



IN THE COURT OF APPEAL

AT NAIROBI

CIVIL APPEAL NO. 272 OF 2002

OMEGA CHEMICAL INDUSTRIES LTD.

CRISPUS M. MURIUKIAPPELLANTS

AND

BARCLAYS BANK OF KENYA LTD.RESPONDENT

**(Appeal from the judgment and decree of the High Court of Kenya at Nairobi (Lady Justice Rawal)
dated 24th July, 2001**

in

H.C.C.C. NO. 1247 OF 1996)

RULING OF THE COURT

This is an application under **Rule 35** of the Court of Appeal Rules for orders that the arithmetic mistake in the judgment delivered on 14th December, 2007 be corrected and the correction thereof be incorporated in the judgment to give effect to the intention of the court when judgment was given.

The application is based on two grounds, namely:

“(a) THAT the award amount of Kshs.509,692.60 at court rates from the date of filing of the suit in the judgment is an arithmetic mistake, the intention of the court being to award Kshs.1,585,394.80 as the correct amount thereof.

(b) THAT to give effect to what was the intention of the court, the said mistake can be corrected by awarding the Kshs.509,692.60 as in the judgment, from the date of incidence of the adjudged debit error on 31st May, 1993 at the proven 27% p.a. monthly rests interest factually deployed by the bank till payment in full and not denied by the respondent”.

The applicant Omega chemical Industries Ltd partially succeeded in *Civil Appeal No. 276 of 2002*. It was the 1st Plaintiff in *H.C.C.C. No. 1247 of 1996* which gave rise to the appeal.

In the plaint filed in the superior court, the plaintiff averred, among other things, that the failure by the

respondent bank to debit the applicant's account with the value of the letter of credit financed by the respondent bank on the maturity date which was 25th January, 1993 and by debiting the said account on 31st May, 1993 when the Kenya shilling had depreciated against Swiss francs, the 1st applicant suffered foreign exchange loss of Shs.509,602/60.

The plaintiffs further pleaded that they ultimately paid Shs.1,813,787/15 to the bank on 6th October, 1997 because of the interest and penalty charges. The applicants, *inter alia*, sought judgment for the refund of Shs.1,815,787.15 plus interest at lending rates.

The superior court (Rawal J) considered this claim and dismissed it holding:

“The company has pleaded the loss of Kshs.509,692/60 with interest and penalties since 31st May, 1993. There are averments of taking a loan to pay Kshs.1,815,787.15 and the payment thereof.

However, there was nothing before me to prove the averments of loan and the repayment of the Kshs.1,815,787.15. Similarly no statements from the bank or accounting or calculation of interest to be charged are before me to show the sum of Kshs.509,692.60 inflating itself to the sum of Kshs.1,815,787.15. The company had produced a schedule showing detailed claim analysis. But that is not the proof of its claim. I am not shown what was the rate of interest or the penalties imposed since 31st May, 1993 or what would be the rate of interest or the penalties if the account was debited on its due date. This court is not expected to conjure up those rates and calculations for the company, which in my view has absolutely failed to prove its claim to the required standard”.

On appeal against the dismissal of the claim, this Court on 14th December, 2007 agreed with the finding of the superior court that the applicant did not prove how the loss of Shs.509,692.60 accelerated to Shs.1,815,787.15 and held further that the rate of interest at 27% p.a. was not supported by concrete evidence and that the respondent bank should not be penalized for interest calculated by applicant for 51 months between 31st May, 1993 to 30th September, 1993 charged for default by the applicant to pay overdraft on time. This Court concluded:

“However, it was admitted that Omega infact incurred exchange loss. In our view, the loss of Shs.509,692.60 was sufficiently proved and the 1st appellant was entitled to judgment for that sum with interest at court rates from date of filing the suit”.

The applicant admits that the bank has now paid a total of Shs.1,218,165.30 being the judgment sum of Shs.509,692.60 plus interest as adjudged by this Court.

Mr. Crispus Muriuki appearing for the applicant submitted that there was an arithmetical error in the judgment in that the Court should have awarded Shs.1,585,394.80 which the applicant ultimately paid after the bank charged interest at 27% p.a. for 51 months.

Mr. Thangei for the respondent submitted that the arithmetical or clerical errors must flow from the judgment and must be discernable from the judgment without reference to any other material; that the court is being asked to sit on appeal against its own judgment or to review its judgment and that the court lacks jurisdiction to sit on appeal against its own judgment or to review its judgment.

It is apparent from the judgment of the superior court that the applicant's claim of Shs.1,815,787.15 comprising of the Shs.509,692.60 and interest thereon and penalty charges was considered by the superior court and dismissed on merits. It is also clear from the judgment of this Court dated 14th December, 2007 that the Court agreed with the finding of the superior court that the whole claim of Shs.1,815,787.15 was not proved and further that the rate of interest at 27% p.a. was not proved and that the applicant was not entitled to interest for 51 months. However, this Court entered judgment for the applicant for Shs.509.692.60 plus interest at court rates from the date of filing the suit. The intention of the Court was clear from the judgment. It was to give judgment for the applicant for Shs.509,692.60 which was not disputed with interest at court rates and disallow any claim above that sum either based on interest or

penalties.

The slip rule is not applicable in this case. By the application, the applicant is ostensibly asking this Court to either review or sit on appeal against its own judgment and award it the balance of the claim it disallowed on the merits. This Court has said on many occasions that this Court being a creature of statute has only such jurisdiction as conferred on it by statute and has no jurisdiction to sit on appeal against itself in the same proceedings or to recall and re-open a concluded appeal except in the limited cases where slip rule applies. (See Lakhamshi Brothers Ltd v R. Raja & Sons [1966] EA 313; Somani's v Shirinkhanu (No. 2) [1971] EA 79; Jasbir Singh Rai and 3 Others vs. Tarlochan Singh Rai and 4 Others – Civil Application No. Nai. 307 of 2003 (unreported).

In the result, this application is incompetent. We order it dismissed with costs to the respondent.

Dated and delivered at Nairobi this 25th day of April, 2008.

E. M. GITHINJI

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JUDGE OF APPEAL

J. W. ONYANGO OTIENO

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JUDGE OF APPEAL

J. ALUOCH

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JUDGE OF APPEAL

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

DEPUTY REGISTRAR