REPUBLIC OF KENYA

IN THE COURT OF APPEAL

AT NAIROBI

(CORAM: M'INOTI, SICHALE & J. MOHAMMED, JJ.A.)

CIVIL APPEAL NO. 81 OF 2016

BETWEEN

SYNERGY INDUSTRIAL CREDIT LIMITED…...……APPELLANT

AND

CAPE HOLDINGS LIMITED…….……...……..……RESPONDENT

(Appeal from the ruling and order of the High Court of Kenya at Nairobi, (Kariuki, J.), dated 11th March 2016 **in MISC. CIVIL APPLICATION No. 114 of 2015**

RULING OF THE COURT

In its judgment dated 6th November 2020, this Court found in favour of the appellant in the appeal. The central issue in the appeal was whether the High Court erred by setting aside an arbitral award on the grounds that the arbitral tribunal had dealt with a dispute not contemplated by the parties, or one beyond the terms of the reference or had otherwise decided matters beyond the scope of the arbitral reference. In holding that the High Court was not entitled to interfere with the arbitral award, the Court rendered itself as follows:

> *"Ultimately we find merit in this appeal. The learned judge was not justified in setting aside the arbitral award on the grounds that the arbitral tribunal had dealt with a dispute that was not contemplated by the parties, or one beyond the terms of the reference to arbitration, or had decided matters beyond the scope of the reference. The appellant will have the costs of the appeal. It is so ordered."*

On 16th November 2020, ***the appellant, Synergy Industrial Credit Ltd,*** filed a motion on notice under ***sections 3(2)*** and ***3A*** of the ***Appellate Jurisdiction Act, rules 1(2), 35 (2)*** and ***42*** of the ***Court of Appeal Rules*** and ***Article 159(2)(d)*** of the ***Constitution*** seeking review of the judgment to specifically grant the prayers that the appellant has sought in its memorandum of appeal. Those prayers were worded as follows:

> *"2 The ruling and orders appealed against be set aside and this Honourable Court do make an order:*
>
> *(a) dismissing the respondent's application dated 25th February 2015 for setting aside the arbitral award published on 30th January 2015; and*
>
> *(b) Allowing the appellant's notice of motion dated 4th March 2015 for recognition of and implementation of the award"*

In the affidavit in support of the motion, ***Mr. Vishal Shah***, a director of the appellant explained that the respondent had refused to approve the order extracted from the judgment of the Court and urged us to review the judgment and clarify that the appeal was allowed in terms of the specific prayers sought in the memorandum of appeal. The appellant contended that the Court has jurisdiction to correct an omission like the one in the judgment dated 6th November 2020 so as to give full effect to the manifest intention of the Court.

The appellant relied on the decisions in ***Nguruman Ltd v. Shampole Group Ranch & Another [2014] eKLR, Kurshed Begum Mirza v. Jackson Kaibunga [2020] eKLR, Mukuru Munge v. Florence Shingi Mwawana & 2 Others [2016]*** and ***Elerman Properties v. National Environment Tribunal & Others [2020] eKLR*** in support of its proposition on the nature and extent of the jurisdiction of this Court to correct errors or omissions.

The respondent, Cape Holdings Ltd, opposed the motion through a replying affidavit sworn by its director, ***Mr. Vinay Sangrajka.*** Part of

that affidavit deposes to the merits of the judgment and what the respondent perceives to be bias on the part of the Court, which are issues outside the remit of this application. As far as is relevant to the application, he contended that the judgment merely found that the appellant's appeal had merit and awarded the appellant costs and that the present application was seeking a substantial amendment of the judgment. In his view, the issue raised by the appellant can only be resolved through the procedure of settling the terms of the order and for that reason, the application was bad in law and a total waste of time.

The respondent also argued that the application was one for review of the judgment, which was totally unmerited because the court has no jurisdiction to review or restructure the judgment. The respondent relied on the decision in ***Beth Muthoni Njau & Another v City Finance Bank [2018] eKLR*** in which this Court declined to review its judgment in the absence of any error on the face of the judgment and ***Kurshed Begum Mirza v Jackson Kainunga (supra)*** to support the contention that under ***rule 35*** of the Court's rules, review is limited to clerical or arithmetic errors only.

We have duly considered the application, the Judgment of the Court dated 6th November 2020, the submissions by both parties and authorities that they relied upon. ***Rule 35 (1)*** of the rules of this Court provides as follows:

> *"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 the application of any interested person so as to give effect to what the intention of the Court was when judgment was given." (Emphasis added)*

Decisions abound that this Court has jurisdiction to correct any error arising from an accidental slip or omission and the circumstances under which that jurisdiction may be invoked. In ***Lakhamshi Brothers Ltd v. R. Raja & Sons [1966] EA 313, Sir Charles Newbold, P***., stated the approach as follows:

> *"Indeed there has been a multitude of decisions by this Court, on what is known generally as the slip rule, in which the inherent jurisdiction of the court to recall a judgment in order to give effect to its manifest intention has been held to exist. The circumstances however, of the exercise of any such jurisdiction are very clearly circumscribed. Broadly these circumstances are where the court is asked in the application subsequent to judgment 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." (Emphasis added).*

Earlier, in ***Raniga v. Jivraj [1965] EA 700***, ***Spry JA*** stated thus:

> *"A court will, of course, only apply the slip rule where it is fully satisfied that in giving effect to the intention of the court at the same 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."*

More recently in ***Mukuru Munge v. Florence Shingi Mwawana*** & ***2 Others*** (supra), the Court rendered itself on this issue:

> *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).*

A consideration of the judgment dated 6th November 2020 shows that the main issue in dispute in the appeal was whether the High Court erred by setting aside the arbitral award that was in favour of the appellant. The Court agreed with the appellant that the High Court was not justified to set aside the arbitral award. It found merit in the appeal and awarded the appellant costs of the appeal. The manifest intention of the Court is so plain to second guess. It was to allow the appeal and set aside the order of the High Court that in turn set aside the arbitral award. We are therefore satisfied that this application is deserved and that this is the kind of slip that ***rule 35(1)*** of the rules of the Court allow to be corrected. Accordingly we allow the application with costs to the appellant. For the avoidance of doubt, the Judgment of the Court dated 6th November 2020 is corrected to read as follows:

1. The appeal is allowed with costs to the appellant;

2. The ruling and order of the High Court dated 11th March 2016 is set aside;

3. The respondent's application dated 25th February 2015 is dismissed with costs; and

4. The appellant's application dated 4th March 2015 is allowed with costs.

Dated and delivered at Nairobi this 29th day of January, 2021

K. M'INOTI

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JUDGE OF APPEAL

F. SICHALE

.....

JUDGE OF APPEAL

J. MOHAMMED

.....

JUDGE OF APPEAL

I certify that this is a true copy of the original.

Signed

DEPUTY REGISTRAR