



REPUBLIC OF KENYA

High Court at Nakuru

Civil Appeal 175 of 2008

(Appeal from the judgment of N. N. Njagi, Principal Magistrate dated 22nd October, 2008 in Naivasha Chief Magistrate's Court, Civil Case No. 185 of 2007)

SHALIMAR FLOWERS LTD.....APPELLANT

VERSUS

NOAH MUNIANGO MATIANYI.....RESPONDENT

RULING

By the Notice of Motion dated 6/5/2011, the Applicant, **Noah Muniango Matianyi** seeks a review of this court's order dated 25/3/2011 in which the court awarded the total costs of the appeal to the Appellant/Respondent. In the grounds in support of the application and the supporting affidavit of the Applicant, it is contended that the Appellant appealed against both liability and damages and this court on 25/3/2011 allowed the appeal on damages by reducing the award of damages but disallowing the six grounds of appeal; that the Appellant having succeeded to a limited extent, the court should not have ordered that the entire costs be awarded to the Appellant but each party should have borne its costs or the court should have apportioned the costs so that each party bears half the costs.

Counsel relied on the decision of **John Gitonga Germano and Bobmill Industries Vs Rispa Paul Ogal and Consolata Apiyo, Civil Appeal No. 94 & 95 of 2010**, where the Appellant was partially successful on appeal and the court ordered each party to bear its own costs. In **Civil Appeal No. 193 of 2008, Timsales Kenya Ltd Vs Enock Nyambicho Kego**, the appeal partially succeeded and the court awarded half the costs to either party.

The application was opposed for being incompetent because no grounds for review had been stated and that no decree was extracted and exhibited to the application. **Mr. Mahida**, counsel for the Appellant/Respondent also urged that the court had arrived at a correct finding; that one party must lose and one succeeds but that if the court was inclined to allow the application, the court should adopt the decision in **Timsales K. Ltd Vs Enock Nyambicho Kego; Nakuru Hcca No. 83 of 2003, V. A. R. Luis Vs Joseph Misoi**, where half costs were given to the Appellant.

I have considered the rival arguments and the authorities cited herein. In my view, this application having been brought in the same file as the appeal, there would be no requirement that the Applicant annexes the decree to the application. The court can easily refer to the judgment which is on the file. In any event, failure to exhibit the decree is an omission that would not be prejudicial to the Respondent as it does not go to the root of the application. This court is enjoined to do substantial justice to all parties to a dispute (**Article 159(2)(d) of the Constitution**) without undue regard to procedural technicalities.

In an application for review, pursuant to **Order 45, Rule 1** of the **Civil Procedure Rules**, the court can review its judgment, upon the discovery of a new and important matter or evidence which was not within the applicant's knowledge or reach or if there is an error on the face of the record or for any other

sufficient cause. In this case, it is not disputed that the court found partially in favour of the Appellant on appeal, by reducing the amount of the award. It was only fair and good practice that the court takes that fact into account when awarding the costs. The court erred by not apportioning the costs between the parties and the application must succeed. The Applicant moved the court without undue delay. In exercise of this court's discretion, I hereby direct that the costs on appeal be borne by the parties equally. Similarly, costs of this application will be borne by the parties equally. It so ordered.

DATED and **DELIVERED** this 18th day of January, 2013.

R. P. V. WENDOH
JUDGE

PRESENT:

N/A for the Appellant

N/A for the Respondent

Court Clerk - Kennedy