



REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA

AT MOMBASA

CIVIL APPEAL NO. 65 OF 2016

1. JACQUELINE RANCE T/A ORLESTON SHIPPING

2. CHRISTOPHER RANCE

T/A ORLESTON SHIPPING.....APPELLANTS

VERSUS

JORAM MUNDA GINTONE.....RESPONDENT

RULING

1. By way of **Notice of Motion** dated **29th November, 2019**, the Appellant/ Applicant has moved this court seeking the following orders that: -

1. Spent;

2. Spent;

3. THAT this matter and the emanating decree be marked as fully settles as between the parties upon the payment of Kshs.498,642.89 in full and final settlement of the matter;

4. THAT the Court proceedings of 31st October, 2019 and all other consequential orders made therein be set aside;

5. THAT costs of this application be provided.

2. The Application is brought under **Sections 1A, 1B, 3, 3A** of the **Civil Procedure Act, Order 25 Rule 5** and **Order 51** of the **Civil Procedure Rules, 2010** and all enabling provisions of the law.

3. In summary, the grounds adduced in support of the application, both on its face and affidavit sworn by **MR. SANJEEV KHAGRAM** on **29th November, 2019** are that the Appellants' appeal was dismissed and execution proceedings were commenced by taking out of warrant of attachment against the Appellants.

4. The advocates of the parties then engaged in negotiations and on **25th April, 2019** or thereabouts, agreed on how to settle the decretal amount in full. That the Appellants proceeded to make the payment as agreed and by **17th May, 2019**, the Respondent, through their advocate acknowledged the settlement of the claim in full by their conduct. The attached copies of the letters dated **25th April, 2019**, and **26th April, 2019** and **17th May, 2019** as evidence with regard to the said negotiations and settlement as between the advocates on record for the parties.

5. As a result thereof, the Applicant alleges that the Respondents' Bill of Costs dated **29th August, 2019** is an afterthought, thus untenable and improperly before the court. The Applicant alleges that the Respondent should be estopped from denying that the amount of Kshs.498,642.89 was the full and final amount owing in the suit.

6. The Applicant has urged the court to allow the application and mark the suit herein as settled as between the parties in the interest of justice.

7. In opposing the application, the Respondents' Counsel, **MR. JOHN GACHIRI KARUIKI** filed a **Replying Affidavit** sworn on **16th December 2019** on even date, in which he averred that the same was ill-conceived, unmerited and incompetent hence it should be dismissed with costs.

8. The Respondent states that there was no agreement, either orally or in writing regarding the waiver of fees for the appeal. **Mr. Gachiri** goes on to state that after the appeal was dismissed he did demand that the Appellants do settle the decree and costs as awarded.

9. According to the Respondent, the letters dated **25th April, 2019**, and **17th May, 2019** respectively are in respect of the decretal sum and not costs as awarded by court. He insists that there is no proof before Court that there was an agreement on the waiver of fees for the appeal.

10. The Respondent's Advocate states that on **20th May, 2019**, he wrote a letter to the Applicant's counsel acknowledging the decretal amount and indicated that the cost of the Appeal had not been settled and that if the same was not settled within five (5) days, they would proceed to tax their Bill of Costs.

11. The application was canvassed by way of submissions with the Applicant having filed theirs on **25th January, 2020**, whilst the Respondents filed theirs on **25th January, 2021 respectively**. The parties elected to rely on their written submissions as presented.

Analysis and determination

12. I have considered the Application filed herein, the grounds on its face and the Affidavit filed in support thereof and **Replying Affidavit** thereto. I have also considered the written submissions by the parties and the case law cited. I find that the main contention in this application is *whether the Respondent is entitled to file a Party and Party Bill of Costs*.

13. The Applicant maintains that the Respondent had been fully settled after the decretal amount of Kshs.498,642.89 was paid, hence this matter should be marked as fully settled.

14. The Respondent on the other hand maintains that the Applicant only settled the decretal amount and not the costs as awarded in the Appeal. He insists that he is entitled to Party and Party Bill of Costs.

15. On **20th December, 2018**, this Court delivered a Judgment and granted the following orders: -

a. Judgment on general damages is confirmed and interest shall accrue to the date of final payment.

b. Finding on appointment of liability is reversed and the Appellants are jointly and severally liable 100% to the Plaintiff/Respondent.

c. Costs of the suit in the lower court and the appeal to the Respondent.

16. The Respondent was granted costs of the suit in the lower court and the appeal which is different from the decretal amount as awarded by court. As shown above, it is a different and separate order from the order on the award of the decretal amount.

17. It is trite law that a successful party in a suit may ask the court for an order that the unsuccessful party pay their costs. **Paragraph 52 of the Advocates (Remuneration) Order (main order 1962)** provides: -

52. Costs to be taxed as between party and party unless otherwise directed

The costs awarded by the Court on any matter or application shall be taxed and paid as between party and party unless the Court in its order shall have otherwise directed.

18. It is evident from the Applicant's own evidence as attached to the application that they had not settled the issue of costs as was awarded to the Respondent and the amount of Kshs.498,642.89 was only the decretal sum as is evidenced from their advocates letter dated **25th April, 2019** wherein they only referred to Auctioneers costs and how they proposed to be paid.

19. The Applicant has further not provided before this court any agreement between parties that shows that costs had been exempted after the payment of the decretal amount. The letters to the respective affidavits speak for themselves of facts behind this issue. With due respect to the Applicant's Counsel, a decretal amount is different from costs as awarded by court.

20. In view of **paragraph 52 of the Advocates (Remuneration) Order (main order 1962)**, I find that the Respondent is entitled to file a party and Party Bill of Costs to recover legal costs incurred by them or the time spent prosecuting or defending a court proceeding.

21. The Applicant cannot claim that by only the decretal amount they have fulfilled the Judgment as was issued on the **20th December, 2018**. Costs as awarded in a suit can only be recovered by filing a party and party Bill of Costs.

22. For the above reasons explained above, I find no merit in the Applicant's Application dated **29th November, 2019** and dismiss it in its entirety.

23. Costs to the Respondent.

It is hereby so ordered.

DATED, SIGNED and DELIVERED VIRTUALLY at MOMBASA this 16TH APRIL, 2021.

D. O. CHEPKWONY

JUDGE