



CIVIL PRACTICE AND PROCEDURE

- *When the slip rule in S. 99 Cap 21 will apply.*
- *Where the decretal amount is amended court can order restitution.*

REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA

AT MERU

HIGH COURT CIVIL CASE NO. 93 OF 2004

MARGARET RWAMBA MOFFAT KARIUKI (*Suing as the legal representative of the estate of*

Moffat Kariuki Joseph Nyaga).....**PLAINTIFF**

VERSUS

MUGAMBI MUKETHA.....**1ST DEFENDANT**

SUSAN WANJUGU GACHORA (*Sued as the legal representative Of the estate of*

Samuel Phinebas Gachora (Deceased)).....**2ND DEFENDANT**

RULING

This court delivered its judgment in this matter in favour of the plaintiff for special and general damages relating to the fatal motor vehicle accident involving Moffat Kariuki Joseph deceased. The judgment amount was a portion at 30% against the 1st defendant and 70% against the 2nd defendant. The court by that judgment ordered each party to bear their own costs. The reason that the court made that order in regard to costs was because the court noted that there was no evidence that the plaintiff’s counsel issued a notice of demand to the defendants before action. Despite that order that each party bear their own costs, the plaintiff proceeded to draw and to tax a bill of costs. The taxing master by his ruling of 28th July

2009, awarded to the plaintiff costs of Kshs. 87,856/=. The defendants have filed a Notice of Motion dated 17th September 2009. They seek by that Notice of Motion to vary/set aside or review the ruling of the taxing master of 28th July 2001. They also seek an order that this court do correct the judgment in this case of 8th May 2009. In respect to the prayer for the judgment of 8th May 2009 to be corrected, the defendants by the affidavit sworn by their advocates stated as follows:-

12. That from my reading of the judgment, I have noticed that the same contains arithmetical/clerical errors in calculation of the award in respect of loss of dependency. The Honourable Judge used Kshs. 5,000/= as multiplicand, 5 years as multiplier and dependency ratio of 2/3. When you calculate $5000 \times 12 \text{ months} \times 5 \text{ years} \times 2/3$ the figure adds up to Kshs. 200,000/= and not Kshs. 600,000/= as found by the court.

13. That it is therefore apparent that the grand total of Kshs. 778,765/= of the judgment is erroneous and ought to be corrected to reflect the true figure of Kshs. 378,768/=.

14. That this Honorable Court has wide powers to correct arithmetical/clerical errors apparent on judgment.

15. That as result of the arithmetical error, the plaintiff has been overpaid by the 1st defendant to the tune of Kshs. 119,999.50/= and the Honourable Court should order the return of the said money to the 1st defendant by the plaintiff otherwise it would amount to great injustice to the 1st defendant.

16. That as a result of the arithmetical error, the plaintiff has been overpaid by the 2nd defendant to the tune of Kshs. 98,287/= and the Honourable court should order return of the said money to the 2nd defendant by the plaintiff otherwise it would amount to great injustice to the 2nd defendant.

17. That I believe that the said money which was paid through the plaintiff's advocates has not been released to the plaintiff by the plaintiff's advocates for distribution among the various dependants shown in the further amended plaint.

18. That in the event that the money has been released to the plaintiff, this Honourable Court, as court of justice and equity, has powers to order the plaintiff to return the money to the defendants. It would amount to unjust enrichment if the plaintiff is to retain Kshs. 218,286.50/= paid by the defendants as result of an error."

Learned advocate for the plaintiff in respect of the prayer that the calculation of the judgment amount was in error, stated in his submissions before court that he was in agreement with the defendants that the court had erred in its calculation of that judgment amount. Defendants by their said for the court to correct the award in the judgment, they have moved under section 99 of the Civil Procedure Act Cap 21 which provides 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."

The defendant by their Notice of Motion sought that the court in correcting that judgment would order the plaintiff to refund the amount she has been overpaid which is Kshs. 119,999.50/= by the 1st defendant in Kshs. 98,287/= by the 2nd defendant. The case of **Raniga vs. Jivalji & Ano.** [1965] EA, 700, the Court of Appeal in discussing the provisions of section 99 of Cap 21 which is sometimes called the 'slip rule'

stated:-

“A court will, of course, only apply the slip rule where it is fully satisfied that it is giving effect to the intention of the court 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, we feel no doubt that if the facts had been before the court when judgment was given on the appeal, the court would, on application or indeed of its own motion, have made the order for refund now sought, which was, in our opinion, necessarily consequential on the decision on the main issues.”

As stated before, the judgment of this court of 8th May 2009 on costs was to the effect that each party was to bear their own costs. Contrary to that order, the plaintiff's costs were taxed by the taxing master of this court. The plaintiff has also filed a Notice of Motion which is also being considered in this ruling. It is dated 22nd July 2010. By that application, the plaintiff seeks review of the judgment of 8th May 2009 on the basis that it had an 'error on the face of the record and/or mistake in ordering parties to bear their own costs.' The plaintiff through her supporting affidavit which was sworn by her advocate stated that she was shocked to see a copy of the judgment where it was ordered that each party bear their own costs. She said that order was contrary to the provisions of section 27 of Cap 21. Section 27 (1) provides as follows:-

“27 (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.”

The plaintiff further stated in that affidavit that it would be fair to award her costs since she was the party that succeeded in this cause. She was of the view that the court erred in failing to award her costs. The learned advocate for the plaintiff in his submissions before court requested the court to correct the judgment as sought by the defendants and additionally to allow the plaintiff's costs in order to balance the figures. The counsel then argued:-

“Demand notice is not a legal requirement and that makes us submit the court made an error of law.”

The demand referred to there by the plaintiff's advocate is the demand made before action to the opposing party. The learned judge who delivered the judgment on 8th May 2009 on costs had this to say:-

“Each party to bear its own costs as there is no evidence that the plaintiff's counsel issued any notice to the defendants.”

My first reaction to the submission made by the advocate as quoted above is that if the judge made an error in law as argued by him then it is not a fit and proper matter to be considered by this court because that would be tantamount to this court sitting in an appeal of a concurrent judge. Further, in response to that argument, I would wish to refer to paragraph 53 The Advocate's (Remuneration) Order which provides as follows:-

“If the plaintiff in any action has not given the defendant notice of his intention to sue, and the defendant pays the amount claimed or found due at all before the first hearing, no advocate’s costs shall be allowed except on special order of the judge or magistrate.”

It is clear that the plaintiffs failed to show that she issued a notice to the defendant. But having so failed, the court could only deny her costs if the defendant paid the amount before the first hearing. See Para. 53 above. The court may have made an error in failing to award the plaintiffs’ costs when the plaintiff wholly succeeded in her claim. A useful case to consider at this juncture is Ritter vs. Godfrey [1920] 2 KB 47 where it was stated:-

“A successful defendant in non injury case has no doubt, in the absence of special circumstances a reasonable expectation of obtaining a order for the payment of his costs by the plaintiff; but he has no right to costs unless and until the court awards them to him and the court has an absolute unfettered discretion to award or not to award this. This discretion like any other discretion must of course be exercised judicially and the judge ought not to exercise it against the successful party except for some reason connected with the case.”

The reason given by the learned judge for denying the plaintiff costs was in error when one considers paragraph 53 as quoted above. That as rightly argued by plaintiff counsel was an error in law. Being an error in law, the plaintiff should have appealed against the court’s decision. It is not proper for the plaintiff to seek review in those circumstances because it is tantamount to the plaintiff seeking an appeal by way of review. The taxing master erred to have taxed the plaintiffs’ costs when there was no order in the judgment awarding the plaintiff such costs. The taxing master had no jurisdiction to tax those costs. It follows that his ruling will be set aside. Section 91 of Cap 21 does provide that the court can order restitution such as is sought by the defendants in this case in respect of monies overpaid to the plaintiff. Section 91 of Cap 21 provides as follows:-

“91. (1) Where and in so far as a decree is varied or reversed, the court of first instance shall, on the application of the party entitled to any benefit by way of restitution or otherwise, cause such restitution to be made as will, so far as may be, place the parties in the position they would have occupied but for such decree or such part thereof as has been varied or reversed; and for this purpose the court may make any orders, including orders for the refund of costs and for the payment of interest, damages, compensation and mesne profits, which are properly consequential on such variation or reversal.

(2) No suit shall be instituted for the purpose of obtaining any restitution or other relief which could be obtained by application under subsection (1).

That being so, I make the following orders:-

- 1. The judgment of 8th May 2009 is corrected to the effect that the award to the plaintiff of loss of dependency is hereby reduced by Kshs. 400,000/=. The correct award shall be Kshs. 200,000/= in respect of loss of dependency.***
- 2. The plaintiff is hereby ordered to refund to the 1st defendant Kshs. 119,999.50/= and to the 2nd defendant Kshs. 98,287/= within 30 days from this date hereof. Failure to refund the amount leave is hereby granted to the defendant to execute for those amount against the plaintiff.***
- 3. The ruling of the taxing master of 28th July 2009 is hereby set aside.***
- 4. Since both parties were under mistake in regard to the terms of this court’s judgment as they proceeded in this matter, each party will bear their own costs in respect of Notice of Motions dated 17th***

September 2009 and 22nd July 2010.

Judgment by:-

MARY KASANGO
JUDGE

Dated, signed and delivered at Meru this 21st day of July 2011.

J. LESIIT
JUDGE