



**REPUBLIC OF KENYA**  
**IN THE HIGH COURT OF KENYA AT MACHAKOS**

**CIVIL APPEAL NO. 190 OF 2008**

**MEHARI TEWOLDE T/A**

**MEHARI TRANSPORTERS LTD..... APPELLANTS**

**VERSUS**

**DAMUS MUASYA MAINGI ..... RESPONDENT**

*(Being an appeal from the Judgment of the Chief Magistrate’s Court at Machakos of Hon F. Muchemi (CM) in Chief Magistrate Case No. 188 of 2007 dated 23<sup>rd</sup> October 2008)*

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*(Before B. Thurania Jaden J)*

**R U L I N G**

1. The application dated 26/6/2013 seeks orders that this Honourable Court be pleased to set aside the consent order entered into and filed in court on 08/05/2013 because the calculations were wrong by a figure of Kshs.141,875/= in excess of the actual sum of Kshs.749,875/=.
2. The application further seeks orders that the suit be marked as settled since the decretal sum, costs and interests of Kshs.749,975/= has been paid to the Respondent by cheque No.009900.
3. According to the affidavit in support, there was an arithmetical error in the calculations which reflected the amount due to the Respondent as Kshs. 890,529/= instead of Kshs.749,875/=.
4. The application is opposed. The Respondent swore a replying affidavit on 2/7/2013. According to the Respondent, the correct amount is Kshs.890,528.25 which was calculated by the Applicant and confirmed by the Respondent as follows:-

1. “Special damages	Kshs. 200/=
2. General damages	<u>Kshs. 1,650,000/=Kshs. 1,650,200/=</u>

3. Less contributory negligence	<u>Kshs. 330,040/=Kshs. 1,319,960/=</u>
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4. Less the sum paid on 02/01/2009	Kshs. 886,775/=
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5. Add interest the balance of 12% P.A	<u>Kshs. 532,285/=</u>
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6. From 02/01/2009 to 31/04/2013

7. Add costs in the lower court	Kshs. _____
<u>86,775/=</u>	<u>Kshs.890,528.35/=”</u>

5. The application was canvassed by way of written submissions which I have duly considered.
6. Section 99 of the Civil Procedure Act provides as follows:-

**“Clerical or arithmetical mistakes in judgments, decrees or orders, or errors arising herein 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.”**

Although the Applicant has stated that there is an excess of Kshs.141,875/=it has not been demonstrated how the said figure has been arrived at.

7. Under **Order 45 rule 1** are as follows:

**“Any person considering himself aggrieved-**

- a. **By a decree or order from which an appeal is allowed, but from which no appeal has been preferred; or**
- b. **By a decree or order from which no appeal is hereby allowed,**

**and who from the discovery of new and important matter or evidence which, after the exercise of due diligence, was not within his knowledge or could not be produced by him at the time when the decree was passed or the order made, or on account of some mistake or error apparent on the face of the record, or for any other sufficient reason, desires to obtain a review of the decree or order, may apply for a review of judgment to the court which passed the decree or made the order without unreasonable delay.”**

8. The law on the setting aside of consent orders is settled. It can only be set aside on the same grounds as would justify the setting aside of a contract, for example fraud, mistake or misrepresentation (see for example **Flora N. Wasike –vs- Destino Wambuko (1982-88) 1 KAR.**
9. The Applicant has failed to demonstrate the error or any other grounds consent order to be set aside. The application has no merits and is dismissed.

**B. THURANIRA JADEN**

**JUDGE**

Dated and delivered at Machakos this 27<sup>th</sup> day of **April** 2015.

**B. THURANIRA JADEN**

**JUDGE**