



REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA

AT MOMBASA

CIVIL APPEAL NO.101 OF 2018

1. NATION MEDIA GROUP

2. LABAN ROBERT.....APPELLANTS

-VERSUS-

AWALE TRANSPORTERS LIMITED.....RESPONDENT

R U L I N G

1. This court in its Judgment dated **15th July, 2021** concluded as follows at paragraph 38;

38. In the upshot, the appeal herein is found without merit and is hereby dismissed.

It is hereby so ordered.

2. As is apparent, the Judgment was silent on the issue of costs of the appeal as the court inadvertently failed to make any decision in respect to costs. This court has now been asked to exercise its discretionary power and review its said Judgment to include an order that costs of the appeal be borne by the Appellants given that the appeal was found to be without merit.

3. The request is vide a **Notice of Motion** application dated **31st August, 2021** which has been brought by the Respondent under the provisions of **Sections 1A, 1B and 3A**, all of the **Civil Procedure Act, Order 45** of the **Civil Procedure Rules** and all other enabling provisions of law.

4. That application is supported by five grounds on its face which are further explicated in the **Supporting Affidavit** of the Respondent's advocate, learned counsel, **Mr. Gikandi Ngibuini**. He avers that under **Section 27** of the **Civil Procedure Act**, the law dictates that costs shall always follow the event unless for good reason the court otherwise dictates. That in this case, since the appeal was dismissed and the Respondent was successful, costs of the appeal ought to have been awarded to the Respondent. **Mr. Gikandi** has added that since this was an inadvertent omission on the part of the court, it can be cured through an application for review as filing an appeal on the same would not be necessary in the circumstances presented.

5. The application has been opposed by the Appellants vide **Grounds of Opposition** dated **15th November, 2021** and a **Replying Affidavit** sworn on even date by the 1st Appellant's Head of Legal Department, **Mr. Sekuo Owino**. It has been argued that the application is defective and bad in law, the same having been framed as a subject of review under **Order 45** of the Civil Procedure rules, when in essence it is a matter of appeal. It is also averred that it would be unprocedural to address an issue for appeal as one for review and thus the court should dismiss the application and direct each party to bear its own costs. Be that as it may, the Appellants' advocate submitted that the correct provision to approach the court would have been **Section 100** of the **Civil Procedure Act**.

6. As per the court's directions, the application was canvassed orally on **24th November, 2021** by respective counsel of the parties and they reiterated the grounds in the application and the response thereof as summarized above.

Analysis and Determination

7. I have carefully considered the grounds in support of and against the application together with the oral submissions by counsel for the parties, alongside the relevant law and authorities cited. I find that the following issues

presenting themselves for determination:-

a) Whether the application is fatally defective for being expressed as an application for review or being anchored on the wrong provisions of the law;

b) Whether the Respondent/Applicant has made out a good case to justify the grant of the orders sought.

8. On the first issue, I am of the view that it is not just for the court to dismiss an application merely because it is anchored on the wrong provisions of the law or that the Applicant has not cited the provisions of the law upon which it is brought so that the court should be reluctant to proceed on such invite unless the relevant provision of law expressly provides so.

9. Similarly, an application cannot be dismissed for want of form because of the principles on the administration of justice set out under **Article 159** of the **Constitution** and the policy set out under **Order 51 Rule 10** of the **Civil Procedure Rules**. The said **Order 51 Rule (10)** provides that;

“(1) Every order, rule or other statutory provision under or by virtue of which any application is made must ordinarily be stated, but no objection shall be made and no application shall be refused merely by reason of a failure to comply with this rule.

(2. No application shall be defeated on technicality or for want of form that does not affect the substance of the application.”

10. Consequently, based on the above provisions, the Objection that the application be disallowed for having cited the wrong provisions of law or for want of form or that the same has been expressed as an application for review when it ought not to be so is disallowed. The court then proceeds to the second issue for determination which is a consideration of whether the application has merit.

11. The instant application seeks for the review of the court’s Judgment in terms of **Order 45** of the **Civil Procedure Rules** on the ground that the court committed a mistake by inadvertently failing to award on costs.

12. The Appellants on the other hand are of the view that given that the court had not pronounced itself as far as costs are concerned, the proper forum for addressing that issue would have been by filing an appeal.

13. I have read through the provisions of **Order 45** of the **Civil Procedure Rules** relied on but before reproducing it here, and for a better discussion, I will first consider the provisions of **Section 80** of the **Civil Procedure Act** which reads as follows;

“Any person who considers himself aggrieved—

(a) By a decree or order from which an appeal is allowed by this Act, but from which no appeal has been preferred;

or

(b) By a decree or order from which no appeal is allowed by this Act, may apply for a review of Judgment to the court which passed the decree or made the order, and the court may make such order thereon as it thinks fit.”

14. In the present case, there is no dispute that the Respondent was aggrieved by the Judgment of this court and maintains that the court mistakenly erred in failing to pronounce itself on the issue of costs.

15. Having been so aggrieved by that decision, the Respondent had two options open to it so as to remedy that grievance by availing himself of the remedies under **Section 80** of the **Civil Procedure Act**, which would either be by way of an appeal or an application for review.

16. However, where one elects to pursue an application for review, then the merit of such an application is weighed against the threshold set under **Order 45** of the **Civil Procedure Rules** which reads as follows;

“1. (1) Any person considering himself aggrieved—

(a) By a decree or order from which an appeal is allowed, but from which no appeal has been preferred; or

(b) By a decree or order from which no appeal is hereby

allowed, and who from the discovery of new and important matter or evidence which, after the exercise of due diligence, was not within his knowledge or could not be produced by him at the time when the decree was passed or the order made, or on account of some mistake or error apparent on the face of the record, or for any other sufficient reason, desires to obtain a review of the decree or order, may apply for a review of Judgment to the court which passed the decree or made the order without unreasonable delay.

17. Therefore, the rules lay down the jurisdiction and scope of review limiting it to the grounds of; *discovery of new and important matter or evidence which after the exercise of due diligence, on account of some mistake or error apparent on the face of the record, or for any other*

sufficient reason.

18. Useful guidance is found in the excerpt from the Judgment in the case of **National Bank of Kenya Ltd –vs- Ndungu Njau [1996]KLR 469** where the court stated:-

“A review may be granted whenever the court considers that it is necessary to correct an apparent error or omission on the part of the court. The error or omission must be self-evident and should not require an elaborate argument to be established.”

19. Having stated as above, my humble view is that, it was an omission on the part of the court in failing to address itself on who was to bear the costs of the appeal and such is a proper issue to be addressed in an application for review as the one at hand.

20. Alternatively, the error could be redressed **Section 99** of the **Civil Procedure Act** which is titled, amendment of Judgments, decrees or orders and the mandate therein is for the court to correct any clerical or arithmetical mistake or any error arising therein from an accidental slip or omission.

21. Therefore since the subject of the present ruling is a Judgment delivered by this court, I have no doubt that an application for correction of an error in the Judgment is well covered under **Order 45** as well as **Section 99** of the **Civil Procedure Rules and Act** respectively.

22. As a matter of general principle, costs follow the event and a successful party will always have costs of his success unless the court has good reason to order otherwise. The same is the spirit of the statute under **Section 27** of the **Civil Procedure Act** which reads as follows:-

(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.”

23. Having earlier observed that the Judgment of this court was silent on costs of the appeal, the question then becomes, could it safely be said that this was an accidental slip or a bona-fide mistake/omission?

24. In my view, I think it was so and for the reason that, had it been the intention of this court to deprive the successful Respondent of costs, then the court would have given reasons for doing so as is required under **Section 27 (supra)**. Since no reasons were provided to the court as to why the Respondent/Applicant should be awarded costs, then it becomes apparent that the intention of the court was to dismiss the appeal with costs to the Respondent/Applicant. I am therefore inclined to rectify the error by granting the costs as stated.

25. In the upshot, the **Notice of Motion** application dated **31st August 2021** succeeds but only to the extent that the **Judgment** made on **14th July, 2021** is hereby amended to include costs to the Respondent.

26. However, parties shall bear their own costs for this application since the same was necessitated by an error on part of the court.

Orders accordingly.

DELIVERED VIRTUALLY, DATED AND SIGNED AT MOMBASA THIS 28TH DAY OF JANUARY, 2022.

D. O. CHEPKWONY

JUDGE

In the presence of:

No appearance for the Appellant

M/S Kiptum counsel holding brief for Mr. Gikandi counsel for Respondent