



Consolidated Bank of Kenya Limited v Kinyua Njagi & Company Advocates (Civil Application 507 of 2017) [2023] KEHC 24584 (KLR) (Civ) (28 July 2023) (Ruling)

Neutral citation: [2023] KEHC 24584 (KLR)

**REPUBLIC OF KENYA
IN THE HIGH COURT AT NAIROBI (MILIMANI LAW COURTS)**

CIVIL

CIVIL APPLICATION 507 OF 2017

MN MWANGI, J

JULY 28, 2023

**IN THE MATTER COMPELLING THE FIRM OF KINYUA NJAGI & COMPANY
ADVOCATES TO HONOUR THEIR PROFESSIONAL UNDERTAKING**

BETWEEN

CONSOLIDATED BANK OF KENYA LIMITED PLAINTIFF

AND

KINYUA NJAGI & COMPANY ADVOCATES DEFENDANT

RULING

1. The plaintiff filed a Notice of Motion application dated 29th November, 2022 under the provisions of Sections 1A, 1B, 3A & 99 of the *Civil Procedure Act*, Order 51 of the *Civil Procedure Rules* and all other enabling provisions of the law. The plaintiff seeks the following orders –
 - (i). That this Honourable Court be pleased to rectify the decree to include the following;
 - (ii). That the defendant honour their professional undertaking hereby be pay (sic) the sum of Kenya Shillings One Million Five Hundred and Fifty Thousand Only (Kshs. 1,550,000/=); and
 - (iii). That the Court be pleased to provide for interest and its application on the decretal amount above mentioned in accordance with the ruling of the Court issued on 22nd November, 2019.
 - (iv). That costs of this application be provided for.



2. The application is premised on the grounds on the face of the Motion. The defendant did not file any response in opposition to the instant application despite having been served with the same.
3. On 20th April, 2023 this Court gave directions for the filing of written submissions but from the record, it is evident that neither the plaintiff nor the defendant complied with the said directions.

Analysis and determination.

4. On consideration of the instant application and the grounds on the face of it, the only issue that arises for determination is if the decree should be amended.
5. The application herein is premised on the fact that the subject matter in these proceedings is the enforcement of a professional undertaking for the release of the sum of Kenya Shillings One Million Five Hundred and Fifty Thousand (Kshs. 1,550,000/=) issued by the defendant to the plaintiff but at the time of filling of the Originating Summons dated 4th September, 2017, the plaintiff inadvertently left out the sum of monies due pursuant to the professional undertaking.
6. a ruling dated 22nd November, 2019, the Court made a finding that the Originating Summons was merited and entered judgment in favour of the plaintiff. The plaintiff has now requested this Court to review the decree and the Originating Summons and in particular, paragraph (c) as noted in the grounds in support of the Summons, which states that the defendant was to release the aforesaid sums of monies pursuant to their undertaking of 21st November, 2013.
7. The plaintiff explained that it has since extracted a decree pursuant to the above ruling but it cannot execute the same as no decretal amount has been indicated. The plaintiff's case is that the amendment sought does not introduce a new cause of action or new issues for determination between the parties herein. Further, that granting the orders sought herein shall not prejudice the defendant in any way, as the decretal amount is and has always been known to them.
8. Section 99 of the *Civil Procedure Act*, Cap 21 Laws of Kenya provides for amendment of judgments, decrees or orders. It states that –

“Clerical or arithmetical mistakes in judgments, decrees or orders, or errors arising therein from any accidental slip or omission, may at any time be corrected by the court either of its own motion or on the application of any of the parties.”
9. In the case of *Vallabhdas Karsandas Raniga Vs. Mansukhlal Jivraj and Others* [1965] EA 780 cited with authority by the Court in *Nguruman Limited v Attorney General & another* [2021] eKLR, the East African Court of Appeal when dealing with a similar issue held the following –

“Section 3(2) of the *Appellate Jurisdiction Act* confers on the Court of Appeal the same jurisdiction to amend judgments, decrees and orders that the High Court has under section 99 of the *Civil Procedure Act*, making it unnecessary to look to the inherent powers of the court. The words “at any time” in section 99 clearly allow the power of amendment to be exercised after the issue of a formal order....“Slip orders” are made to rectify omissions resulting from the failure of counsel to ask for costs and other matters to which their clients are entitled.....A court will only apply the slip rules 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 present case, if the facts had been before the court when judgment was given on appeal, the court would, on



application or indeed of its own motion, have made the order for refund, now sought, which was necessarily consequential on the decision on the main issues.”

10. A ruling was delivered on 22nd November, 2019 in respect to an Originating Summons filed by the plaintiff on 4th September, 2017. The Court at paragraph 1, page 13 of the said ruling held as follows –

“...the plaintiff has established its claim of non-payment of Kshs. 1,500,000/= outstanding balance and Kshs. 50,000/= legal fees...”

11. Consequently, the Court upheld the application by the plaintiff bank to recover from the defendant the funds due and owing from the defendant with interest and costs of the suit.

12. In *Republic v Attorney General & 15 others, Ex-Parte Kenya Seed Company Limited & 5 others* [2010] eKLR, the Court of Appeal examined the the application of Section 99 of the *Civil Procedure Act* and stated as hereunder -

“27. It is a codification of the common law doctrine dubbed ‘the Slip Rule’, the history and application of which has a wealth of authorities both locally and from common law jurisdictions. It is a rule that applies as part of the inherent jurisdiction of the court, which would otherwise become functus officio upon issuing a judgment or order, to grant the power to reopen the case but only for the limited purposes stated in the section.

28. Some of the applications of the rule are fairly obvious and common place and are easily discernible like clerical errors, arithmetical mistakes, calculations of interest, wrong figures or dates. Each case will, of course, depend on its own facts, but the rule will also apply where the correction of the slip is to give effect to the actual intention of the Judge and/or ensure that the judgment/order does not have a consequence which the Judge intended to avoid adjudicating on.

The Australian Civil Procedure has provisions in pari materia with section 99. As was stated in the case of *Newmont Yandal Operations Pty Ltd v The J. Aron Corp & The Goldman Sachs Group Inc.* [2007] 70 NSWLR 411, the inherent jurisdiction extends to correcting a duly entered judgment where the orders do not truly represent what the court intended.

29. Nearer home the predecessor of this Court in *Lakhamshi Brothers Ltd v R. Raja & Sons* [1966] EA 313 endorsed that application of the rule, that is, to give effect to the intention of the court when it gave its judgment or to give effect to what clearly would have been the intention of the court had the matter not inadvertently been omitted. Spry JA in *Raniga Case (supra)* also stated as follows: -

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.

30. What is certainly not permissible in the application of section 99, is to ask the court to sit on appeal on its own decision, or to redo the case or application, or



where the amendment requires the exercise of an independent discretion, or if it involves a real difference of opinion, or requires argument and deliberation or generally where the intended corrections go to the substance of the judgment or order”.

13. Based on the foregoing, a Court will only correct a defect where it is fully satisfied that it is giving effect to the intention of the Court at the time when judgment was given.
14. It is not disputed that the plaintiff’s Originating Summons dated 4th September, 2017 is anchored on the defendant’s professional undertaking dated 21st November, 2013. Paragraphs 3 and 4 of the said professional undertaking provides that upon release of the original title documents and duly executed discharge of charge, the defendant shall pay the plaintiff the outstanding balance of Kshs. 1,500,000/= within 45 days of receipt of the said documents and fees of Kshs. 50,000/= within seven (7) days of successful registration of the transfer or within 60 days from the date of receipt of the said documents.
15. The Court having found that the plaintiff had established its claim of non-payment of Kshs. 1,500,000/= outstanding balance and Kshs. 50,000/= legal fees and thereafter, having upheld the plaintiff’s application to recover from the defendant the funds due and owing from the defendant with interest, I hold that the error referred to by the plaintiff amounts to a clerical error which if corrected will not alter the Court’s intention in its ruling dated 22nd November, 2019. This is because the Court intended to award the plaintiff the amounts due and owing from the defendant, that is Kshs,1,550,000/=, with interest.
16. This Court finds that the amendments sought will not change the Court’s ruling but will instead give effect to the intended outcome of the said ruling.
17. In the premise, the application dated 29th November, 2022 is merited and is allowed in the following terms -
 - i. The ruling dated 22nd November, 2019 is hereby amended as follows-
 - a. That the defendant is hereby compelled to honour its professional undertaking by paying the plaintiff Kenya Shillings One Million Five Hundred and Fifty Thousand (Kshs. 1,550,000/=);
 - b. That the defendant is hereby compelled to pay the plaintiff interest at Court rates on the aforesaid amount from the date of default; and
 - c. Costs of this application are awarded to the plaintiff.

It is so ordered.

DATED, SIGNED AND DELIVERED AT NAIROBI ON THIS 28TH DAY OF JULY, 2023.

NJOKI MWANGI

.....

JUDGE

I certify that this is a true copy of the original

Signed



DEPUTY REGISTRAR

