IN THE COURT OF APPEAL

AT NAIROBI

(CORAM: GITHINJI, VISRAM & KIAGE, JJ.A)

CIVIL APPEAL (APPLICATION) NO. 54 OF 2015

BETWEEN

MESHACK OCHIENG T/A MECKO ENTERPRISES............. APPLICANT

AND

CHAIRMAN BOARD OF GOVERNORS

NG'IYA GIRLS HIGH SCHOOL ....1ST RESPONDENT

THE PRINCIPAL SECRETARY,

MINISTRY OF EDUCATION .... 2ND RESPONDENT

ATTORNEY GENERAL...3RD RESPONDENT

SECRETARY CORDINATOR ECONOMIC

STIMULUS PROGRAMME PUBLIC WORKS..................4TH APPLICANT

CABINET SECRETARY, NATIONAL TREASURY........... 5TH APPLICANT

(Appeal from the ruling and order of the Court of Kenya at Nairobi (Hon. Lady Justice J. Kamau) dated 19th December, 2014

in

Misc. Civil Appln. No. 445 of 2013)

****

RULING OF THE COURT

The application before us is a strange one. Expressed as brought under **Rule 35(1)** of the Court of Appeal Rules, by Meshack Ochieng T/a Mecko Enterprises who was the 1st respondent in Civil Appeal No. 54 of 2015, it seeks orders;

> ***"1. That, the 2nd, 3rd , 4th and 5th respondents herein in order (3) are hereby ordered to settle interest of late payment of Kshs. 32,616,629.80 to Meshack Ochieng' the 1st respondent herein payable within thirty (30) days from the date hereof with interest at the rate of 20.5% in full payment.***
>
> ***2. Cost of application and appeal be awarded to the applicant.***
>
> ***3. The court to certify the matter as urgent."***

The first of those orders seeks a substantial determination in the question of interest for late payment of a decretal sum which the applicant computes at **Kshs 32,616,629.8,** which should then attract further interest at 20.5% per annum until payment in full.

In grounds forming the basis for the application, the motion on its face lists excerpts from the order of this Court dated 20th June 2016 the correction of which the application purports to seek under ***Rule 35(1)***, as well as of a ruling by Olga Sewe, J. and of certain provisions of the Constitution. The same hotch-potch of excerpts and provisions is what constitutes the supporting affidavit of Meshack Ochieng sworn on 11th April 2018.

The reason why we characterized the application as strange at the beginning of this ruling is simply that whereas it purports to be brought in Civil Appeal No. 54 of 2015, that appeal no longer exists having been withdrawn by consent of the parties when they appeared before the Court (Karanja, Mwilu and Azangalala JJ.A) on 20th June 2016 and the following brief order was made by that bench;

> ***"By consent of the parties herein confirmed and enforced by their filed consent herein on 17th June, 2016 marking the appeal as fully settled out of court, and which we adopt as a court order and at the request of all parties now present in court, appeal no. 54 of 2015 is marked as withdrawn under rule 96(5) of our rules."***

That order, which brought the appeal to an end, was preceded by a consent letter signed by **Meshack Ochieng** himself as the 1st respondent in person, **Otieno, Ragot & Co. Advocates** for the appellant and **Emmanuel Kuria**, State counsel for the Attorney General who was representing the 2nd to 5th respondents. Its terms were as follows;

> ***"By Consent:***
>
> ***1. The award made and published on 30th September 2013 and adopted as a judgment and decree of the High Court in Nairobi High Court***
>
> ***Miscellaneous Civil Application No. 445 of 2013 on 19th March 2014 as well as the consent recorded in the said suit on 18th March 2014 shall not be construed as requiring the appellant herein being the 2nd respondent in the suit to make any payment directly to the 1st respondent in respect of the works that were the subject matter of the award, the appellant having fully discharged its obligations to the 1st respondent.***
>
> ***2. The 1st respondent as applicant in the said suit hereby gives an irrevocable undertaking not to execute or enforce as against the appellant in any manner whatsoever the decree given by the High Court in the said suit on 19th March 2014 or on any other date or to initiate proceedings of any kind to recover the decretal sum from the appellant.***
>
> ***3. The 1st respondent be at liberty to pursue the settlement of the award and the decree against and from the 2nd, 3rd, 4th and 5th respondents.***
>
> ***4. This consent be filed in the Superior Court and upon the such filing, the entire dispute between the appellant and the 1st respondent in respect of the matters the subject of the arbitration giving rise to the award made and published on 30th September 2013 and the subsequent decree given by the Superior Court in the said suit on 19th March 2014 be marked as fully settled.***
>
> ***5. This appeal be marked as settled and each part shall bear its own costs of both this appeal and of the suit in the Supreme Court."***

Given the antecedents of the consent letter leading to the withdrawal of the appeal and the crystal clarity of this Court's order,

we are unable to understand the basis of the applicants' quest through the motion before us. It is noteworthy that even though the consent letter had some five clauses, the first four related, in the main, to proceedings that were before the High Court which were thereby settled out of court and only clause 5 dealt with the appeal before this Court. It is not therefore surprising that the Court was content to adopt the consent letter as a court order and to record only the order withdrawing the appeal by consent of the parties. The consent letter itself anticipated its filing before the High Court as a culmination of the out of court negotiations that had fully settled the matter.

Under those circumstances, we find it intriguing that the applicant should have brought this application. Not only is the Court *functus officio* its role having been spent by the withdrawal of the appeal, but, significantly, the order having been entered into by consent, it has contractual binding force between the parties who signed it and could only be set aside by consent of the same parties or if it were shown that conditions such as would lead to the rescission of a contract do exist. Such conditions include fraud, misrepresentation or mistake, the onus to prove which falls in the party seeking to alter or uproot the consent. See ***FLORA N. WASIKE vs. DESTIMO WAMBOKO [1988] eKLR.***

There is nothing in the motion, the grounds in the affidavit in support or in the applicants' submissions before us that has attempted to show that the consent was improperly procured and should therefore be set aside or altered. No basis has been laid for the alterations that the applicant seeks.

As to the reliance on the power Court under ***Rule 35(1)*** to correct errors, we think it does not avail the applicant because we do not see what error there is when that which the applicant seeks to undo or alter is what he voluntarily and expressly committed himself to by signing the consent. The order of the Court is a faithful rendition of the parties' consent letter with which it fully corresponds so that it then follows that the rule, which we set out hereunder, cannot support the correction that the applicant seeks. The rule states;

> ***"35. (1) A clerical or arithmetic 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.***

It is not lost to us that the corrections the applicant seeks far from being minor errors or omissions describable as mere slips are with regard to substantial interest. It is the same thing he has unsuccessfully pursued on various occasions in the High Court but he remains intrepid and undeterred. In one of the rulings the applicant refers to, the one by Olga Sewe, J. dated 22nd December 2017, the learned Judge addressed this very issue as follows;

> ***"2. Again, the only issue between the parties herein, is the question whether the applicant is entitled to interest for the late payment, which has been worked out to be in the sum of Kshs. 32,616,629.80 as at the time of the filing of the instant application. The order of 19th March 2014 arose from the decision of Kamau, J. dated 26th February 2014. Much time and effort has been expended on a reconsideration of that decision and decisions rendered by this Court thereon. The pertinent rulings are dated 3oth June 2017 and 3rd November 2017. Quite apart from the fact that this Court is in no position to "…dismiss and/or strike out…" any portion of the ruling of a Court of concurrent jurisdiction, as has been sought by the plaintiff herein, the question of interest has been repeatedly ruled to be res judicata. Unless and until that conclusion is overturned on appeal, it is pointless for the plaintiff to keep harping on about it. As matters stand, I would reiterate the previous decisions made herein and find that nothing has changed since those decisions were arrived at."***

We think, with respect, that litigation must come to an end and the current attempt by the applicant to reopen that very issue by this application cannot possibly be granted as it is wholly devoid of merit and quite plainly misconceived. It is accordingly dismissed with costs to the 1st respondent (Chairman Board of Governors, Ng'iya Girls High School) who appeared and opposed the application through learned counsel Mr. Mola who held brief for Mr. Ragot.

Orders accordingly.

Dated and delivered at Nairobi this 23rd day of November, 2018.

E. M. GITHINJI

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JUDGE OF APPEAL

ALNASHIR VISRAM

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JUDGE OF APPEAL

P. O. KIAGE

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JUDGE OF APPEAL

I certify that this is a true

copy of the original.

DEPUTY REGISTRAR