



REPUBLIC OF KENYA
IN THE HIGH COURT OF KENYA AT NAIROBI

CIVIL APPEAL NO. 513 OF 2008

DIAMOND TRUST KENYA LIMITED.....APPELLANT

VERSUS

MOTORWAYS KENYA LIMITED.....RESPONDENT

ATTORNEY GENERAL.....RESPONDENT

RULING

Judgment in this Appeal was delivered by this court on 16th May 2013. In the judgment the court had directed that the 2nd Respondent do refund the excess payments to the Appellant. The parties herein approached the court pursuant to Section 99 of the Civil Procedure Act for the rectification of the judgment stating that the excess amount ought to have been refunded to the 1st Respondent and not the Appellant. The court then directed that the application for rectification be prosecuted by way of written submissions. The written submissions were filed and exchanged.

The 1st Respondent submitted that the judgment is erroneous since they had made the excess payment and not the Appellant. They stated that the court found the sum was not accounted for by the Commissioner of Lands and therefore the 1st Respondent had erroneously paid the excess amount.

The 1st Respondent also submitted that it was the successful litigant so far and that the actions of the 2nd Respondent having necessitated the filing of the suit he should accordingly be responsible for their costs in connection with the claim that has succeeded.

The Appellant has not opposed the application for rectification of the judgment on the issue of refund. The Appellant submits that there is apparent error which arose when the honourable court directed the sum of Kshs.67,680 to be paid to the Appellant instead of the same being paid to 1st Respondent who had paid the excess to the 2nd Respondent. The Appellant agrees with the 1st Respondent that the excess money paid by them should be refunded to them.

The Appellant is opposed to the issue of costs. The Appellant submits that the award of costs was due to the fact that the 1st Respondent claimed the entire figure of Kshs.116,697 as against the Appellant including rates and rents that they were entitled to pay and that the fact they are refunded does not alter the finding. It is the Appellant contention that an award of cost in a matter does not constitute a clerical or arithmetical error capable of rectification under section 99 of the Civil Procedure Act. The Appellant relied on the **Kakamega HCCC Appeal 43 of 2000 Levi Ndombi Mukonyole Vs Clay Godwin Wambulwa**, to the effect that the issue of costs cannot be rectified under Section 99 but can be reviewed under Order 45 of the Civil Procedure Rules. The Appellant argued that the 1st Respondent is precluded

from review by the provisions of Order 45 since they have filed a notice of Appeal dated 24th May 2013.

I have considered the foregoing submissions; in my view since the rectification sought is not disputed then the only issue for determination is costs.

I do agree with the parties that this Court has the powers both under Section 99 of the *Civil Procedure Act* and its inherent jurisdiction to correct clerical or arithmetical mistakes in judgments, decrees or orders, or errors arising there-from. Any accidental slip or omission, can without doubt, be corrected at any time by the court, either of its own motion or on the application of any of the parties. Courts have set out guidelines which govern the circumstances under which the exercise of the jurisdiction to correct clerical or arithmetical mistakes in judgments, decrees or orders, or errors arising therein from any accidental slips or omissions, are to be exercised. *The East Africa Court of Appeal in the case of Vallabhdas Karsandas Raniga Vs. Mansukhlal Jivraj and Others [1965] EA 780*, held:

“Section 3(2) of the Appellate Jurisdiction Act confers on the Court of Appeal the same jurisdiction to amend judgments, decrees and orders that the High Court has under Section 99 of the Civil Procedure Act, making it unnecessary to look to the inherent powers of the court. The words “at any time” in Section 99 clearly allow the power of amendment to be exercised after the issue of a formal order....“Slip orders” are made to rectify omissions resulting from the failure of counsel to ask for costs and other matters to which their clients are entitled.....A court will only apply the slip rules where it is fully satisfied that it is giving effect to the intention of the court at the time when judgment was given or, in the case of a matter which was overlooked, where it is satisfied, beyond doubt, as to the order which it would have made had the matter been brought to its attention. In the present case, if the facts had been before the court when judgment was given on appeal, the court would, on application or indeed of its own motion, have made the order for refund, now sought, which was necessarily consequential on the decision on the main issues.”

In the instant application, the 1st Respondent claims to be the successful litigant who ought to be awarded costs. I do not however, agree with the 1st Respondent’s submissions. The issue of costs is discretionary which should be exercised judiciously to ensure the ends of justice. ***Section 27 of the Civil Procedure Act states:***

“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 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”

The Supreme Court in **Jasbir Singh Rai & 3 others Vs Tarlochan Singh Rai & 4 others [2014] eKLR** held that:

“It emerges that the award of costs would normally be guided by the principle that “costs follow the event”: the effect being that the party who calls forth the event by instituting suit, will bear the costs if the suit fails; but if this party shows legitimate occasion, by successful suit, then the defendant or Respondent will bear the costs. However, the vital factor in setting the preference, is the judiciously-exercised discretion of the Court, accommodating the special circumstances of the case, while being guided by ends of justice. The claims of the public interest will be a relevant factor, in the exercise of such discretion, as will also be the motivations and conduct of the parties, prior-to, during, and subsequent-to the actual process of litigation..... Although there is eminent good sense in the basic rule of costs – that costs follow the event – it is not an invariable rule and, indeed, the

ultimate factor on award or non-award of costs is the *judicial discretion*. It follows, therefore, that costs do not, in law, constitute an *unchanging consequence* of legal proceedings – a position well illustrated by the considered opinions of this Court in other cases. The relevant question in this particular matter must be, *whether or not the circumstances merit an award of costs to the applicant.*”

In the instant case on the issue of costs, the court did not make an error on the face of the record which would require correction under Section 99 aforesaid. The court considered the issue and deliberately made an order which it considered reasonable in the circumstances. What the applicant herein seeks is a review of the order which can only be done under Order 45 of the Civil Procedure Rules. This is not such an application.

The appropriate final order which this court wishes to make is as follows: -

ORDER

The second sentence of the last paragraph of the Judgment of this court dated the 16th May, 2013, is hereby rectified to read as follows: -

“The honourable trial magistrate erred in law and fact in not doing so and this court has no alternative but to order the 2nd Respondent to refund the said sum of Ksh.67,680/- to the 1st Respondent.”

Dated and delivered at Nairobi this 20th day of May, 2015.

D A ONYANCHA

JUDGE