



REPUBLIC OF KENYA



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**Peter & another v Kimeu (Suing on behalf of the Estate of Justus Kioko Mutisya)
(Civil Appeal 129 of 2018) [2023] KEHC 18247 (KLR) (25 May 2023) (Ruling)**

Neutral citation: [2023] KEHC 18247 (KLR)

**REPUBLIC OF KENYA
IN THE HIGH COURT AT MACHAKOS
CIVIL APPEAL 129 OF 2018**

MW MUIGAI, J

MAY 25, 2023

BETWEEN

KIOKO PETER 1ST APPELLANT

DENNIS KAVUU MBONDO 2ND APPELLANT

AND

**JOSEPHINE N'THENYA KIMEU (SUING ON BEHALF OF THE ESTATE OF
JUSTUS KIOKO MUTISYA) RESPONDENT**

RULING

1. Vide a Notice of Motion dated 25th July 2022 brought under Section 1A, 1B and Section 3A of the [Civil Procedure Act](#) and Article 159 of the [Constitution](#) of Kenya, the Appellants/Applicants seeking the following orders, that;
 - i. This Court delivered judgment on 22/11/2022 where the Respondent was awarded half of the costs of the cross appeal.
 - ii. Thereafter the respondent drew the Bill of Costs of 14/12/2021 and it was duly taxed off and Ruling was delivered on 6/4/2022.
 - iii. The Respondent recalled the Court File and in the absence of the Appellants amended the judgment to award the Respondent Costs of the Appeal.
 - iv. The Respondent again drew another Bill of Costs dated on 13/6/2022 and the same was set down for Ruling on 27/7/2022.
 - v. Ex parte proceedings recorded on the 9th June 2022 in the absence of the Appellants be set aside



- vi. The Respondent's bill of costs dated 13.06.2022 be struck out with costs to the Appellants'
 - vii. Costs of the Application be in the cause.
2. The Application is supported by the Affidavit of Nyamwaya Innocent Mogaka, Advocate who stated that judgment was delivered on 22.11.2022 wherein the Respondent was awarded half the costs of the Cross Appeal and thereafter the Respondent drew its bill of Costs dated 14.12.2021. The Bill was taxed vide a Ruling dated 6.04.2022. He deposed that the Respondent thereafter recalled the file in the absence of the Appellants and the judgment was amended to award the Respondents costs of the Appeal contrary to the rules of procedure.
 3. The Respondent again drew another bill of Costs dated 13.06.2022 and the same was set for ruling on 27.07.2022. Counsel contended that the court was functus officio after delivery of the judgment in 22.11.2021 and ruling on 6.04.2022 and further stated that it was in the interest of justice that the orders sought be granted.

Response

4. The Respondent through the advocate AlexK. Mutua filed a Replying Affidavit sworn on 27.07.2022 and deposed that the application was filed in bad faith and was meant to delay justice as the matter pending Ruling is on a Bill of Costs that the Applicant's advocates fully participated by seeking time to file submissions to oppose the Bill of 30.6.2022 as the record shows. The submissions have not been filed to date and the Ruling date for 27.7.2022 was granted in their presence.
5. Counsel stated that the mention dated for 12.5.2022 was served upon the Applicant's counsel via their email address masireandmogusuadvocates@gmail.com on 11.4.2022. The Respondent contended that on the said date, the Court on its own Motion under Section 100 of the *Civil Procedure Act* and awarded the Respondents the Costs of the Appeal and there was no opposition. He said that the only option for the Applicant was to seek review of the order of 12.5.2022 and not seek to strike out the Bill of costs. Counsel stated that the proceedings of 9.6.2022 were recorded in the presence of counsel for the Applicant.

Submissions

Appellant Submissions

6. The 1st and 2nd Appellant filed submissions on 13.12.2022. Whilst relying on the cases of *Patel v EA Cargo Handling Service* [1974] EA 75, *Wachira Karani v Bildad Wachira* [2016] eKLR and Civil Appeal 1467 of 2011 *Parimal v Veena Bharti* [2011], it was submitted that on 9.06.2022, Counsel who had conduct of the matter had no notice of that date and the Respondent has not attached any Affidavit of Service to indicate how the alleged mention date was served upon them. That the excerpt of an email allegedly sent to the Appellant's advocate does not indicate the Case Number of the Mention nor the parties. The court was urged to exercise its discretion judiciously and set aside the ex-parte proceedings recorded on 9.06.2022.



7. Counsel submitted that Section 100 of the *Civil Procedure Act* envisages amendments with regards to

“any defect or error in any proceeding in a suit” and failure to award costs of the suit or appeal cannot be termed as a defect or error. That it was upon this erroneous amendment that the Respondent drew his Bill of Costs dated 13.06.2022.

Respondent’s Submissions

8. The Respondent filed submissions on 17.11.2022 submitted on two issues. Firstly, it was submitted that there was no reason why proceedings should be stayed as the Appeal was heard and determined and no appeal has been filed in the Court of Appeal. That what is left is the taxation of the Bill of Costs after the court awarded costs on 12.5.2022 and if the Applicant felt aggrieved he should have appealed or sought review, which has not been done. Reliance was placed on the cases of Machakos HCCA 103 of 2018 *Kioko Peter v Kisakwa Ndolo Kingoko, Kenya Power & Lighting Company Limited v Esther Wanjiru Wolabi* [2014] eKLR and HCCA E142 of 2021 *Lawrence Mutuku Mutua v Augustus Mbithi Ndolo (Suing as the legal representative of the estate of Erastus Ndolo Mbithi (Deceased))*.
9. Secondly, it was submitted that there was no good reason advanced why the Bill of Costs dated 13.6.2022 should be struck out. The Court while dismissing the Appeal was silent on the Costs of the Appeal but awarded half costs on the Cross Appeal and upon being moved by Counsel, corrected the judgment under Section 100 of the *Civil Procedure Act*. It was submitted that the court was satisfied that there was proper Affidavit of Service and there were no ex-parte proceedings on 9.6.2022 as counsel was in Court when the court directed that a fresh bill be filed.

Determination

10. The Court considered the Application, the Affidavits in support and opposition thereto, the submissions of the parties and the court record and find that the issues for determination are as follows;
- i. Whether the proceedings recorded on 9.06.2022 should be set aside.
 - ii. Whether the Bill of costs dated 13.06.2022 should be struck out with costs.
11. On the first issue, the court notes that on 6.4.2022, the taxing master delivered a ruling on the Bill of costs dated 14.12.2021.
12. On 8.04.2022, the matter was fixed for mention for directions on 12.5.2022 by the Respondent in the Registry and Notice was to issue. Vide an Affidavit of Service filed on 6.05.2022, a mention notice was served via e mail address - masireandmogosuadvocates@gmail.com.
13. On 12.5.2022 the Respondent’s advocate sought directions on paragraph 69 of the judgment with regard to costs and the court directed that the judgment was amended/ corrected to include that the Appeal was dismissed with costs as costs follow the event. The amendment was done under Section 99 and 100 of the *Civil Procedure Act* at paragraph 69 of the judgment of 22nd November, 2021.
14. On 18.5.2022, the mention date for directions was taken by the parties’ representatives in the Registry for 9.6.2022.
15. On 9.06.2022 the Respondent was directed to file a fresh Bill of Costs by the court. On 30.6.2022, the Appellants requested for 7 days to file submissions to the Bill of Costs and Ruling was set for 27.7.2022.
16. Section 99 and 100 of the *Civil Procedure Act* provide as follows;



99. Amendment of judgments, decrees or orders

Clerical or arithmetical mistakes in judgments, decrees or orders, or errors arising therein from any accidental slip or omission, may at any time be corrected by the court either of its own motion or on the application of any of the parties.

100. General power to amend

The Court may at any time, and on such terms as to costs or otherwise as it may think fit, amend any defect or error in any proceeding in a suit; and all necessary amendments shall be made for the purpose of determining the real question or issue raised by or depending on the proceeding.

17. The Appellant contends that the court was functus officio after delivery of the judgment and the Ruling on the Bill of costs but as has been noted before, Section 99 and 100 of the [Civil Procedure Act](#) are an exception to this rule. I am persuaded by the finding of the Court of Appeal case of [Leonard Mambo Kuria v Ann Wanjiru Mambo](#) (2017) eKLR that:

“The application of these two sections [Sections 99 and 100 of the [Civil Procedure Act](#), Cap 21] has been considered before in several decisions. They vest a general power to the courts to correct or amend their records. As such they are an exception to the doctrine of ‘functus officio’-- the principle that once a decision has been given, it is (subject to any right of appeal) final and conclusive. It cannot be revoked or varied by the decision-maker. As the court stated in the case of *Jersey Evening Post Limited v. Ai Thani* [2002] JLR 542 at 550:-

“A court is functus when it has performed all its duties in a particular case. The doctrine does not prevent the court from correcting clerical errors nor does it prevent a judicial change of mind even when a decision has been communicated to the parties. Proceedings are only fully concluded, and the court functus, when its judgment or order has been perfected. The purpose of the doctrine is to provide finality. Once proceedings are finally concluded, the court cannot review or alter its decision; any challenge to its ruling on adjudication must be taken to a higher court if that right is available”.

18. Similarly, in the case of [Republic v Attorney General & 15 others, Ex-Parte Kenya Seed Company Limited & 5 others](#) [2010] eKLR , the court stated as follows:-

“27. It is a codification of the common law doctrine dubbed ‘the Slip Rule’, the history and application of which has a wealth of authorities both locally and from common law jurisdictions. It is a rule that applies as part of the inherent jurisdiction of the court, which would otherwise become functus officio upon issuing a judgment or order, to grant the power to reopen the case but only for the limited purposes stated in the section.

28. Some of the applications of the rule are fairly obvious and common place and are easily discernible like clerical errors, arithmetical mistakes, calculations of interest, wrong figures or dates. Each case will, of course, depend on its own facts, but the rule will also apply where the correction of the slip is to give effect to the actual intention of the Judge and/or ensure that the judgment/order does not have a consequence which the Judge intended to avoid adjudicating on.



The Australian Civil Procedure has provisions in pari materia with section 99. As was stated in the case of *Newmont Yandal Operations Pty Ltd v The J. Aron Corp & The Goldman Sachs Group Inc* [2007] 70 NSWLR 411, the inherent jurisdiction extends to correcting a duly entered judgment where the orders do not truly represent what the court intended.

29. Nearer home the predecessor of this Court in *Lakhamshi Brothers Ltd v R. Raja & Sons* [1966] EA 313 endorsed that application of the rule, that is, 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. Spry JA in *Raniga Case (supra)* also stated as follows: -

A court will, of course, only apply the slip rule where it is fully satisfied that it is giving effect to the intention of the court at the time when judgment was given or, in the case of a matter which was overlooked, where it is satisfied, beyond doubt, as to the order which it would have made had the matter been brought to its attention.

30. What is certainly not permissible in the application of section 99, is to ask the court to sit on appeal on its own decision, or to redo the case or application, or where the amendment requires the exercise of an independent discretion, or if it involves a real difference of opinion, or requires argument and deliberation or generally where the intended corrections go to the substance of the judgment or order”.

19. On the issue of costs, the Court already rendered itself on the matter. The court in the *Party of Independent Candidates of Kenya versus Mutula Kilonzo & 2 others* [2013] eKLR the High Court quoted case of *Nedbank Swaziland Ltd verses Sandile Dlamini NO.* (144/2010) [2013] SZHC30 (2013) Maphalala Judge rendered itself thus:

“It is clear from the authorities that the fundamental principle underlying the award of costs is two-fold. In the first place, the award of costs is a matter in which the trial judge is given discretion. But this is a judicial discretion and must be exercised upon grounds on which a reasonable man could come to the conclusion arrived at. In the second place the general rule that costs should be awarded to the successful party, is a rule which should not be departed from without the demonstration of good grounds for doing so.”

Court Record

20. This Court will set the record straight as follows; the Judgment was delivered on 22/11/2021 and on Costs Paragraph 69 stated;
- ‘The Appeal is dismissed and the cross- appeal has succeeded in full. In the premises, the Court will award half of the costs of the cross appeal to the Respondent. The appellants will pay full costs of the Trial Court.’
21. On 8/4/2022, the Respondent Advocate took the date of 12/5/2022 in the Registry for directions in Court. The matter was brought before Court on 12/5/2022.
22. Mr. A. K. Mutua for the Respondent addressed the Court as follows;



‘I am seeking directions with regard to costs as stipulated in Paragraph 69 of the Judgment. If the appeal was dismissed the costs were not included and it is an appeal from 2018.’

23. The Court granted the following order;
‘The Judgment of 22/11/2021 is amended/ corrected to include Costs that the appeal was dismissed with costs as costs follow the event. The amendment is under Section 99 & 100 of Civil Procedure Act at Paragraph 69 to include Costs.’
24. At the outset it is untrue as pleaded, that;
The Court called for the Court file and changed the Judgment of 22/11/2021 on Costs on its own Motion as it is contrary to the record.
25. The Court took up the matter as was listed and heard in open Court and the Court record indicated that the Appellant’s Counsel was absent, the Respondent’s advocate took the date from the Registry, ought to have served the Appellant’s Counsel with the date and informed Counsel that he intended to pursue directions on Costs. The issue of service cannot be blamed on the Court.
26. The email address being masireandmogusuadvocates@ gmail.com that has been used previously to serve the Appellants is the same one that was used on 11.04.2022 and has not been disowned by the Appellants Counsel.
27. This Court is not party to Taxation of Bills of Costs by the Taxing Officer until a reference is filed in this Court.
28. . Section 99 & 100 CPA provide for the Court to amend the Judgment, decree or Order and it is not time bound and since dismissal of appeal it is an event that attracts costs.
29. The Court took the view that since the Appeal was dismissed then costs follow that event.
30. The Trial Court is functus officio after delivery of the Ruling/Judgment but that does not mean that if a party moves the Court, the Trial /Appellate Court may not consider the Application as long as it is not to change the substantive reasoning and finding of the Court to the dispute as that is left for review before the Trial Court or the Appellate Court to hear and determine the Appeal. The substance of the Judgment remains intact.

Section 27 Civil Procedure Act provides on Costs;

- (1) Subject to such conditions and limitations as may be prescribed, and to the provisions of any law for the time being in force, the costs of and incidental to all suits shall be in the discretion of the court or judge, and the court or judge shall have full power to determine by whom and out of what property and to what extent such costs are to be paid, and to give all necessary directions for the purposes aforesaid; and the fact that the court or judge has no jurisdiction to try the suit shall be no bar to the exercise of those powers:

Provided that the costs of any action, cause or other matter or issue shall follow the event unless the court or judge shall for good reason otherwise order.



Disposition

31. This Court finds the application is one whom the Applicant is aggrieved, that the proceedings of 12/05/2022 were in their absence and prejudicial to the Applicant. To ensure fair trial - this Court grants the following orders;
- a. In the end, the Notice of Motion Application dated 25.07.2022 is compromised.
 - b. The parties shall canvass the issue of Costs interpartes either orally and/or with written submissions.
 - c. Each party shall have 14 days each to file and serve skeletal submissions on Costs
 - d. Any decree order resulting from the Judgment of this Court may proceed for execution but shall exclude Costs as outlined at Paragraph 69 and the Court order(s) of 12/5/2022.
 - e. Further mention for directions and/or compliance shall be on 15/06/2023.

DELIVERED DATED & SIGNED IN OPEN COURT IN MACHAKOS ON 25/5/2023 (VIRTUAL / PHYSICALLY).

M.W. MUIGAI

JUDGE

In The Presence Of:

No Appearance - For The Appellant

No Appearance - For The Respondent

Patrick/geoffrey - Court Assistant(s)

