



REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT MACHAKOS

(APPELLATE SIDE)

(Coram: Odunga, J)

CIVIL APPEAL NO. 169 OF 2018

MOHMED DAGANE FALIR aka ALI DAGANE.....APPELLANT

VERSUS

ALFONCE MUTUKU MULI.....1ST RESPONDENT

REAL TILAK ENTERPRISES.....2ND RESPONDENT

(Being an Appeal from the Judgment delivered on 30th November, 2017 of the Hon. C.A. Ocharo (PM)

delivered in Machakos Civil Suit No. 462 of 2015, Mohamed Dagane Falir aka

Ali Dagane versus Alfonse Muli and Real Tilak Enterprises)

BETWEEN

MOHMED DAGANE FALIR aka ALI DAGANE.....PLAINTIFF

VERSUS

ALFONCE MUTUKU MULI.....1ST DEFENDANT

REAL TILAK ENTERPRISES.....2ND DEFENDANT

RULING

1. On 16th June, 2020, I delivered a judgement in this appeal in which I allowed the appeal and entered judgement in favour of the appellant on liability at 100%. I then proceeded to award the Appellant General damages for pain and suffering in the sum of Kshs. 500,000/=, Cost of future medical treatment in the sum of Kshs. 700,000/= and Special damages in the sum of Kshs. 1,632,700/=. The said amounts totalled Kshs 2,832,700/=. I directed that while general damages would attract interest at court rates from the date of judgement in the lower court, the other two awards would attract interest at the same rate from the date of filing suit till payment in full.

2. The application the subject of this ruling is dated 23rd June, 2020 and in the said application the Appellant seeks that the said Judgement be reviewed and the Appellant/Applicant, being the successful party be awarded costs of the Appeal and the Lower Court and further that the costs of the Application be provided for.

3. The said application is based on the ground that in delivering the judgement, this court did not address the issue of costs both for the lower court and in this appeal. Being the successful party, the appellant contended that the said omission constitutes an error on the face of the record hence the judgement ought to be reviewed and costs be awarded to him since costs follow the event.

4. It was submitted on behalf of the Appellant that the provisions of Section 80 of the **Civil Procedure Act** and Order 45 Rule 1 of the **Civil Procedure Rules** gives the High Court power of review, but such power must be exercised within the framework of the two provisions. However, the Applicant herein is relying on the ground that there is an apparent mistake or error apparent on the face of the Record and or Judgement as this Court did not pronounce itself on the issue of costs.

5. While appreciating that the court has discretion as to whether costs are payable by one party to another, the amount of those costs, and when they are to be paid, it was submitted that this discretion must be exercised judicially; it must not be exercised arbitrarily but in accordance with reason and justice. It was submitted that the Court ought to have awarded costs of the Appeal and the Lower Court to the Appellant as he was successful in his Appeal. In the Appellant's view, if costs are awarded to the Appellant, it would not be prejudicial to the Respondents as it would only reimburse the Applicant of all costs expended in following up this matter.

6. In opposing the application, the Respondent relied on the following grounds of opposition:

- 1) **THE Court having delivered its judgement in the Appeal herein on the 16th day of June 2020 is now functus officio.**
- 2) **THERE is no mistake or error apparent on the face of the record.**
- 3) **THE Applicant has not produced any evidence to show that there is a mistake or error apparent on the face of the record.**
- 4) **THERE is no sufficient cause or any cause at all to warrant this Court to exercise its discretion in the Applicant's favour.**
- 5) **THE Application herein has no merit.**

7. It was submitted on behalf of the Respondent that the Applicant has not demonstrated any of the elements as set out in Order 45 of the **Civil Procedure Rules, 2010** and in particular that there is no mistake or error apparent on the face of the record to warrant a review of the judgment delivered on the 16th day of June 2020.

8. It was submitted that the award of cost is not as of right but subject to the discretion of Court and reliance was placed on the comments in **Halsbury's Laws of England** 4th Edition (Re-issue), {2010}, Vol.10. para 16 as follows with respect to costs:

"The court has discretion as to whether costs are payable by one party to another, the amount of those costs, and when they are to be paid. Where costs are in the discretion of the court, a party has no right to costs unless and until the court awards them to him, and the court has an absolute and unfettered discretion to award or not to award them. This discretion must be exercised judicially; it must not be exercised arbitrarily but in accordance with reason and justice."

9. Therefore, pursuant to section 27 of the **Civil Procedure Act**, it was submitted that this Court judicially exercised its discretion, on the face of the judgment, in not awarding the costs of the Appeal and/or of the Lower Court as such there is error apparent on record as alluded by the Applicant to warrant the grant of review herein.

10. However, and in the event the Court proceeds to review the judgment delivered on the 16th day of June 2020 with respect to costs, it was submitted that noting that the Appeal succeeded partially, parties should therefore bear their own costs on both the Appeal and the Lower Court suit.

Determination

11. I have considered the application herein, the affidavits both in support of and in opposition thereto.

12. The general rule as to costs is provided for in section 27 of the **Civil Procedure Act** which provides 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.

13. This provision has been the subject of several judicial pronouncements. In the case of **Supermarine Handling Services Ltd vs. Kenya Revenue Authority Civil Appeal No. 85 of 2006** the Court of Appeal expressed itself thus:

"Costs of any action or other matter or issue shall follow the event unless the court or Judge shall for good reason otherwise order. It is well established that when the decision of such a matter as the right of a successful litigant to recover his costs is left to the discretion of the Judge who tried his case, that discretion is a judicial discretion, and if it be so its exercise must be based on facts. If, however, there be, in fact, some grounds to support the exercise by the trial Judge of the discretion he purports to exercise, the question of sufficiency of those grounds for this purpose is entirely a matter for the Judge himself to decide, and the Court of Appeal will not interfere with his discretion in that instance... Thus, where a trial court has exercised its discretion on costs, an appellate court should not interfere unless the discretion has been exercised unjudicially or on wrong principles. Where it gives no reason for its decision the Appellate Court will interfere if it is satisfied that the order is wrong. It will also interfere where the reasons are given if it considers that those reasons do not constitute "good reason" within the meaning of the rule...In the instant case the learned Judge gave no reasons whatsoever for his decision to deprive the successful plaintiff of its costs and yet it was not shown that the defendant had been guilty of some misconduct

which led to litigation. In the court's view the learned Judge's order was wrong and for the foregoing reasons, the plaintiff's appeal succeeds as to the award of interest and costs on the principal sum awarded."

14. In Devram Manji Daltani vs. Danda [1949] 16 EACA 35 it was held that a successful litigant can only be deprived of his costs where his conduct has led to litigation, which might have been averted.

15. In this case the Court in allowing the appeal did not expressly deal with the issue of costs.

16. What then constitute error apparent on the face of the record? In Kanyabwera vs. Tumwebaze [2005] 2 EA 86 it was held that:

"In order that an error may be a ground for review, it must be one apparent on the face of the record, i.e. an evident error which does not require any extraneous matter to show its correctness. It must be an error so manifest and clear, that no court would permit such an error to remain on the record. The "error" may be one of fact, but it is not limited to matters of fact and includes errors of law."

17. In Nyamogo & Nyamogo Advocates vs. Moses Kipkolum Kogo Civil Appeal No. 322 of 2000 [2001] 1 EA 173 the Court of Appeal held that an error apparent on the face of the record cannot be defined precisely or exhaustively, there being an element of indefiniteness inherent in its very nature, and it must be left to be determined judicially on the facts of each case. Nevertheless, the Court held that there is a distinction between a mere error and an error apparent on the face of the record and that where an error on a substantial point of law stares one in the face, and could reasonably be no two opinions, a clear case of error apparent on the face of the record would be made out. However, an error which has to be established by a long drawn process of reasoning or on points where there may, conceivably, be two opinions can hardly be said to be an error apparent on the face of the record; neither can a view which is adopted by the Court in the original record, if a possible one, be an error apparent on the face of the record even though another view is also possible: mere error or wrong or an erroneous view of evidence or of law is certainly no ground for a review although it may be a ground for appeal. See also Muyodi vs. Industrial and Commercial Development Corporation and Another [2006] 1 EA 243

18. Section 27 of the *Civil Procedure Act* mandates the Court to expressly address its mind to the issue of costs and where the Court decides not to follow the general rule, the Court is required to give its reasons for not so doing. Where a Court of law fails to address its mind to a legal requirement that may constitute a ground for review as opposed to where the Court addresses its mind to the same and makes a decision thereon.

19. The Respondent has however contended that this Court is *functus officio*. The doctrine of *functus officio* is one of the expressions in law on the principle of finality and *Black's Law Dictionary*, 9th Edition defines *functus officio* as: -

"[having performed his or her office]" (of an officer or official body) without further authority or legal competence because the duties and functions of the original commission have been fully accomplished."

20. The Court of Appeal in Telkom Kenya Limited vs. John Ochanda (Suing on his Own Behalf and on Behalf of 996 Former Employees of Telkom Kenya Limited) [2014] eKLR therefore held that: -

"Functus officio is an enduring principle of law that prevents the re-opening of a matter before a court that rendered the final decision thereon."

21. I associate myself with the position adopted by the Supreme Court decision in Raila Odinga & 2 Others vs. Independent Electoral & Boundaries Commission & 3 Others [2013] eKLR where the Supreme Court cited with approval an excerpt from an article by Daniel Malan Pretorius entitled, *"The Origins of the Functus Officio Doctrine, with Special Reference to its Application in Administrative Law"* (2005) 122 SALJ 832 to the effect that:

"The *functus officio* doctrine is one of the mechanisms by means of which the law gives expression to the principle of finality. According to this doctrine, a person who is vested with adjudicative or decision making powers may, as a general rule, exercise those powers only once in relation to the same matter...The [principle] is that once such a decision has been given, it is (subject to any right of appeal to superior body or functionary) final and conclusive. Such a decision cannot be reviewed or varied by the decision maker."

22. That position however clearly applies to a situation where the Court has pronounced itself on merits. It cannot once more revisit the same decision with a view to arriving at a different decision. However, the court is not barred from dealing with the matter in order to facilitate its decision. Otherwise the provision of the law dealing with review and correction of errors would be rendered superfluous. I therefore agree with the decision in Mombasa Bricks & Tiles Ltd & 5 Others vs. Arvind Shah & 7 Others [2018] eKLR, where the court observed on the doctrine of *functus officio* that :-

"I understand the doctrine, like its sister, the *res judicata* rule to seek to achieve finality in litigation. It is a way of a court saying, 'I have done my part as far as the determination of the merits are concerned hence let some other court deal with it at a different level'. It is designed to discourage reopening a matter before the same court that has considered a dispute and rendered its verdict on the merits. It however does not command that the moment the court delivers its judgment in a matter then it becomes an abomination to handle all and every other consequent, complementary, supplementary and necessary facilitative processes. As was held by the court of Appeal in Telkom Kenya Ltd vs John Ochanda, the bar is only upon merit-based decisional engagement. To say otherwise would be to leave litigants with impotent decision incapable of realization towards closure of the file."

23. Similarly, in **Aneriko M Simiyu vs. Redempta Simati Civil Appeal No. 227 of 2004**, it was held that it cannot be correct that a court of law would be said to be *functus officio* when moved to correct a mistake or mistakes on the face of the record because the ultimate result would be injustice.

24. It is clear that the Court is required to make a decision on costs one way or the other. Where it has made a decision thereon, the Court might well become *functus officio* in so far as the issue of costs is concerned. However, where, as in this case, no decision was made on costs, the Court cannot be termed as being *functus officio*.

25. Accordingly, I am satisfied that this is a proper case in which the Court ought to review the judgement herein. In fact, this is the kind of error contemplated under sections 99 and 100 of the ***Civil Procedure Act*** which state as follows:

99. 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. 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.

26. As was held in in **Mahinda vs. Kenya Power & Lighting Co. Ltd [2005] 2 KLR 418** the Courts jurisdiction in such cases is meant to give effect to its intention at the time the decision was made. Since there is no contrary intention manifested by the Court in the decision allowing the appeal and as costs follow the event, the Appellant is entitled to costs. I however, agree with the Respondent that the Appellant did not fully succeed in the appeal. Accordingly, I hereby award half costs of this appeal and full costs of the lower court to the Appellant.

27. Ruling accordingly.

Read, signed and delivered in open court at Machakos this 17th day of November, 2020.

G.V. ODUNGA

JUDGE

Delivered in the presence of:

Miss Olunga for the Respondent

Mr Kingoina for Mr Musundi for the Appellant

CA Geoffrey