Shah & 2 others v Mercantile Life and General Assurance Company Limited & 2 others (Suing on Behalf of the International Air Transport Association - IATA) (Civil Appeal (Application) 146 of 2015) [2024] KECA 968 (KLR) (26 July 2024) (Ruling)

Neutral citation: [2024] KECA 968 (KLR)

REPUBLIC OF KENYA

IN THE COURT OF APPEAL AT NAKURU

CIVIL APPEAL (APPLICATION) 146 OF 2015

MSA MAKHANDIA, K M'INOTI & M NGUGI, JJA

JULY 26, 2024

BETWEEN

DILIP M SHAH ..... 1ST APPLICANT

PANKAJ MEGHJI SHAH ..... 2ND APPLICANT

KAMAL M SHAH ..... 3RD APPLICANT

AND

FIVE CONTINENTS TRAVEL LIMITED ..... 1ST RESPONDENT

MERCANTILE LIFE AND GENERAL ASSURANCE COMPANY LIMITED ..... 2ND RESPONDENT

MOHAMMAD HASSIM PONDOR ..... 3RD RESPONDENT

SUING ON BEHALF OF THE INTERNATIONAL AIR TRANSPORT ASSOCIATION - IATA

(Being an application to correct an order of this Court issued on 11th January 2018 (Asike-Makhandia, Ouko & M'Inoti, JJ.A) so that it corresponds with the judgment of this Court dated 26th May 2017inCivil Appeal No. 146 of 2015)

RULING

1. Before us is a Notice of Motion dated 15th March 2021, brought pursuant to rule 35(2) of this *Court's Rules.* The applicants seek that we correct the order issued on 11th January 2018 pursuant to the judgment delivered by this Court on 26th May 2017. According to the applicants, the order does not correspond with the judgment.

2. The application is supported by the grounds on its face as well as the affidavit sworn in support thereof by Mr. Anthony Guto Mogere, learned counsel dated 15th March 2021.

3. The uncontested facts leading to this application are that on 26th May 2017, this Court (Asike-Makhandia, Ouko and M'Inoti, JJ.A) delivered a judgment partially allowing the appeal on one ground only. Otherwise, the rest of the appeal was dismissed with no order as to costs. The order flowing from the said judgment was duly extracted by the respondents. By a letter dated 31st October 2017, the respondents' advocates forwarded a draft order to the Deputy Registrar of this Court to approve, sign, and seal it. This was after the draft order had been forwarded to the counsel for the applicants with the request that they approve it with or without amendments as required by rule 34 of *this Court Rules*. However, the applicants declined and or failed to do so. Subsequently, on 11th January 2018, on the application of counsel for the respondents the Deputy Registrar signed, sealed, and issued the order. The order was in these terms:

    a. The judgment of the High Court dated 14th May 2015 be and is hereby set aside and the suit reinstated pending determination of the arbitral proceedings.

    b. The respondent cannot be called upon to indemnify the appellants before the question of default by the company, which has been referred to arbitration is resolved.

    c. There be no orders as to costs.

4. According to the applicants, however, the order does not accord or correspond with the judgment of this Court because the Court neither set aside the judgment of the High Court nor dismiss it as indicated in the order. It is on that basis that the applicants have lodged the instant application.

5. The application was opposed by the respondents through the replying affidavit of Karen Njagi dated 29th March 2021. It is their case that the respondents duly sent the draft order to the applicant's counsel for approval as required by the *rule of this Court* aforesaid. That the applicants had not disputed receipt of the draft order. That even in the letter that was sent to the Deputy Registrar requesting for the settling of terms of the order, counsel for the applicants was copied. In the premises, the applicants had at least two occasions to approve with or without amendments the draft order but did nothing. That the substance of the judgment was that the High Court misdirected itself in dismissing the respondents' suit, which had in fact been stayed pending arbitration proceedings. As far as the respondents were concerned, the order was in consonance with the judgment.

6. The application was canvased by way of written submissions with limited oral highlights. At the hearing, Mr. Angwenyi, learned counsel appeared for the applicants. Highlighting the written submissions, counsel argued that the order issued did not correspond with the judgment as the two had material discrepancies. First, the order states that the judgment of the High Court was set aside pending the hearing of the arbitral proceedings. That there was no such determination in the judgment. The second discrepancy was that the judgment speaks to the court not finding merit in the appeal and dismissing it. However, the order does not reflect this fact. That the respondents in their replying affidavit had not demonstrated how the judgment corresponded with the extracted order. Counsel relied on the cases of *Synergy Industrial Credit Limited vs. Cape Holdings Limited* [2021] eKLR and *Nguruman Limited vs. Shompole Group Ranch & Another* [2014] eKLR, to submit that it was manifestly clear that this Court intended to dismiss the 1st and 2nd respondents' appeal against the applicants. That it was therefore unjust for the 1st and 2nd respondents to use an order which does not correspond to the judgment of this Court to revive a suit which was dismissed.

7. On his part, Mr. Gichuhi, SC, appearing for the respondents reiterated the depositions in the replying affidavit and submitted that following the judgment of this Court, the draft order was drawn by counsel for the respondents and forwarded to the applicants'advocates for approval with or without amendments, who refused to act. The draft order was then placed before the Court for the settlement of the terms of the order with notice to the applicants. However, the applicants' counsel once more failed to attend. The draft order was subsequently approved and extracted by the Court and served on the respondents who never objected to its terms until after more than 3 years. Counsel further urged that the applicants had not attached any draft order of their own to demonstrate how the impugned order did not correspond with the substance of the judgment to warrant its correction. To the respondents, the order corresponds with the judgment and it correctly captured the intention of the Court. It was contended that no mistake has been pointed out by the applicants to warrant any correction and that the applicants had selectively cherry-picked excerpts of the judgment to suit their self-interests. In the respondent's view, the order as extracted gave effect to the intention of the judgment which was to reinstate the suit pending the hearing and determination of the arbitral proceedings. Counsel added that the reinstatement of the suit was necessary to meet the ends of justice and simply allowed the suit against the applicants to remain alive to await the arbitral award. Relying on the cases of *Synergy Industrial Credit Limited v Cape Holdings Limited* (*supra*) and *Republic v District Commissioner, Siaya & Another, Ex-Parte Nicholas Oluoch Luanda* [2014] eKLR, senior counsel submitted that a court of equity will not aid stale demands, where the claimant has slept upon his right and acquiesced for a great length of time. He submitted that the applicants were guilty of laches for bringing the application more than 3 years after the order was settled.

8. We have considered the application, the grounds, and the affidavits sworn in support and in opposition to the application, the able submissions of both parties and the law. The main vehicle for accessing redress for this kind of grievance is none other than rule 35(1) (2) of *this Court's Rules*. It provides, inter alia:

> "(1) A clerical or arithmetical mistake in any Judgment of the Court or any error arising therein from an accidental slip or omission may at any time, 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 an interested person so as to give effect to what the intention of the Court was when the Judgment was given.
>
> (2) An order of the Court may at any time be corrected by the Court either of its own motion or on the application of any interested person if it does not correspond with the Judgment it supports or where the Judgment has been corrected under sub rule (1) with the Judgment as so corrected."

9. It, therefore, follows that the mandate is to correct "any clerical or arithmetical mistake or any error arising therein from an accidental slip or omission". The target is either a judgment or an order. The part of the judgment on which the application is founded is contained in the following paragraph of the judgment:

> "We would however agree with the appellants that it was a misdirection for the learned Judge to dismiss the appellants' suit against the company. That suit was stayed pending the hearing and determination of the arbitral proceedings, which are still proceeding and there was no good reason why it was dismissed. Save to that extent, we do not find any merit in the appeal,

and the same is dismissed. In light of the circumstances of this appeal and the fact that the appellants have succeeded on one of the grounds of appeal, we make no orders as to costs."

10. Pursuant to the said paragraph of the judgment, the orders extracted read as already reproduced elsewhere in this ruling.

11. The applicant contends that the orders as reproduced above do not correspond with the judgment or its contents. It follows that in order for rule 35 to be invoked, there has to be demonstration of the existence of the following: (i) an acknowledgment that there is either a clerical, arithmetical mistake or an error which is readily noticeable in the ruling or judgment; (ii) the alleged clerical arithmetical or error identified arose as a result of an accidental slip or omission; and (iii) its rectification is necessary in order to give effect to the intention of the Court in the said judgment or ruling as the case may be. We are certain that the instant application does not fit in any of the above requirements.

12. It is axiomatic that the jurisdiction of the Court under *the slip rule* is circumscribed and limited to correction of errors arising from accidental slip or omission, so as to give effect to the manifest intention of the Court. It is not the purpose of the jurisdiction to allow the Court to sit in judgment of the merits of its previous decisions. In *Mukuru Munge v Florence Shingi Mwawana & 2 Others* [2016] eKLR, this Court stated as follows on the application of the slip rule:

> " Besides the residual power to reopen a decided case, it must be pointed out that under rule 35 (1) of the *Court of Appeal Rules*, (commonly referred to as the slip rule), the Court has power to correct any clerical or arithmetical mistake in its judgment or any error arising therein from an accidental slip or omission. The Court may undertake that correction of its own motion or on the application of any interested person, and at any time whether before or after the judgment has been embodied in an order. The slip rule does not allow the Court to sit in judgment on its own previous judgment... Its purpose is to effect correction so as to give effect to the intention of the Court when it gave its judgment. (Emphasis added)."

13. A closer reading of the judgment reveals that this Court found one limb of the appeal successful to the extent that the trial court was in error in dismissing the suit whilst it had been stayed to await the outcome of the arbitration. It however, found the other prayers in the appeal without merit and dismissed them. Looking at the order as extracted, it is obvious that the order of the Court partially allowing the appeal is captured in the first paragraph of the order whereas the other prayers are captured in the remainder of the order. We cannot find anything in the order that went against the intent of the court in the judgment by whichever interpretation.

14. We see no clerical or arithmetic error or any other error of the nature that would justify the invocation of *the slip rule*. In our view, granting this application will not give effect to the manifest intention of the Court as expressed in the judgment. On the contrary, it will amount to overturning the Court's clear intention and substituting it with an entirely different outcome which the applicants consider palatable to them. We are afraid that is not the purpose of the slip rule. We note that there has been several developments since the extraction of the order, including the dispute being heard by the arbitrator and the award made followed by its adoption by court and execution has been set in motion. All through the applicants have actively participated in these processes. They cannot now, so late in the day, purport to impugn an order that had been acted upon. It cannot be gainsaid that the applicants are guilty of laches and indolence as well. Ultimately, we can do no more in the circumstances, but agree with the respondents' sentiments that this application is an afterthought and indeed an abuse of the process of the court.

15. The application has no merit and is hereby dismissed, with costs to the respondents.

DATED AND DELIVERED AT NAIROBI THIS 26TH DAY OF JULY, 2024.

ASIKE-MAKHANDIA

JUDGE OF APPEAL

.....

K. M'INOTI

JUDGE OF APPEAL

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MUMBI NGUGI

JUDGE OF APPEAL

I certify that this is a True copy of the original

Signed

DEPUTY REGISTRAR