



IN THE COURT OF APPEAL

AT NAIROBI

(CORAM: KOOME, G. B. M. KARIUKI, & ODEK, J.J.A)

CIVIL APPEAL (APPLICATION) NO. 13 OF 1994

BETWEEN

NATIONAL BANK OF KENYA LIMITED..... APPELLANT

AND

DEVJI BHIMJI SANGHANI & ANOTHER trading

under the style of SANGHANI BUILDERS.....RESPONDENTS/APPLICANTS

(An application for correction of the judgment and order of the Court of Appeal in Nairobi Civil Appeal No. 13 of 1991 delivered on 15th November, 1996 (Kwach, Tunoi, Shah J.J.A) from the Judgment and Decree of the High Court of Kenya at Nairobi (The Honourable Justice Shields issued on the 15th day of May, 1991

in

H.C.C.C. No. 2004 of 1984)

RULING OF THE COURT

1. By a Notice of Motion dated 15th November, 2010, filed under **rules 1 (2), 35 (1) and (2), 42 and 43** of the **Court of Appeal Rules**, the applicants **Devji Bhimji Sanghani** and **Jadva Bhimji Sanghani** trading under the name and style of **Sanghani Builders** have sought orders that:-

“a. This Court be pleased to correct its judgment dated 15th November, 1996 and the subsequent order arising therefrom (Kwach, Tunoi & Shah JJA) to give effect to what was the intention of the Court when judgment was given.

b. The appellant do meet the costs of this application. “

2. The application was made on the grounds, *inter alia*;

a. *The Court quite inadvertently wrongly stated that the entire decretal sum of Kshs. 21,560,122.75 had been paid over to the Respondents by the Appellant at the date of delivery of the judgment and that indeed the sum of Ksh. 6,014,777/= received by the Respondents from the receivers of Pentax*

Properties Limited (on liquidation) be refunded to the Appellant where the true position as at 15th November, 1996 when the Court delivered its judgment was as follows:-

- i. On 28th May,, 1991 the Appellant paid to the Respondents a sum of Kshs.10,935,958.75. This amount comprised the sum payable under the two certificates by the Appellants to the Respondents exclusive of the interest awarded on the respective certificates by the trial judge. The Court of Appeal had granted the Appellant a stay of execution in respect of the payment of interest on the two certificates sums as the issue of award of interest by the trial court on the two certificates was one of the grounds of appeal.*
- ii. On 1st June, 1992 the Respondents received the sum of Kshs.6,014, 777/= from Coopers & Lybrand who were the Managers/Receivers of Pentax Properties Limited.*
- b. Therefore it is clear that by the date of judgment of this Court the Respondents had received only the two sums itemized in (i) & (ii) above which monies are less than the decretal sum of Kshs. 21,560,122.75 comprised in the decree dated 19th October, 199, full credit for the interest that accrued on item (ii) above having been given to the Appellants.*
- c. On 23rd June, 1997 over (6) months since the date of judgment of this Court, the Respondents received the sum of Kshs.10,058,265.65 from the Appellants towards settlement of the outstanding decretal sum.*
- d. Thereafter there arose a dispute over the actual outstanding balance due from the Appellant to the Respondents culminating in lengthy correspondences between the parties over a spate of years and numerous attendances before the Superior Court.*
- e. Ultimately through a Notice to Show Cause dated 18th July, 2007 the Respondents moved the Superior Court for determination of the actual amounts outstanding from the Appellant to the Respondents.*
- f. In their written submissions dated 16th October, 2007 the Respondents asked the Deputy Registrar of the Superior Court to find as a fact that the actual outstanding amount due and owing from the Appellants to the Respondents stood at Kshs.3,346,833.90 as at 16th October, 2007.*
- g. The Appellant in its written submissions dated 3rd October, 2007 and filed in court on 5th October, 2007 in response to the Respondents' submissions contended quite mischievously and obviously hiding behind the apparent inadvertent error in the holding of the Court of Appeal of 15th November, 1996 (Kwach, Tunoi & Shah JJA) that the entire decretal sum had been paid over in full to the Respondents by the Appellant as at the date of judgment of this Court namely 15th November, 1996 and that indeed the Respondents were to refund to the Appellant the sum of Kshs 6,014,777/= together with interest thereon from 1st June, 1992 at the rate of 12% per annum.*
- h. Despite the Respondents rendering accurate and proper accounts before the Deputy Registrar and bringing to the attention of the Deputy Registrar the fact that on 23rd June, 1997 over six (6) months since the date of, judgment of the Court of Appeal, the Appellant did make a payment of Kshs.10,058,265.65 to the respondents as indicated in paragraph (c) of the grounds hereof towards settlement of the decretal sum and more significantly that the Appellant had not previously contended that it had fully liquidated the entire decretal monies as at 19th November, 1996 as indicated in the judgment of the Court of Appeal the Deputy Registrar in his ruling dated 16th November, 2007 held that he had no powers to interfere with this Court's said judgment.*
- i. Consequently, it is only just and fair that this Honourable Court deem it fit to correct the error in its judgment on 15th November, 1996 and the subsequent order thereto to enable the Respondents recover all their due monies from the Appellant."*

3. The instant application is supported by an affidavit sworn on 15th November 2010 by **Stanley Kihiko Mutungu**, who was a legal assistant to the late **Satish Gautama**, Senior Counsel who had the conduct of the Appeal in this matter.

4. Among the annexures to the supporting affidavit is the judgment by Shields, J dated 31st October 1997 and the judgment of this Court (Kwach, Tunoi and Bosire JJ.A) delivered on 28th December, 1993 in **Civil Case No. 2004 of 1984**. Needless to emphasize, it is the High Court ruling by Shields, J. that gave rise to **Civil Appeal No. 13 of 1994**, where this Court (Kwach, Tunoi & Shah JJ.A) in a majority decision (Kwach, JA dissenting) delivered on the 15th of November, 1996 dismissed the appeal with costs to the Respondents.

5. When the application came up for hearing before us, Mr. Kihiko, learned counsel for the Respondents/Applicants, stated that the Notice of Motion dated 15th of November, 2010 refers to **National Bank** as the applicant. He submitted that as he relies on the grounds stated in the motion, it was his submission that the majority bench of this Court made errors in the figures and sum indicated as having been paid and received in satisfaction of the decretal sum; that the error is that the judges stated the entire principal sum had been paid when this was not so. Counsel submitted that parties took accounts after this Court's judgment in 1996 and it became apparent that there was an error in the figures stated by this Court in its judgment. On the issue of the Limitation of Actions, the applicant urged that as parties had gone before the Deputy Registrar to take accounts this extended the limitation period.

6. Learned counsel for the appellant, Mr. Muchiri, opposed the application and submitted that the instant Notice of Motion was time barred and unmeritorious. He contended that judgment sought to be reviewed was delivered more than fourteen years ago. Counsel observed that even if there was an error in the judgment, the Deputy Registrar pointed out the error in 2007 and at that time, the twelve year limitation period was yet to expire. It was submitted that the present application was nothing but an attempt to re-open the appeal contrary to **section 4 (4)** of the **Limitation of Actions Act**.

7. Mr. Kihiko in reply stated that this Honourable Court has jurisdiction and that **Section 4(4)** of the **Limitation of Actions Act** does not apply in this instance.

8. We have considered the instant application in light of **Rule 35** of the Rules of this Court. **Rule 35** stipulates;

“(1) A clerical or arithmetical error in any judgment of the court or an 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.

“(2) An order of the Court may at any time be corrected by the Court, either of its own motion or the application of any interested person if it does not correspond with the judgment it supports to embody or, where the judgment has been corrected under sub rule (1), with the judgment as so corrected.”

9. In outlining what was meant by an error as contemplated by **Rule 35**, this Court in the case of **JKN vs HWN [2015] eKLR** stated:

“It is necessary to state that the rule is meant to correct an error on the face of the record; an error to be corrected is obvious. It must be manifest to the eyes of the Court. In other words an error on the face of the record does not require arguments or sworn depositions and lengthy submissions. A party wishing the Court to correct an error under rule 35 can just write to the Registrar of the Court pointing out the error and the Court may in many circumstances correct the error on its own motion or at the request of any interested party.”

10. The judgement sought to be corrected was delivered by this Court in 1996. The respondent submitted that under **Section 4(4)** of the **Limitation of Actions Act**, a judgment cannot be enforced after 12 years and no cause of action can be founded on a judgment after expiry of 12 years. The respondent in support cited the case of **Willis Onditi Odhiambo -vs- Gateway Insurance Co. Ltd (2014) eKLR. Section 4(4)** of the **Limitation of Actions Act, Cap 22** Laws of Kenya provides:-

“4.(4) an action may not be brought upon a judgment after the end of twelve years from the date on which the judgment was delivered, or (where the Judgment or a subsequent order directs any payment of money or the delivery of any property to be made at a certain date or at recurring periods) the date of the default in making the payment or delivery in question, in respect of a judgment debt may be recovered after the expiration of six years from the date on which the interest became due.”

11. In the present application, what the applicant seeks is to recover interest on the principal sum upon which judgment had been entered. In the persuasive case of **Rachel Mwikali Mwandia -vs- Ken Wameu Kasinga (2013) eKLR** Ogola, J. while considering a claim for recovery of interest arrears in relation to the relevant part of **Section 4(4)** of the **Limitation of Actions Act**, the High Court correctly held that action to recover interest is time barred after six years from the date on which interest became due.

12. This Court in **Willis Onditi Odhiambo -vs- Gateway Insurance Co. Ltd (Supra)** clearly expressed that execution of judgments and/or decrees is governed by **Section 4(4)** of the **Limitation of Actions Act** and an action may not be brought upon a judgment after the end of twelve years from the date on which the judgment was delivered.

13. We have examined the nature, import and purport of the instant application. The present application is an indirect application to re-open and argue an appeal that has been heard and determined. The applicant requires this Court to re-open the appeal more than twelve years after delivery of the Judgment. The twelve years limitation period applies and this Court has no jurisdiction to reopen a matter that has been determined. Further, the parties in this case had the option to move this Court for settlement of terms. This was not done; instead the parties went to the Deputy Registrar of this Court. The Deputy Registrar in his ruling dated 16th November, 2007 correctly held that he had no powers to interfere with this Court’s Judgment. Without pronouncing ourselves on the merit of the present application, we come to the conclusion that the application is time barred under **Section 4 (4)** of the **Limitation of Actions Act** with the consequence that the Notice of Motion application dated 15th November 2010 is hereby dismissed with costs to the Respondent therein.

Dated and delivered at Nairobi this 29th day of April, 2016.

M. K. KOOME

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JUDGE OF APPEAL

G.B.M. KARIUKI

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JUDGE OF APPEAL

J. OTIENO-ODEK

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JUDGE OF APPEAL

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

DEPUTY REGISTRAR