



IN THE COURT OF APPEAL

AT MALINDI

(CORAM: NAMBUYE, KOOME & OKWENGU JJA)

CIVIL APPEAL NO. 31 OF 2014

BETWEEN

SARAF LIMITED.....APPELLANT

AND

AUGUSTINO ARDUIN.....RESPONDENT

(An application Under Section 3A and 3B the Appellate Jurisdiction Act, Rules 35, 43 and 53 of the Court of Appeal Rules)

RULING OF THE COURT

[1] This is an application to correct errors contained in the judgment of this Court delivered on 1st July, 2016 by Koome, Okwengu & GBM Kariuki. JJA. Following the delivery of the said Judgment, **Saraf Limited** (applicant) who was the appellant in the aforesaid judgment, filed a notice of motion on 22nd March, 2017 principally invoking the jurisdiction of this Court under **Rule 35** of the Court Rules. The applicant sought *inter alia* a correction of an error arising from an accidental slip or omission apparent on record to be corrected. **Rule 35** of the Court of Appeal Rules provides;

(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 Judgment as so corrected.”

[2] The mandate thus donated by **Rule 35** is for this Court to correct “**any clerical or arithmetical mistake or any error arising therein from an accidental slip or omission**”. During the hearing of the motion **Mr. Ole Kina** learned counsel for the applicant pointed out to us that there is a mix up in the submissions that were made on behalf of the appellant that seemed to have been attributed to counsel for the respondent and *vice versa*. In his view, that mix up brings incoherence in the whole judgement of the Court. This is how counsel put it in the grounds supporting the motion;

“That an examination of the judgment will reveal that there is a mix up in the evaluation of submissions as some of the submissions of counsel for the appellant are attributed to the counsel for the respondent in a manner that results in a break in the coherence of the judgment of the Honourable Court.

That it is clear that there was a slip, other error or omission that precipitated the judgment in its present form

That it is in the interest of justice that the Honourable Court is pleased to exercise its discretion and cause the errors to be rectified”

[3] The respondent was represented by **Mr. Philip Michira** who supported the judgment as it is because in his view the errors did not affect the substance or the final orders as the reasons given in the judgment clearly explain how the final order was arrived at.

[4] We have considered the said judgment of the Court and are in agreement that there are some typographical, slips or omissions in regard to the description of the parties. **Mr. Ole Kina** was acting for **Saraf Ltd** who was the defendant in the High Court and respondent in this Court. On the other hand, **Mr. Michira** was acting for **Augusto Arduini** who was the Plaintiff in the High Court and respondent respectively

in this Court.

[5] We have identified the following errors;

(i) Paragraph 11 of the judgment it is indicated that;

“It was Mr. Ole Kina’s submission that the “defendant/appellant...”

This should have read the “**plaintiff/respondent**” **(ii) Paragraph 12** it is indicated that;

“On his part, Mr. Elijah Ogot, learned counsel for the appellant” this should read “**respondent**” “... submitted that the appellant qua defendant did not...” should have read “**respondent qua plaintiff**”

(iii) On Paragraph 14 it is indicated that;

“The respondent/defendant...”should read the “**appellant**”

(iv) On Paragraph 15 it is indicated that;

“In short, the respondent’s” should read the “**appellant’s**” “...case for striking out the appellant’s” should read

“**respondent’s**”

[6] We are of the considered view that these errors do not affect the substance of the judgment because the reasons for the final order are well stated.

[7] Accordingly the judgment dated 1st July, 2016 is hereby corrected pursuant to the provisions of **Rule 35** of this Court Rules. We direct the said corrections be reflected in the Original judgement of this Court. The Notice of Motion dated 22nd March, 2017 is hereby allowed to the extent of the aforesaid corrections. We make no order as to costs.

Dated and delivered at Malindi this 4th day of October, 2019.

R. N. NAMBUYE

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JUDGE OF APPEAL

M.K. KOOME

.....

JUDGE OF APPEAL

HANNAH OKWENGU

.....

JUDGE OF APPEAL

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

DEPUTY REGISTRAR