



REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA

AT NAIROBI

MILIMANI LAW COURTS

COMMERCIAL & TAX DIVISION

HCCC NO. 15 OF 2014

INTERNATIONAL AIR TRANSPORT ASSOCIATION.....1ST PLAINTIFF

MERCANTILE INSURANCE COMPANY LIMITED.....2ND PLAINTIFF

VERSUS

AKARIM AGENCIES COMPANY LIMITED.....1ST DEFENDANT

AHMED SHEIKH ISSACK.....2ND DEFENDANT

IBRAHIM S.I. KHANYARE3RD DEFENDANT

RULING

1. The Judgment of this Court of 19th July 2019 concludes as follows:-

[60] The upshot is that the Plaintiffs have proved their case against the Defendants and enter judgement against the 1st, 2nd and 3rd Defendants jointly and severally for Kshs.115,000,075 and USD 1,427,285.00. While the Plaintiffs had sought interest from a date prior to the date of filing suit, that antecedent claim needed to be justified by evidence. However, none was forthcoming. Interest shall be at Court rates from the date of filing suit until payment in full.

[61] Costs of the withdrawn counterclaim shall also be to the Plaintiffs.

2. As is apparent the Court did not make any decision in respect to Costs of the main suit. This Court is now asked to exercise its power under the slip Rule to make the following orders:-

“The Judgment and decree dated 19th July 2019 be corrected to include costs of the suit on an Advocate client basis and interest thereon at Court rates to be to the Plaintiffs”.

The request is in a Notice of Motion dated 2nd September 2019 said to be brought under the provisions of Article 159 of the Constitution, Sections 1A, 1B, 3A, 27 and 99 of the Civil Procedure Act.

3. The Application is opposed. The Defendant argues that the Court having made its findings In the Judgment became *functus officio* save for the limited jurisdiction of enforcing its Judgment and decree.

4. Aggrieved by the decision of the Court, the Defendants have lodged an appeal against it being Civil Appeal No. 395 of 2019 Akarim Agencies Company Limited & 2 Others –vs- International Air Transport Association (IATA) and Mercantile Insurance Company Limited. It is submitted that if the Plaintiffs are aggrieved by the order of costs, then they should mount a Cross-appeal in the pending Appeal.

5. The main anchor for the Application is Section 99 of the Civil Procedure Act which reads:-

“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”.

6. The provision grants the Court power to correct mistakes or errors on Judgments, Decrees or orders which arise from an accidental slip or omission so as to align the Judgments, decrees or orders with what the Court obviously meant to pronounce. For a mistake or error to be the subject of correction then it has to be a bona-fide mistake or error. I would think that the Court has inherent power to make such corrections even if there were no express provisions for correction. This is because just like any other human beings, Judges make errors from time to time and the Court would have inherent power to correct its own Judgments, decrees or orders so as to bring it in harmony with what it meant.

7. In the Amended Plaintiff of 23rd March 2015, the Plaintiffs had, amongst other prayers, sought costs of the suit on an advocate client basis and it is not in dispute that the Court did not pronounce itself on the issue of costs on the main suit.

8. Section 27 of the Civil Procedure Act on costs reads:-

(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.

(2) The court or judge may give interest on costs at any rate not exceeding fourteen per cent per annum, and such interest shall be added to the costs and shall be recoverable as such.

9. The general rule is that costs follow the event but where the Court feels that it has good reason to depart from the rule then it must give its reasons.

10. In the decision, the Court made an order on costs of the withdrawn counterclaim. The decision is completely silent on costs on the main suit. Was this an accidental slip or bona-fide mistake?

11. I would think so for two reasons. First, had it been the intention of the Court to deprive the successful Plaintiffs of costs, then the Court would have given its reasons. Second, when one reads the way in which the award on costs on the withdrawn counterclaim was couched then it becomes apparent that the intention of the Court was to award costs on the main suit to the Plaintiffs. It reads:-

“Costs of the withdrawn counterclaim shall also be to the Plaintiffs”.

12. I reach the decision that the Court’s omission to make an order of costs on the main suit is one that can be corrected under the Slip Rule. In doing so the Court is alive to the pendency of an Appeal brought by the Defendants against its decision. However, the issue of the Plaintiffs’ cost is not the subject of the Appeal as the Plaintiffs have not mounted an Appeal against it. For that reason, the issue of costs is still amenable for correction under the slip Rule.

13. I again state that costs follow the event. The Plaintiffs were successful in their action and I see no reason to deprive them of costs. The next question would be whether the Plaintiffs deserve costs on an advocate client basis as prayed for in the Amended Plaintiff. The prayer is for an order of costs on a full indemnity basis. Such an order is a matter of substantive law, so that a party seeking costs on an advocate client basis instead of the normal party and party costs would have to provide proof that the more enhanced costs is deserved.

14. In this matter the Plaintiffs have simply submitted that they were entitled to costs as prayed for in the Amended Plaintiff (See paragraph 38 of the Plaintiffs’ submissions of 31st January 2019). No basis was laid for costs on an Advocate-client basis and so the Defendants were not called upon to respond to it. Since the Court is making an order on the basis of the case presented before the Judgment, then I am inclined to grant the costs on the usual party and party basis.

15. The Notice of Motion dated 2nd September 2019 succeeds but only to the extent that the Judgment and Decree made on 19th July 2019 is hereby amended to include costs to the Plaintiffs on the main suit on party to party basis and interest thereon at Court rates.

16. As the application was necessitated by an error on the part of the Court, I make no orders on costs of the Motion itself.

Dated, Signed and Delivered in Court at Nairobi this 13th Day of March 2020

F. TUIYOTT

JUDGE

PRESENT:

Wawire for Plaintiff

No appearance for Defendant

Court Assistant: Nixon