Ready

IN THE SUPREME COURT OF UGANDA
HOLDEN AT MENGO

(CORAM: ODER, TSEKOOKO, MULENGA, KANYEIHAMBA, MUKASA-KIKONYOGO, JJ.S.C.)

MISC. APPLICATION NO. 8 OF 2000

BETWEEN

NON- PERFORMING ASSETS RECOVERY TRUST ::::::::::::: APPLICANT

AND

GENERAL PARTS(U) LTD :: RESPONDENT

(Application arising from judgment of the Court in Civil Appeal No.5 of 1999 dated 2nd March 2000)

RULING OF THE COURT

The Non-Performing Assets Recovery Trust, the applicant, (herein for brevity referred to as *"NPART*") has applied to this Court to recall its judgment in Civil Appeal No.5 of 1999 dated 2nd March, 2000, so as to set it aside or correct part of it. The application is by Notice of Motion and is stated to be brought under Rules 1(3), 34, 41 and 42 of the Supreme Court Rules, 1996. It is supported by two affidavits dated 19th May, 2000. One was sworn by Herbert Kwikiriza, the Acting Legal Manager of NPART, and the other by Robert Opio, Assistant Chief Registrar of Titles.

In the Notice of Motion, NPART prays for orders framed as follows:-

> ***"(i) THAT this Honourable Court exercises its inherent powers and sets aside part of its judgment dated 2nd March 2000 in so far as it allowed the appeal of the***

Respondent in Civil Appeal No.5 of 1999 on the basis that the legal mortgage executed between the Respondent and Uganda Commercial Bank and registered as Instrument No. KLA 1489924 on 22nd August, 1991 which was the subject matter of the dispute between the parties was not properly executed.

(ii) THAT the Court finds that there was no evidence on which it could base to hold that the said mortgage deed was not sealed as sealing a mortgage is a question of fact and the said issue of fact was not tried.

(iii) THAT the court instead makes an order that Civil Appeal No.5 of 1999 be dismissed with costs, or in the alternative, that the order it made in the said appeal be varied.

(iv) THAT the respondent pays the costs of this application.

The grounds on which the application is based are summarised in the Notice of Motion as follows:

"(i) THAT at the commencement of hearing H.C.C.S. No.386 of 1993 out of which C.A.C.A. No 20 of 1998 arose and out of which eventually S.C.C.A No.5 of 1999 arose issues for determination of the court were framed but the validity or due execution of the suit mortgage was not framed as an issue since the said validity was not contested.

(ii) THAT if the issue of the validity or due execution of the mortgage had been raised evidence would have been adduced to resolve the said issue since execution is a matter of fact.

(iii) THAT the Supreme Court made a finding of law on a fact which had not been raised or tried by the first court and hence it is in the interest of justice that this Honourable Court exercises its inherent powers to

revisit its findings in order to achieve the ends of justice and to prevent abuse of the process of court.

(iv) ***THAT it is further in the interest of justice that the Court revisits its decision as the amount involved in the dispute is colossal and the applicant stands to pay a lot of money out of public funds by way of costs which otherwise would not have accrued."***

There is one contention made out in the two supporting affidavits which is not directly included in this summary. It is that although the photocopy mortgage produced in evidence at the trial, as Exh.P9, does not show that the document had been sealed, both the original, in the custody of the Central Registry of Titles, and the duplicate, in the custody of the applicant, bear the clear impression of the common seal of General Parts (U) Limited, the respondent, (herein referred to as "General Parts").

Because in the Notice of Motion, the orders sought, and the grounds relied upon, are not drawn concisely, the application appears to cast the net so wide that it includes a prayer to dismiss Civil Appeal No.5/99. In reality, however, going by submissions of counsel, what NPART seeks is an order reversing the holding of this Court that the mortgage Exh.P9, was not validly executed. The core ground relied on is the contention that the mortgage was as a matter of fact, sealed with the common seal of General Parts, and that this Court had no basis for holding otherwise. It is therefore, useful to put that holding in its proper context, by briefly recalling the background, before reviewing counsel's arguments in this application.

The judgment of the Court, which is subject matter of this application, was given on a second appeal, in a case which originated from High Court Civil

Suit No.386/93 in which Uganda Commercial Bank (hereinafter referred to as *"UCB"*), sued General Parts, alleging that General Parts had executed in its favour a debenture and mortgages to secure loan facilities, and pursuant to the provisions of the debenture, UCB had appointed a Receiver/Manager of the property and assets of General Parts. In the suit UCB prayed for, inter alia, *"a declaratory judgment that (it) had properly appointed the Receiver/Manager."* In the course of the trial, copies of one mortgage and the debenture, were produced in evidence, as Exh.P9 and Exh.D6 respectively. In its judgment the trial court granted the declaration prayed for. General Parts appealed to the Court of Appeal in Civil Appeal No.20/98. At that stage, UCB was dropped from the proceedings, and NPART being successor to UCB, as assignee, was the respondent in that appeal. The Court of Appeal dismissed the appeal and confirmed the judgment of the trial court. In the course of its judgment, the Court of Appeal, responding to counsel's argument concerning execution of the mortgage, held that the mortgage had been validly executed. General Parts brought the second appeal to this Court on seven grounds of appeal. We upheld three of the grounds and allowed the appeal. We set aside the judgments of the trial court and the Court of Appeal and substituted therefor, a judgment rejecting the declaration prayed for. One of the grounds of appeal we upheld was the sixth ground which read as follows:-

> ***"6. The learned judges erred in law in holding that***
> ***(a) the validity of the mortgage was not an issue or, at the very least, in issue at the trial in the High Court, and that the mortgage Deed was properly executed by the registered proprietor; and***
> ***(b) in introducing and basing their decision on a new matter of the power of attorney, which was never***

in evidence or in issue in the High Court or the Court of Appeal."

It was in consequence of this ground of appeal that this Court held that the mortgage document was not validly executed. It is quite evident from our judgments, however, that, contrary to the assertions in this application as framed in the first order sought, this holding did not form part of the *ratio deidendi.* In the lead judgment, after reviewing the pleadings in the suit, Mulenga JSC, stated:

> ***"Given those pleadings, it is obvious that in order for the court to resolve whether or not the receiver was properly appointed, it did not have to consider the validity of the mortgage, which mortgage was neither invoked in the appointment, nor pleaded in the plaint, save for the oblique reference to "mortgages" in paragraph 5(a) ....it is for that reason that the learned trial judge ignored the issue and the Court of Appeal held in the leading judgment of Engwau J.A., that validity of the mortgage was not an issue at the trial.....That notwithstanding, however, the learned Justice of Appeal, after noting that the issue had been raised in the written submissions of counsel for the defendant to the trial court, proceeded to consider it. On the basis of the evidence of Haruna Semakula, the learned Justice of Appeal came to the conclusion that the mortgage was properly executed. With due respect, I find it difficult to agree with that conclusion, and although I am of the view that the issue was not very material to the suit as presented, I am constrained to express my views on it, because of the impact that conclusion is likely to have on the issue of execution of documents generally."*** (emphasis is added).

The question of execution of the mortgage was, therefore, adverted to as a side issue. The subject matter in dispute between the parties was the appointment, under the debenture, of a Receiver/Manager. To that extent therefore, the first order sought in this application is misleading to the extent

it suggests that the holding was a basis for allowing the appeal, and that the mortgage was subject matter of dispute between the parties. The order of this court refusing the *"declaratory judgment"* had no bearing on the validity of the mortgage at all.

Mr. Nangwala, counsel for NPART, submitted that the errors made by this court which ought to be corrected are in the following two passages appearing in the lead judgment, namely where the learned Justice of the Supreme Court said:-

> ***"The mortgage document was produced in evidence as Exh.P9. On the face of it, it is a mortgage wherein Haruna Semakula and the appellant, both recited therein as registered proprietors of the lands listed, mortgaged the lands to UCB. However the appellant did not affix its common seal to the document."***

and

> ***"In view of all the foregoing, I would hold that the mortgage document was not validly executed by the registered proprietor(s)/ mortgagor(s), and that the Court of Appeal erred in holding that it was properly executed."*** (emphasis is added).

Counsel pointed out that in the trial court, execution of the mortgage was not pleaded or otherwise in issue, and that as a result, the fact of sealing the mortgage was not subject of trial. It was not subject of any ground of appeal in the first appeal, and, in his view, the Court of Appeal made its finding on the validity of the mortgage only in passing. He added that although during the hearing of the second appeal the broad issue of validity was touched, the specific question of sealing the mortgage did not feature in any of the addresses by counsel. He then observed that Exh.P9 was a photocopy of the

mortgage, and asserted that where a document bearing a colourless impression of a seal is photostated, the impression does not appear on the photocopy. He argued that therefore, it was a slip on the part of this Court to hold, on basis of a photocopy, that the mortgage was not sealed. However, in the end, he reluctantly, submitted in the alternative, that the Court's error resulted from default of counsel on both sides, who failed to draw the Court's attention to the fact that the original mortgage bore the impression of General Parts' common seal, though it was not visible on the photocopy. He submitted that such omission by counsel can and should in the instant case, be rectified under the slip rule. Counsel cited the decisions of this Court in **ADAM VASSILIADIS vs LIBYAN ARAB UGANDA BANK,** Civil Application No.28/92 (unreported) and **ZAITUNA KAWUMA vs GEORGE MWA LURUM,** Civil Application No.3/92 (Sc) (unreported), in support of the proposition that where a matter is overlooked, the Court will make a slip order *"if it is satisfied beyond doubt as to the order it would have made had the matter been brought to its attention."* He then invited us to look at the original mortgage which was annexed to the original affidavit of HERBERT KWIKIRIZA and deposited with the Registrar of this Court. He submitted that although it is provided in r. 29(1) of the Rules of this Court that this Court has no discretion to take additional evidence, in appropriate cases that rule has to give way to r. 1(3) which provides that nothing in the rules shall be taken to limit the inherent power of the Court to make an order necessary for achieving the ends of justice or to prevent abuse of process of court. Counsel contended that if the judgment is not amended as prayed, General Parts would take undue advantage of the holding, to contend that it is an equitable, rather than a legal, mortgagor. Counsel, however, did not elaborate whether the amendment sought was to omit from the judgment the

finding and the holding objected to, or to substitute for them a finding and a holding, respectively, to the effect that General Part's common seal was affixed to the mortgage and that the mortgage was validly executed. In our view, however, the former alternative would be untenable. The Court of Appeal pronounced on the validity of the mortgage, and the challenge of that pronouncement in this Court in the sixth ground of appeal was neither objected to nor abandoned; and for the reason given, this Court rightly considered it. We will only consider whether a case for reversing the Court's finding and holding is made out.

In an affidavit in reply dated 28th June, 2000, Haji Haruna Semakula, Managing Director of General Parts averred, inter alia, that he *"signed the mortgage deed as is apparent on the face of Exhibit P9......and the company did not seal it."* In his submissions, Dr. Byamugisha, counsel for General Parts, refuted the contention that counsel for both parties had been in fault in failing to disclose to the court that the original mortgage bore the impression of General Part's common seal. He maintained that at the trial he had cross-examined PW2, Alfred Oder, on execution of Exh.P9, and the witness had admitted that the mortgage was not sealed. He said that in his subsequent submissions, to the trial court, to the Court of Appeal, as well as to this Court his challenge of the validity of that mortgage was based on that admission. He also pointed out that at the hearing of the appeal in this Court, counsel who appeared for NPART, had conceded that there was irregularity in the execution of the mortgage. In conclusion he submitted that a party who produces a document in court and concedes through counsel, that it was irregularly executed, cannot be permitted to come to court later with a purportedly better document which the Court had not seen

earlier, and claim that the court had made an error to base its decision on the earlier one. He argued that this would provide a dangerous precedent, on strength of which unsuccessful litigants would in future, return to court with *"improved"* evidence. He invited us not to agree to look at the document which was not before the court at the hearing and determination of the appeal.

We have examined the trial judge's notes of the evidence of PW2. They do not directly bear out the contention by Dr.Byamugisha that PW2 admitted that the mortgage was not sealed. The only recorded evidence of PW2 on the issue is:

> ***"I have a security document for those additional securities. This document*** *"Registration of Mortgages."* ***It is between UCB and Haruna Semakula in respect of the loan to General Parts (U) Ltd. The signatory is the Director, Haruna Semakula and a Secretary, the identities of the signatories are not indicated. It is not shown for whom they are Secretary and Director."***

If this was in reference to Exh.P9, we think it is reasonable to infer that if the witness had been aware that on the original document the signatures appeared with the impression of General Parts' Common seal, he would most probably have said that on the original it was indicated for whom the signatories were Secretary and Director. Nevertheless this is not the same thing as saying that the witness admitted that the original was not sealed. For the reasons which will become apparent later in this ruling we do not find it necessary or useful to resolve the dispute whether the original mortgage was sealed with General Part's common seal as averred in the affidavits in

support of the application, or was not so sealed as averred in the affidavit in reply.

Rule 34 of the Rules of this Court, commonly called *"the slip rule"* provides:-

> ***"34. (1) a clerical or arithemetrical mistake in any judgment of the court or any error arising in it from an accidental slip or omission may, at anytime, whether before or after the judgment has been embodied in an order, be corrected by the court, either of its own motion or on the application of any interested person so as to give effect to what was the intention of the court when judgment was given."***

The circumstances in which this Court will exercise its power under this rule are well settled. The Court of Appeal for East Africa said in **RANIGA vs JIVRAJ** (1965) EA 700 at p.703:-

> ***"A Court will, of course, only apply the slip rule where it is fully satisfied that it is giving effect to the intention of the Court at the time when judgment was given or, in the case of a matter which was overlooked, where it is satisfied, beyond doubt, as to the order which it would have made had the matter been brought to its attention."***

In the decision of the same Court in **LAKHAMSHI BROTHERS LTD. vs R. RAJA & SONS** (1966) EA 313, Newbold P., stressed that the circumstances are very clearly circumscribed, and after citing that sentence in the RANIGA's case said:

> ***"These are the circumstances in which this Court will exercise its jurisdiction and recall its judgment, that is, only in order to give effect to what clearly would have been its intention had there not been an omission in relation to the particular matter."***

These statements have been repeatedly cited with approval in various decisions of this Court, on applications for slip orders. The decisions include **ZAITUNA KAWUMA vs GEORGE MWA LURUM** (supra), **SALIM JAMAL & OTHERS** vs **UGANDA OXGYEN LTD & OTHERS**, Civil Application No.13 of 1997 (unreported), and **ADAM VASSILLIADIS vs LIBYAN ARAB UGANDA BANK** (supra), cited by Counsel in this application. It is necessary, however to clarify a point made in the statement in RANIGA'S case. What is invisaged in the expression *"in the case of a matter which was overlooked"*? In our view, what is invisaged is a matter which the Court could have lawfully looked at, or acted upon, when deciding the appeal. It must be a matter which was available, or implicit in the record of appeal or a matter which is necessarily and clearly consequential upon the decision of the Court on the appeal. It cannot be a matter which was not in evidence, or which does not follow from findings of the appeal.

In **ZAITUNA KAWUMA vs GEORGE MWA LURUM**, (supra), the application was for an order for refund of purchase price that was paid under a sale agreement which was held on appeal to be null and void. This Court held:

> ***"...... we are satisfied that had the matter of refund of the purchase price been brought to our attention, an order would have been made when judgment was given on appeal.***
>
> ***We agree with counsel for the defendant/applicant that it follows logically from our findings......that the contract was null and void, that an order should be made for repayment of the purchase price. The respondent cannot have his house back .....and at the same time retain and enjoy the purchase price paid by the applicant".***

It is quite clear that at the time of the judgment on appeal in that case, the Court was seized of the circumstances which rendered an order for refund inevitable, namely undisputed evidence that the purchase price had been paid, and the holding that the contract under which the payment was made was null and void. It is also clear that the Court had omitted to make the order for refund only because it did not advert to the consequences of those circumstances.

The application in **SALAM JAMIL & OTHERS vs UGANDA OXYGEN LTD vs & OTHERS** (supra), sought correction of several orders in the judgment of the Court in Civil Appeal No.64/96. The Court allowed to correct only the order granting costs. It had granted to the respondents in the appeal 5/6 of *"costs of the appeal and of the suit in the court below"*, while at the same time ordering for a re-hearing of the suit by the lower court. On application for correction, this Supreme Court held that because of the order for a re-hearing, the hearing of the suit in the lower court was not yet concluded, and went on to say:

> ***"The order of this Court granting costs in the lower court was therefore an error arising from an accidental slip and did not give effect to the intention of the Court. The proper order should have been that the costs of the suit in the lower court abide the outcome of the re-hearing."***

In that case also the Court's error was a result of accidentally overlooking the consequence of its order for re-hearing of the suit.

Even in **ADAM VASSILIADIS'** case (supra), where this Court refused to make *"a slip order,"* what the Court had to consider were matters that had been properly before it at the time it heard and decided the appeal. It was an

application by an appellant who had succeeded in an appeal against dismissal of his suit for breach of contract of sale of land, but was not granted specific performance and damages prayed for. This Court held that the omission to make the orders was not a result of accidental slip, but it was deliberate for avoidance of possibility of facilitating an illegal contract under the Land Transfer Act (Cap.202).

The application in the instant case is different in a number of aspects. In the first place, the alleged mistakes sought to be corrected did not arise from an accidental slip or omission. It is not in respect of a matter or matters overlooked by this Court, or even by counsel, at the appeal stage. The finding and holding complained of were mainly based on a document which was produced in evidence as Exh.P9, and which was part of the record of appeal. One of the deficiencies found on it, was that it was not sealed with the common seal of General Parts. That finding, so far as it relates to Exh. P9 remains correct. Exh. P9 does not bear the impression of the said seal nor any written indication that it was sealed. There is therefore no error to be corrected in that regard. If, as is contended in this application, the original and duplicate of the mortgage were sealed with the common seal of General Parts, then the blunder was committed at the trial, when the plaintiff produced in evidence, a copy of a document which was not identical with its original, and failed to bring the discrepancy between the two, to the notice of the trial court. Needless to say, that the remedy cannot be found in this Court applying the slip rule to correct a mistake that may have occurred during the trial. If, as is apparent in this case, the blunder was not corrected through review by the original court, and was not capable of founding a ground of appeal, then the blunder would not be corrected under

the slip rule. (See **RAICHAND LAKHAMSHI vs ASSANAND** (1957) EA 82.) Secondly, this application is grounded on a document which was not produced in evidence. For an appellate court to take cognisance of a document, other than what was produced in evidence at the trial, however, that document has to be introduced as additional evidence in compliance with the conditionalities for admission of additional evidence. But for this Court, r. 29 (1) of the Rules of this Court provides expressly that in second appeals from decisions of the Court of Appeal the Court *"shall not have discretion to take additional evidence."* This contrasts with the Court of Appeal which, under its rules, has discretion to take additional evidence. On the face of it therefore, it would be a contravention of r.29 (1) for us to accept to take into consideration a document which was not produced in evidence at the trial or as additional evidence on the first appeal.

Thirdly, this application does not purport to be about giving effect to what was the intention of the Court when judgment was given. The Court's intention was well articulated in its judgment. Nor can it be about what order it would have made if the discrepancy between Exh.P9 and its original had been drawn to its attention in view of what we have said on the restriction on additional evidence. In the circumstances therefore, we are satisfied that this is not a proper case for the application of the slip rule, under r.34 (1) of the Rules of this Court.

The jurisdiction of this Court to recall its judgment and correct or otherwise alter it, however, is not limited to the slip rule. It may, also be exercised under its inherent power, which is set out in r.1 (3) of the Rules of this Court as follows:

> ***"(3) Nothing in these Rules shall be taken to limit or otherwise affect the inherent power of the Court, and Court of Appeal to make such orders as may be necessary for achieving the ends of justice or to prevent abuse of the process of any such court, and that power shall extend to setting aside judgments which have been proved null and void after they have been passed, and shall be exercised to prevent an abuse of the process of any Court caused by delay."***

Consequently, we are inclined to agree that, where appropriate circumstances exist for the exercise of its inherent power, this Court would not be inhibited by r.29 (1) to receive additional evidence. But that raises the question: do the appropriate circumstances exist in the instant case? Counsel for NPART relied on the hypothesis that by reason of the finding and holding objected to, the mortgage would be unjustly construed as an equitable, rather than a legal, mortgage, to the undue advantage of General Parts and disadvantage of NPART.

It must be recalled that the holding that the mortgage document was not validly executed was based on several grounds. Apart from the absence of General Part's common seal from Exh.P9, there was a failure to produce in evidence the power of attorney by virtue of which General Parts was supposed to execute the mortgage. Furthermore there was the failure to show that there was compliance with the statutory provisions relating to the signing and registration of that power of attorney, as well as the apparent non-compliance with statutory provisions regarding signing of the mortgage as an instrument: (see provisions of ss 114, 141, 154 and 156 of the Registration of Titles Act reproduced in the lead judgment). In this application, however, the applicant focused solely on the issue of affixing of the common seal, and made no attempt to explain or otherwise deal with the

other deficiencies pointed out in the judgment, though Counsel was specifically referred to them and in particular to the issue of the power of attorney. In view of that therefore, even if we were inclined to look at the original mortgage as requested, and we were to find that it was sealed with General Part's common seal, we would still not be able to hold that the mortgage was validly executed. In the circumstances we are not persuaded that it is necessary either for achieving ends of justice or preventing abuse of court process to make an order reversing any holding of the judgment of this Court in Civil Appeal No.5 of 1999.

It seems obvious that NPART has come to a belated realisation that although in the previous proceedings neither its predecessor nor itself canvassed the validity of the mortgage seriously, the issue has taken on proportions probably not invisaged when the document was casually produced in evidence. We also appreciate that though the finding and the holding in question are not very material to the substantive appeal and are concerned with the document produced in court as Exh.P9, they are capable of being construed as constituting *"res judicata"* vis a viz the status of the mortgage. For avoidance of such misconstruction, we would slightly modify the finding by substituting the expression *"does not appear to have affixed"*, and the holding with the insertion of the words *"proved to have been"* so that the two relevant portions read, respectively as follows:

> ***"……the appellant does not appear to have affixed its common seal to the document."***

and

> ***"……would hold that the mortgage document was not proved to have been validly executed by the registered***

proprietor(s)/mortgagor(s) and that the Court of Appeal erred in holding that it was properly executed."

In the result the application substantially fails and it is therefore dismissed with costs. In order to reflect the slight success, the respondent will have only 4/5 of the costs of the application.

DATED at Mengo 18th day of October 2000.

Original signed by all.

A.H.O. Oder
Justice of the Supreme Court

J.W.N. Tsekooko
Justice of the Supreme Court

J.N. Mulenga
Justice of the Supreme Court

G.W. Kanyeihamba
Justice of the Supreme Court

L.E.M. Mukasa-Kikonyogo
Justice of the Supreme Court