



**REPUBLIC OF KENYA**  
**IN THE HIGH COURT OF KENYA AT NAIROBI**  
**MILIMANI COMMERCIAL & ADMIRALTY DIVISION**  
**CIVIL CASE NO. 54 OF 2013 (O.S)**

IN THE MATTER OF: MORTGAGOR/CHARGOR AND MORTGAGEE/CHARGEE

AND

IN THE MATTER OF: DISCHARGE OF CHARGE

BETWEEN

ANTONY THUO KANAI .....PLAINTIFF/ RESPONDENT

VERSUS

CANNON ASSURANCE LIMITED ..... DEFENDANT/ APPLICANT

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1. The application herein is the Notice of Motion dated **12<sup>th</sup> May 2016**. It is brought under sections 80, 99 and 100 of Civil Procedure Act, Order 45 of Civil Procedure Rule and any other enabling Provision of the Law.
2. The Applicant is seeking for orders that:-
  - *The Order made on 30<sup>th</sup> January, 2015 and the consequential decree issued on 13<sup>th</sup> March, 2015 be reviewed or varied in accordance with prayers 2 & 3 hereunder.*
  - *The Decree issued on 13<sup>th</sup> March, 2015 assessing the costs at 50% in favour of the Plaintiff, and more specifically item (d) thereof be and is hereby vacated and/or set aside.*
  - *The phrase, "Plaintiff/Applicant" appearing on item (d) of the Decree issued on 13<sup>th</sup> March, 2015 be corrected to read "Defendant/Respondent".*
  - *The costs of this application be provided for.*
  - *Such further and other relief be granted as this court deems fit and expedient in the circumstances.*
3. The Application is based on the grounds on the face of it, and is supported by an affidavit sworn by **EDITH MUCHIRI** dated 12<sup>th</sup> May 2016. However, it is opposed based on the replying affidavit sworn by **ANTONY THUO KANAI** dated 4<sup>th</sup> June 2015.
4. The Applicant's case is that on the 13<sup>th</sup> February 2013 the Plaintiff herein, ANTHONY T. KANAI by an Originating summon dated the same day applied to the court for a plethora of orders. On the 30<sup>th</sup> January 2013 the Honourable Court delivered a ruling on the said originating

summons and the following orders were made:-

- ***The Plaintiff to pay the Respondent the balance of Kshs.205,144/= together with interest at court rates from 26<sup>th</sup> February, 2013 until payment in full.***
- ***Upon such payments, the amount of Kshs.329,418 deposited in the joint earning account of the parties Advocates be released to the Plaintiff together with the interest to date.***
- ***Upon payment of the outstanding amount, as per prayer (a) herein, the Defendant to execute and deliver to the Plaintiff in triplicate within seven days, a Discharge of Charge of the Property together with the Plaintiff's title documents and all documents relating to L.R No. 15153/93 which are in the Defendant's possession.***
- ***The costs of this suit is assessed at 50% and given to the Plaintiff/Applicant.***

5. However, according to the Applicant there is an apparent error on the face of the records for the following reasons:-

- *That the Ruling and the consequential Orders made therein were delivered in favour of the Defendant/Respondent and not in favour of the Plaintiff/Applicant; and as such, it is inconceivable for the court to make adverse orders as to costs against the successful litigant.*
- *That the court has rendered no legal basis of assessing costs at 50% in favour of the Plaintiff/Applicant who in any event was not successful in his Originating Motion dated 13<sup>th</sup> February, 2013, the subject of the impugned orders.*
- *That there was no special circumstances to warrant the assessment of costs at 50% or at all.*

6. The Applicant submitted that, in the circumstances, the Court is vested with residual jurisdiction under sections 1A, 1B, 3A 99 and 100 of the Civil Procedure Act to correct clerical or arithmetical mistakes in judgments, decrees or orders, or errors arising therein from any accidental slip or omission. Therefore it is in the interest of justice that the said orders be reviewed. The Applicant further argued that, there is no unreasonable delay in making this application.

7. The Respondent opposed the application on the grounds that it is misconceived, lacks merit, and is also an abuse of the process. He relied on the grounds that:-

- *The court did not dismiss the Originating Summons as stated by the Applicant but in fact, it granted five substantive orders for Plaintiff's benefit pursuant to prayers 1, 2, 3, 4, 8, 9 and 10.*
- *That the court ruled in it's favour by upholding the interest rate of 6% as opposed to 15% claimed by the Plaintiff/Applicant.*
- *That, the Defendant/Respondent admitted prayers 4 and 6 of the Originating Summons and that led to a reduction in it's favour by a reduction of Kshs.124,374 from the initial sum claimed.*
- *It was also granted an order for discharge of the charge and release of the deposited amount of Kshs.329,418 to it.*

8. The Respondent submitted that in the circumstances there is no error on the face of the record as deponed by EDITH MUCHIRI and that, the allegation that the Court had no legal basis of assessing costs at 50% in favour of the Plaintiff is a direct challenge of the interpretation of the law by the Honourable Court and the substance of the ruling. That the same is not premised on an error on the face of the record. He further argued that in deed none of the prayers sought for the Defendants/Applicants were granted. That, the Applicants are guilty of delay having filed this application five months after the delivery of the subject ruling.

9. The parties filed their respective submission to dispose off the matter. The Applicant's submission invited the Court to consider the general rule of Law that **costs** follow the cause. The Applicant submitted that, as the Defendant was successful in the matter, it is entitled to costs as a general rule under the law. That although the Court has discretion under section 27 of the Civil Procedure Act, to grant costs to any party or litigant, that discretion must be exercised upon grounds which a reasonable man could have come to the conclusion arrived at.

10. The Applicant relied on the case of ***Party of Independent Candidate of Kenya and Another –vs- Mutula Kilonzo & 2 Others, HCEP No. 6 of 2013.*** They cited the case of ***Mayfair Holding Ltd –vs- Ahmed (1990) KLR 669*** which re-stated the position that in order to justify the order refusing

the Defendant his costs, he must be shown to have been guilty of conduct which induced the Plaintiff to bring the action, and without which it would probably have been brought. The Applicant invited the court to exercise the general rule of Judicial practice in the Superior Courts, and grant costs to the successful litigant. The Applicants further relied on the cases of **Patrick Kilonzo & Teachers Service Commission (2015) eKLR** and **Joseph Oduor Anode –vs- Kenya Red Cross Society Nairobi HCC No. 66 of 2009 (2012) eKLR**. The Applicant also submitted that the Defendant will suffer prejudice if the error is not corrected. They relied on the case of **Jashir Singh Rai and 3 others –vs-Tarlochan Singh Rai and 4 Others (2014) eKLR**.

11. The Plaintiff/Respondent, in his submission relied on the replying affidavit. He submitted that there is no apparent error on the face of the record and that, the Defendant/Applicant has failed to demonstrate the specific error that the Honourable Court committed in awarding the Plaintiff 50% of the costs of the suit. He relied on the cases of **Daniel Okoth –vs- KNCHR Industrial cause No. 1238 of 2012**. He submitted that an error on the face of the record must be manifestly clear and the Court should not travel beyond the record to see whether the Judgment is correct or not. That, the Defendant/Applicant is seeking to disguise an Appeal issue as a review issue. That, each party is alleging to have won the case, thus, this Court has to interrogate the reasoning of the two parties to determine that issue.
12. The Respondent further submitted that the Applicant has not explained the delay in filing this application. He relied on the case of **Kenfreight EA Ltd –vs- Star East African Company Limited (2002) KLR 783**. Finally, the Respondent submitted that Applicant has failed to demonstrate how the exercise of a judicial discretion to award a party costs can be termed as a clerical or arithmetic mistake. He relied on the case of **Patrick Kilonzo –vs- Teachers Service Commission (2015) eKLR**. On the issue of the allegation that the Court has no legal basis of assessing costs at 50% in favour of the Plaintiff, Respondent relied on the case of **Abasi Balinda –vs- Fredrick Kangwama and Another (1963) EA 557**; where it was held that:-

***“An erroneous view of evidence or law is not a ground for review though it may be a good ground for appeal”.***

The Respondent also relied on the case of **Pancras T. Swai –vs- Kenya Breweries Ltd Nairobi Civil Appeal No. 275 of 2010**.

13. I have considered, the orders sought for in this application, the grounds and affidavit in support thereof and the replying affidavit. I have also considered the written submissions by the parties and the authorities cited therein. I find the following issues require determination whether:-

- There is an error apparent on the face of the record as stated by the applicant.
- The orders in the ruling and the consequential orders were delivered in favour of the Plaintiff and or the Defendant.
- There was a legal basis for the court to assess costs of 50% in favour of the Plaintiff.
- The court has residual jurisdiction to correct what the Applicant refers to as **“clerical or arithmetical mistakes in judgments, decrees, or orders or errors arising therein from any accidental slip or omission”**.
- There has been a delay in making this application.

14. I now turn to the law relating to review of Court orders, and more specifically, sections 80, 99 and 100 of Civil Procedure Act, Cap 21, Laws of Kenya, and order 45 of the Civil Procedure Rules 2010. In a nutshell, Section 80 allows a party to apply for review of Judgment or order made by a Court. The Review application is naturally made to the Court that passed the decree or made the order. The same section allows the court, upon hearing the application for review to **“make such orders thereon as it thinks fit”**. Section 99 allows amendments of Judgments, decrees or orders on the grounds that there are clerical or arithmetical arising therein from any accidental slip or omission.

Section 100 relates to the courts general power to amend any defect or error in any proceedings in a suit and requires all necessary amendments shall be made for the purpose of **“determining the**

**real Question or issue raised by or depending on the proceeding**". Order 45, Rule 1 Civil Procedure Rules specifically relates to Applications for review of decree or order. It sets grounds for the same as:

- The discovery of new and important matter or evidence which after exercise of due diligence, was not within the Applicant's knowledge or could not be produced by him at the time when the decree was passed or Order made, or
- On an account of some mistake or error apparent on the face of the record, or
- For any other sufficient reason, desired to obtain a review of the decree or order.

15. In the instant case, the Applicant relies on an error apparent on the face of the record and has cited the reasons thereof, which I have already reproduced in this ruling. He argues that the ruling herein and consequential orders was **in favour of the Defendant and not the Plaintiff**. The Plaintiff responds to the same and argues that the Plaintiff was successful in obtaining some of orders.

16. I have carefully read the Ruling of the Honourable court delivered on 30<sup>th</sup> January 2015 and find that under paragraph 14 thereof, the court summarised the two issues for determination as:

- ***Whether the Defendant is entitled to include the sum of Kshs. 542,140/- to the Loan amount of Kshs. 10,000,000/=***
- ***Whether the Defendant is entitled to vary the interest rates as provided for in the Charge***

Upon analysis of the same, the court ruled as follow.

***"In the light of the foregoing it is my considered opinion that the additional amount of Kshs.542,140/= included in the loan was lawful as the same was contemplated in the charge document"***.

On the 2<sup>nd</sup> issue the court made the following observation:-

***"... in this statement the applicable interest is indicated as 6% all through and it seems the Defendant abandoned the interest rate of 15%. See the Statement of Account at Page 86 of the Defendant's bundle of documents. This court will consider the sum of Kshs.205,144/= as the outstanding amount. This is the sum indicated in the corrected and detailed statement of the loan account prepared by the Defendant as ordered by this Court"***.

17. The plain reading of the Orders and that were a result of an originating summons dated 13<sup>th</sup> February 2013 reveals that both parties partially won and lost their case. The Plaintiff clearly found favour with the Court on prayer 6 of the originating summons which was seeking that: ***"THAT, this court be pleased to declare the applicable interest on the loan is 6%"*** and partly prayer 8 thereof, where the discharge of the charge was ordered albeit conditional. That in my opinion informed the decision of the court to award the Plaintiff 50% of the total costs.

18. I find although the general rule is that costs follow the cause, but that can be varied where the court has a good reason to order otherwise. The Court was merely exercising its judicial discretion in awarding the costs as ordered. That cannot be termed as error apparent on the face of the record. It's not a clerical or arithmetic mistake. Therefore where the court finds both parties are partially successful, it is not erroneous to order that costs be shared among the parties. That to me is in line with the general principle that costs follow the cause. There is no accidental slip in the Order or Decree arising herein. I don't agree with the Applicant's submissions to the effect that ***"the reduction of the amount payable to the Defendant from Kshs.329,418 to Kshs.205,144 is not an indication of the Plaintiff Success"***.

19. In conclusion I find that the notice of motion dated 12<sup>th</sup> May 2016 lacks merit. I dismiss it with costs to the Plaintiff/ Respondents.

It is so ordered.

DATED AND DELIVERED IN AN OPEN COURT AT NAIROBI THIS 28TH DAY OF JUNE 2016.

G.L.NZIOKA

JUDGE

**Ruling Read in open court in the presence of:**

..... for Plaintiff

..... for Defendant

Teresia – Court Clerk