IN THE COURT OF APPEAL

AT NAIROBI

(CORAM: MAKHANDIA, OUKO & M'INOTI, JJ.A.)

CIVIL APPEAL NO. 287 OF 2015

DOMINIC ALOIS GEORGE OMENYE

T/A OMENYE & ASSOCIATES...APPELLANT

AND

PRIME BANK LIMITED.....RESPONDENT

(Appeal from the ruling and order of the High Court at Nairobi, (Amin, J.) dated 26th October 2015

in

HCCC NO. 1649 OF 2001)

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JUDGMENT OF THE COURT

Section 99 of the ***Civil Procedure Act*** vests in the High Court power to correct clerical or arithmetical mistakes in judgments, decrees or orders, or errors arising from any accidental slip or omission, either on its own motion or on application by any party to a suit. On 26th October 2015, the High Court (***Amin, J.)*** dismissed with costs an application by the appellant, ***Dominic Alois George Omeenye***, seeking correction of purported arithmetical errors in a judgment and decree of the High Court dated 25th October 2004. The contested question in this appeal is therefore whether the matters that the appellant was complaining about constitute clerical or arithmetic errors, or errors arising from accidental slip or omission.

By way of background, on 29th October 2001 the respondent, ***Prime Bank Limited,*** filed a suit in the High Court against the appellant seeking recovery of ***Kshs 4,449,182.15*** with interest at 23.5% per annum from 18th September 2001 until payment in full, being money it had advanced to the appellant in an overdraft arrangement. In a defence filed on 11th December 2001, the appellant denied liability, arguing that his liability under the overdraft was limited to Kshs 1 million and accused the respondent of breaching the terms of the overdraft.

The respondent thereafter applied for summary judgment and by a ruling dated 30th January 2003, ***Nyamu, J.*** (as he then was) entered judgment in favour of the respondent for Kshs 1 million which he found the appellant to have admitted and directed the parties to take account or go to trial on the balance of the respondent's claim. The parties elected to go to trial, and ***Azangalala, J.*** (as he then was) heard the

suit. By a judgment dated 25th October 2004, the learned judge found for the respondent and awarded it ***Kshs 3,215,182.15*** with interest at court rates with effect from the date of filing suit until payment in full, plus costs of the suit. However, he disallowed ***Kshs 234,000/=*** in the respondent's claim because he found it unproven.

The appellant was aggrieved by the judgment of the High Court and appealed to this Court in Civil Appeal No. 88 of 2005 against the whole of the judgment. His appeal was premised on 11 grounds of appeal, but of concern to us here is the last ground, which stated:

> ***"11. The learned judge erred in law and fact in arriving at a wrong decision and not appreciating that the interest effect on the sums not proved by the bank (Kshs. 234,000/=) in untraceable cheques from 1996-1997 is what constituted the interest and penalties in the account which (formed) the basis of the suit and in their absence, no suit could be sustained".***

By a judgment dated 6th March 2015 this court dismissed the appeal in its entirety. Specifically as regards the last ground of appeal, which the Court considered together with two other grounds of appeal, the Court expressed itself thus:

> ***"Turning to grounds 9, 10 and 11, we agree with the trial judge that the respondent's claim was proved on a balance of probabilities. The judge was not satisfied that the respondent had proved a claim of Kshs 234,000/= and it was accordingly discounted. The sum was in respect of 4 entries made to the appellant's account on 10th March 1997, 1st April 1997 (two payments) and 22nd April 1997. The claims were rejected because the respondent did not have the original cheques to support the debit entries. Several other cheques that had been shown by the appellant in his analysis for 1997 statement were proved to have been properly issued by the appellant and duly honoured. The appellant did not demonstrate that it is the interest element on the disallowed sum that formed the basis of the respondent's claim. The final sum of Kshs 3,215,182.15 for which judgment was entered was duly proved and the interest thereon was ordered to be paid at court rate but not at the rate of 23.5% per annum as claimed in the plaint. In all we find no basis for interfering with the trial judge's findings. The appeal is lacking in merit and is accordingly dismissed with costs to the respondent."*** (emphasis added).

On 8th May 2015, almost 11 years after the judgment of the High Court, the appellant took out a motion on notice in the High Court substantially under section 99 of the Civil Procedure Rules, seeking the following prayer:

> ***"That the judgment a decree given herein by the Hon. Mr Justice Azangala (as he then was) on 25/10/2004 be and is hereby corrected by removing the disallowed sum of Kshs 234,000/= from March/April 1997 together with accrued interest thereon up to the date of filing suit (22/10/2001) as claimed in the plaint as at 18/09/2001 totalling Kshs 799,328.12 together with the sum already paid amounting to Kshs 1,000,000/= out of the final decree leaving a balance of 2,649,854.05."*** (Emphasis added).

Amin, J. heard the motion and dismissed it with costs in a ruling dated 26th October 2015, after finding that the alleged error was not clear or manifest; that the appellant had the opportunity to raise the issue at trial and had indeed raised it in his defence; that he was accordingly precluded by the res judicata rule from raising it again; and that the delay in bringing the application was inordinate.

Undeterred, the appellant is back in this Court, challenging the ruling of the High Court. In his written submissions and oral highlights, he argues through ***Mr. K'Opere,*** learned counsel, that there was a clear arithmetic error because the sum of Kshs 234,000/= excluded by Azangalala, J. had accumulated compound interest at various rates of interest thus contributing substantially to the amount claimed by the respondent in the plaint. In his calculation, the interest on the excluded sum amounted to Kshs 799,328.12, which should have been deducted from the sum awarded to the appellant.

Regarding the dismissal of his appeal, the appellant submitted that if the appeal had succeeded, there would have been no errors to correct, but now that it did not, he was at liberty to apply for correction of the error, which he did promptly after the order of this Court was extracted. In his view, the appropriate time to apply for correction of errors was after the dismissal of his appeal. He further contended that the learned judge had erred by failing to take into account the fact that an order of stay of execution was issued pending the hearing and determination of the appeal. For that reason, we were urged to find that the learned judge erred by holding that the appellant was guilty of inordinate delay.

Lastly the appellant also faulted the learned judge for holding that the issue of correction of errors was *res judicata*, arguing that the jurisdiction of the court to correct errors had not been previously invoked.

The respondent urged us to find the appeal has no merit and to dismiss it with costs. ***Mr Wanjohi,*** learned counsel, submitted that the appellant ought to have applied for the correction of the alleged errors at the earliest possible moment, which was immediately after the decree was issued. He also disputed the appellant's contention that the order of stay of execution prevented him from applying for correction of the alleged errors earlier, noting that the order was issued almost six and half years after the decree. In the respondent's view, the finding by the learned judge that there was inordinate delay in bringing the application was well founded.

Next the respondent submitted that there was no arithmetic or clerical error involved in this appeal because in the appeal to this Court the respondent had treated the issue of the disallowed sum of Kshs 234,000 and interest thereon as a substantive issue, and addressed it in full as one of the grounds of appeal. The respondent also urged us to uphold the conclusion by the earned judge that the issue raised by the appellant was *res judicata* in view of the judgment in Civil Appeal No. 88 of 2005.

Lastly the respondent urged us to find that the appeal was incompetent because it was filed without leave. In his final reply, learned counsel for the appellant complained, and justifiably so in our view, that the respondent had raised the issue of leave to appeal belatedly and thus denied the appellant a proper opportunity to effectively respond to it. We note that when directions for hearing and determination of the appeal through written proceedings were given on 18th October 2016, the appellant was not granted leave to file submissions in reply upon getting those of the respondent. In any event, rule 84 of the Court of Appeal Rules obliged the respondent, if it was its contention that no appeal lies in this instance, to apply to strike out the record of appeal within 30 days from the date of service of the record of appeal, failing which it is precluded from raising the issue. Accordingly, we shall determine this appeal on its merits.

We start by asking ourselves the question, what is the true purpose of Section 99 of the Civil Procedure Act on which the application before Amin, J. was founded? In ***Raniga v. Jivraj [1965] EA 700***, the predecessor of this Court was considering an application to vary its judgment. The Court stated that under section 3(2) of the Appellate jurisdiction Act, it had the same jurisdiction to amend judgments and orders that the High Court has under section 99 of the Civil Procedure Act. Regarding that jurisdiction, the Court was emphatic that the power to correct errors will only be made where the court is ***fully satisfied*** that it is ***giving effect to intention of the court*** at the time when judgment was given, or in the case where a matter was overlooked, where it is ***satisfied beyond doubt*** that as to the order which it would have made had the matter been brought to its attention.

Subsequently in ***Lakhamshi Brothers Ltd v R. Raja & Sons [1966] EA 313, Sir Charles Newbold, P***., speaking for a unanimous

Court said:

> ***"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." Githinji, Ag. J. (as he then was), was of the same mind in ***Davda v. Ahmed & Others [1978] KLR 665,*** when he stated that the error or omission under section 99 must be an error in expressing the ***manifest*** intention of the Court.

After hearing the evidence, Azangalala J. was satisfied that the respondent had not proved that the appellant owed it Kshs 234,000 and accordingly disallowed that amount from the respondent's claim. He did not make any finding whether that amount had accrued compound interest as the appellant claims, and at what rate. We do not see any evidence on record upon which the learned judge would have made that determination. Can we in the circumstance properly conclude that deducting a further sum of Kshs 799,328.12 from the sum that the learned judge found to be due and owing to the respondent is giving effect to the manifest intention of the learned judge at the time he made his judgment? Are we fully satisfied that is indeed what the learned judge wished, but failed to do because of an error or omission? We are not persuaded for the following reasons.

In Azangalala, J.'s judgment, there was no provision for deduction from the decretal amount, of the alleged compound interest arising from Kshs 234,000, which can be perfected by correction. In our view, there is no error or omission in expressing the manifest intention of the court. We cannot say that the refusal by the learned judge to order deduction of the alleged compound interest was an error in the judgment arising from accidental slip or omission, particularly when there was no clear evidence before him. To agree with the appellant's contention would entail fundamentally changing the judgment and decree of the High Court in a manner and to an extent that Azangalala, J. clearly did not intend or even contemplate. It would amount to rewriting the judgement under the guise of correcting an error or omission.

Even the appellant himself did not believe that the refusal by Azangalala, J. to reduce the decretal sum by the amount that he claims was interest on the Kshs 234,000, was an error or omission. That is the reason why he raised the issue as a substantive ground of appeal in CA No. 88 of 2005. Having carefully considered the record, we agree with the respondent that the issue was substantively presented to this Court, was fully addressed by both parties and was duly considered and rejected in the judgment dated 6th March 2015. After the judgment of this Court on the issue, it is plainly disingenuous for the appellant to return to the High Court, raise the same issue and claim that it was an error or omission on the part of the trial court. For the same reason, we cannot fault Amin, J. for refusing to entertain the appellant's claim on the ground that this Court had effectively determined it.

For all the above reasons, we find this appeal bereft of any merit and the same is dismissed with costs to the respondent. It is so ordered.

Dated and delivered at *Nairobi* this *12th day of May, 2017*

ASIKE-MAKHANDIA

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JUDGE OF APPEAL

W. OUKO

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JUDGE OF APPEAL

K. M'INOTI

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JUDGE OF APPEAL

I certify that this is a true copy of the original

DEPUTY REGISTRAR