops, Hotels and Catering Establishments) Act (cap 301) after the expiration of the lease. That was a mutual mistake of law and not fact. The learned judge was in error in holding that the mistake was one of fact. No relief is available to a plaintiff on the ground of a mistake in law. Halsbury’s Laws of England, 3rd Edition, Volume 26 at page 895. The contract to grant the appellant a lease after November, 1975 was therefore not void and the appellant was entitled to relief for breach or failure to complete on the part of the respondents. Consequently this appeal must succeed on the second ground.

What damages is the appellant entitled to? Mr Wamae sought to rely on the rule in Bain v Fothergill [1874] LR HL 158 which prevents a purchaser of land from recovering damages for loss of his bargain where the seller fails to complete through defect of his title. The rule has been applied to agreements for leases: see McGregor on Damages, 14th Edition paragraph 761 and Hanslip v Padwick (1850) 5 Ex 615. It is a good rule and in an appropriate case I would apply it in Kenya. However, although the instant case

involves failure by the lessors to complete an agreement for lease, the reason for the failure was not a defect of the title for the title was good, but a mistake of law. Consequently, the rule in Bain v Fothergill (ibid) is not applicable to this case, and, in my view. Mr Wamae's contention that the measure of damages is the amount of rent paid by the appellant to the respondent, with interest is unacceptable. The normal measure of damages for cases like this one which fall outside the Bain v Fothergill rule is the rental value of the premises less the contractual rent reserved by the lease (McGregor on Damages – ibid paragraph 763). So the appellant would be entitled to the difference between the rent he is paying to the third party and the contractual rent. That was the position in Hollington Brothers v Rhodes [1951] 2 All ER 578. In that case the plaintiff succeeded in obtaining a new lease of the same premises from a third party at a higher rent and the court said, obiter, that they would be entitled to the difference between the contractual rent and the amount they were paying the third party. The appellant was in possession of the premises prior to November 7, 1975 as it appears they were sub-tenant of M/s Cold Storage (1964) Ltd from May 1966. M/s Cold Storage (1964) Ltd increased the rent to Kshs 10,750 from September 1, 1975 and the tenant/appellant accepted the increase. It was not specified whether services were included or not, but since site tax was specifically excluded I would assume the rent of Kshs 10,750 was inclusive of services otherwise they also would have been expressly excluded. In August 1975 when the appellant approached the respondent for a direct lease it was paying a rent of Kshs 6,028 per month inclusive of services. That rent had been fixed five years before August 1975. The appellant did not oppose the notice of increase of rent and there was no evidence that the Kshs 10,750 was the rental value of the premises in the open market. The respondent made no attempt to establish the reasonable rental value other than the Kshs 10,750.

It is to be noted that out of the monthly rent of Kshs 6,028 about 11.65% was for services, if we assume for the purposes of this case that the rent without services was Kshs 5,400. The increase in total rent was almost forty-four per cent (44%). I would apportion 15% of the new rent to service charges. Thus the rental value of the premises is Kshs 9,137.50. The contractual rent is Kshs 5,400 which leaves Kshs 3,737.50 per month. In his evidence Mr Sapra said that he stopped paying the rent to the respondent in April 1976. He must have then realized that he was unlikely to get the direct lease yet he did nothing to minimize the damages. I would, therefore, calculate his loss after April 1976 at half. The total sum works out as follows:-

November 8, 1975 to May 7, 1976 - 6 months

May 8, to September 30, 1978 - 23½ months

6 months @ Kshs 3,737.50 - Kshs 22,425.00

20½ months at Kshs 1,868.75 - Kshs 53,259.40

Kshs 75,684.00

I would, for the reasons stated, allow the appeal, set aside the judgment of Brar, J and give judgment for the appellant on the claim. Like Hancox, JA, I would too allow the cross-appeal to the extent of substituting Kshs 75,684 for the learned judge's notional figure. I agree with Hancox JA on the order proposed by him as to costs in this court and in the court below.

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June 12, 1985, Hancox JA delivered the following Ruling.

We listed this matter for further mention because it was discovered, on delivery of the judgment of the members of the court who heard the appeal (by a single judge under sub-rule (7) of the rule of this court's rules) that the issue of interest on the damages had not been included in any of the judgments.

There can be no doubt that a prayer for interest on the damages was included in the memorandum of appeal and that interest was sought by Mr Esmail in the course of his argument. He submitted that his

clients should, if successful, be awarded interest under section 26 of the Civil Procedure Act (cap 21) on that which he referred to as the special, as opposed to the general damages; so that on the Kshs 2,000 awarded as nominal damages for breach of contract interest would be payable from the date of the judgment.

It is common ground that the decision of the court has not, as yet, been perfected by a formal order being drawn up. Rule 35 is directed to the correction of a clerical or arithmetical mistake in any judgment of the court, or any error arising in a judgment from an accidental slip or omission. The oversight as regards the interest was clearly not a clerical or an arithmetical mistake. Was it therefore an error arising from an accidental slip or omission under the second limb of the rule, and, if so, can it be corrected by the court thereunder? I should add at this stage that Mr Wamae, who argued the appeal on behalf of the respondent, made it perfectly clear that, had he argued it on the appeal, he would have opposed any award of interest on the basis that the award was in the nature of general damages, that it was non-specific, and therefore did not carry any interest. The tenor of the East African and English authorities on the application of the so-called slip rule has been that the courts have an inherent power to recall a judgment before it is perfected by a formal decree or order. The first case cited to us by Mr Esmail, who appeared on behalf of the appellant on the main appeal, namely Raichand Lakamshi and Another v Assanand and Sons [1957] EA 82 at page 85 letters C to F, makes this clear. The error in that case was that the magistrate had wrongly granted a new tenancy from January 1, 1955, and, as a result of a remark by the Supreme Court, drew up the formal order stating that it should commence on July 3, 1955. The second authority cited by Mr Esmail, Raniga v Jivraj, [1965] EA 700, seems to say at page 702, that the words “at any time” in section 99 of the Civil Procedure Act (cap 21) which also appear in our rule 35, allows the court the power of amendment even after the issue of the formal order.

In the recent English case of R v Cripps, Ex parte Muldoon, [1984] Law Society’s Gazette 4th July, page 1916, relating to the costs of a local government election petition, Sir John Donaldson, MR said that a judge was fully entitled to reconsider and vary any decisions at any time before the order embodying it had been perfected. In Charles Bright & Co Ltd v Sellar, [1904] 1 KB 6, where the word “debentures’’ had been omitted from the order absolute charging certain assets of the defendants, Cozes-Hardy, LJ, recalled that the former right of rehearing to correct a decision could only be exercised before the decree or order had been enrolled, up to which time it was not considered to be, in the full sense, an order of the court.

This decision is cited in support of a passage on the identical English rule, Order 20 rule 11, in the commentary to it in the 1982 White Book, Volume 1 at page 395 which states that the error or omission must be an error in expressing the manifest intention of the court, and that the court cannot correct a mistake of its own, in law or otherwise, even though apparent on the face of the order. The implication there is that there must be an error which can be corrected so as to express the court’s intention, so that the slip rule would not apply where there can have existed no intention, because the court completely overlooked the matter. Bright v Sellar did not , however, decide that. It decided that the High Court had not inherited the power of the former Court of Chancery to entertain an action for the review of its own decision where an appeal lay against the order it had made.

In the Privy Council case of Tak Ming Co v Yee Sang [1973] 1 WLR 300, the judge in Hong Kong had also omitted to deal with the question of interest. When exercising the power under the slip-rule he explained the omission by saying;-

“A most important matter for me to consider is what I would have done at the time I gave judgment had this matter of interest been in my mind. After a lengthy trial, in the course of which both sides asked me to confine my decision to the issue of liability, and having written a long judgment which occasioned to me no small difficulty, my mind was on the issue of liability rather than upon any figures. But had I thought the matter through further, as I should have done I am in no doubt whatever, having a very clear recollection of the case and at the evasiveness of Mr Cheng, witness for the second defendant company, that I would have made an award of interest.”

In its judgment the privy Council laid down the criteria to be applied even if there was long delay, as

follows:-

“In this case there was considerable delay by the respondent before they made their application under the slip rule. It does not appear however, that the delay caused the appellant to take any step which they would otherwise have refrained from taking or to omit any step which they would otherwise have taken. The liability for interest was of course dependent on the liability for the principal sum, the balance due to the respondents, and there was no final decision as to the appellant’s liability for the principal sum until the appeal to Her Majesty in council was dismissed by Order in Council on October 27, 1971. There were also factors in favour of making the order under the slip rule. The respondents had been kept out of their money – the balance due to them, for which the appellants have been held responsible – for several years and it is just that they should have interest on it. Also they had asked for interest in their statement of claim and had indicated when directions were given on February 8, 1969, that they intended to apply for interest “at the appropriate time,” and they had made the application for interest on August 6, 1969, which was rejected by Briggs, J for want of jurisdiction on August 10, 1969, and they made their application under the slip rule on May 26, 1970. Thus they had taken several steps with a view to recovering interest. This question of discretion was carefully considered by both courts below, and no sufficient ground has been shown to their Lordships for interfering with the exercise of the discretion which was made by Pickering, J and affirmed by the full court.”

Their Lordships approved in Re Inchcape, [1942] Ch 394 which was followed in Raniga v Jivraj (supra).

In my judgment the error of omission, or, rather, the errors of omission in the instant case are of the same nature, as in Tak Ming Co v Yee Sang. In an even more recent case, where the arbitrator had erroneously attributed the evidence of the shipowner’s expert witness to that of the charterer, and vice versa, Sir John Donaldson, MR said that it was a classic case of error in an award arising from an accidental slip and could be corrected under section 17 of the Arbitration Act, 1950, which is in narrower terms than our Rule 35. In my opinion here this is an equally obvious error arising from an accidental omission, and, if the jurisdictional question had not arisen, could be dealt with by each judge of the full court as it was constituted when the appeal was heard.

All the cases I have referred to concerned an error by a single judge and not an appellate court. One would hope that an appellate court is incapable of error but, realistically, it can always occur. However, it does highlight the difficulties where one of the members of the court ceases to hold office or any other of the events occur which are mentioned in the recent amendment to sub-rule (3) of rule 32. Mr Esmail asked the present court, in which Platt, Ag JA, has replaced Chesoni Ag JA to involve that sub-rule, but I do not think it is appropriate to the instant case where the judgments have already been delivered. In a case falling under rule 32(3) the argument will have been heard by all three judges, the minimum number specified by the proviso to section 5(3) of the Appellate Jurisdiction Act, cap 9. In the instant case the question of interest was only touched on by Mr Esmail and there is no way of knowing how Chesoni, Ag JA would have decided it, if it were opposed as Mr Wamae has indicated.

Accordingly, while in my view the slip rule could have been invoked in this case (so as to deal with the question of interest) by the same court before the decision had been perfected (for I do not , with respect agree with the decision in Raniga v Jivraj in this respect) neither the remaining two members, nor the three members constituting the present court, have any jurisdiction to do so now.

Has the reconstituted court power to reopen the question of interest by the court hearing it de novo, which was another alternative suggested by Mr Esmail? In my opinion it has not I agree with Mr Wamae that we cannot have the matter of interest, a matter which is clearly contentious, argued in isolation. Consultation between the members of the court on all five issues is essential and we should not now deal with a matter which was not a separate and independent issue, but bound up with the question of damages.

In these circumstances, regrettable though it may be, I would hold that there is no jurisdiction vested in the remaining members of the original court, or in the three members as it is presently constituted, to decide on the issue of interest under the slip-rule (which would otherwise be applicable); neither can we decide it de novo on further submissions.

As this matter was effectively raised by the court of its own motion, I would make no order as to costs. As Nyarangi JA agrees that is the order of the court.

Nyarangi JA. The purpose of further mentioning this matter is stated in the judgment prepared by Hancox JA which I have had the advantage of reading in draft.

Under rule 35(1) of the rules of this court, a clerical or arithmetical mistake or any error arising from an accidental slip or omission may be corrected by the court before or after the judgment has been embodied in an order. That is in sharp contrast with the judgment in Unnanse v Unnanse [1950] AC 561 where the general rule was stated to be that once an order is passed and entered or otherwise perfected according to the practice of the court, the court is functus officio and cannot set aside or alter its order however wrong it may appear to be.

No formal order has been drawn following the judgments.

It is clear from the memorandum of appeal that a prayer was made for interest, and , equally clear from the notes of Mr Esmail's submissions, that the court was urged to award interest to the appellant if it was successful. The court overlooked to deal with that particular matter.

Something was therefore left out by accident resulting in an accidental omission: See Sutherland & Co v H Annevig Bros Ltd [1921] 1 KB 336 at page 337, per Rowlatt, J at page 341.

I have no doubt that, but for the resignation of one of the members of the court which accidentally omitted to consider the issue of interest, the court would have had jurisdiction under rule 35(1) to correct the omission to give effect to what was the intention of the court or of the majority of the court. The position now is that the court that heard the appeal no longer can exist. The decisions in Raniga v Jivraj [1965] EA 700 and Raichand Lakamshi & Another v Assanand & Sons [1957] EA 82 are each distinguishable from the present state of facts relative to this matter in so far as a reconstituted court has had to hear the application The court which has to correct the accidental omission is the same court that gave judgment(s) out of which the accidental omission arises. The matter of interest arises directly from the memorandum of appeal and the judgments on it and it could not possibly be argued as a separate item.

The question which arises for decision by this court is whether it has power to amend the judgment(s). That question must be answered against the appellants.

I agree with the order proposed on costs.

Platt Ag JA.

I have nothing to add to ameliorate the problem.