REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA

AT KAKAMEGA

Civil Appeal 43 of 2000

LEVI NDOMBI MUKONYOLE.....APPELLANT

VERSUS

CLAY GODWIN WAMBULWA.....RESPONDENT

R U L I N G

In my judgement dated 10th March 2006 allowing the appeal against the decision of the Appeals Committee set up under section 9(1) of the Land Disputes Tribunals Act (No. 18 of 1990), I made an order granting the costs, not to the Appellant who was successful, but to the Respondent who lost the appeal. My intention was to grant the costs to the successful party and not the vice versa. But on the face of it, the order for costs to the Respondent who lost the appeal seemed clear and it could be argued that the court is factus official on the matter.

The Appellant applied on 26/9/2006 under sections Ss. 3A and 80 of the Civil Procedure Act, Cap 21, and Order XLIV rr.1 &2 of the Civil Procedure Rules by way of Notice of Motion seeking orders that the order for costs dated March 10th, 2006 be reviewed.

Mr. Shitsama, learned counsel who argued the application on behalf of the Appellant, urged the court to review the said order contending that the order for costs "was made by mistake which could be rectified through review."

The Respondent, Godwin Clay Wambulwa, who had filed an objection to the said application on 28/11/06 did not attend court when the application came up for hearing on 23-3-2007.

Under section 27 (1) of the Civil Procedure Act, the costs of and incidental to all suits are in the discretion of the court or judge. The proviso to the section stipulates:-

"***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."***

Clearly the order for costs should have followed the event with the result that the costs for the appeal should have been borne by the Respondent who was unsuccessful. In departing from the proviso (supra), the order for costs did not give reason for such departure for the simple reason that the intention was not to award the costs to the losing party, namely the Respondent. The Appellant did not come to court under section 99 of the Civil Procedure Act which gives the court the power to correct at any time **clerical or arithmetical mistakes** in judgement, decree or orders **or errors arising therein from any accidental slip or omission. But was this a clerical or mathematical mistake? "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."** ***(see RANIGA v. JIVRAJ (1965) EA 700 in which the court of appeal for East Africa held that "a slip order" will only be made where the court is fully satisfied that it is giving effect to the intention of the court at the time when judgement was given, or, in the case of a matter which was overlooked, where it is satisfied beyond doubt, as to the order it would have made had the matter been brought to his attention."*** On authorities, the order sought to be reviewed cannot be rectified under section 99 of the Civil Procedure Act as the issue of costs was not a matter the court overlooked nor

was there omission to make the order on costs. The slip rule therefore could not be invoked and perhaps this is the reason why Mr. Shitsama did not invoke it.

The Application was premised on Order XLIV rules 1 and 2 of the Civil Procedure Rules. The order for review is sought on the ground that the order for costs was made in error as the Appellant was the successful party and costs ought to have followed the event and therefore awarded to the Appellant and not the Respondent who did not attend the hearing of the appeal on 27.3.2007 and against whom the judgement was delivered.

It could not have been the intention of the court to grant the costs to the Respondent who was absent in the hearing and who lost the appeal which was allowed in favour of the Appellant. Moreover, there was no good reason for the Respondent to get the costs of the appeal the hearing of which he did not attend. In paragraph 10 of the affidavit in support of the Notice of Motion, the appellant averred that "***as the successful party the natural course of events would have dictated that he be awarded the costs of the appeal."*** In short, what the appellant was contending was that having regard to the circumstances of this case the error gave rise to a sufficient reason for the review of the order. Departing from erstwhile decisions in ***AHMED H. MULJI v. SHIRINBHAI JADAVJI (1963) EA 217*** and ***TANITALIA v. MAWA HANDELS (1957) EA 215, Kneller, Hancox, and Nyarangi JJA*** in ***WANGECHI KIMATA AND ANOTHER v. MUTAHI WABIRU C.A. Civil Appeal No. 80 Of 1985*** stated with regard to construction of "***any other sufficient reason"*** in order XLIV Rule 1 that they saw no reason why "***any other sufficient reason"*** need be analogous with the other grounds in order SLIV "***because clearly section 80 of the Civil Procedure Act confers an unfettered right to apply for review"*** and so the words "***for any sufficient reason"*** need not be analogous with the other grounds specified in the order……..." The Court of Appeal held in ***Shanzu Investments Ltd. v. Commissioner of Lands C.A. Civil Appeal No. 100 of 1993*** that "***any other sufficient reason"*** need not be analogous with the other grounds in Rule 1 of Order XLIV because such restriction would put a clog on the unfettered right given to the court by section 80 of the Civil Procedure Act and that the other grounds set out in the rule did not in themselves form a genus or class of things with which the third general head could be said to be analogous.

Having regard to the application, and the circumstances of this case, it is patent that there is sufficient reason under Rule 1 of Order XLIV to review the order for costs as it was not the intention of the court to grant such costs to the unsuccessful party, to wit the respondent, who did not attend court during the hearing on 27.3.2007.

I hold and I am satisfied that the order for costs was an error and there is sufficient reason to vary it to reflect the intention of the court and to do justice to the parties in accordance with the proviso to S.27 of the Civil Procedure Act.

In the result, I allow the application and vary the order for costs in the judgement to read that the Respondent shall bear the costs of the appeal. It is so ordered.

Dated at Kakamega this 21st day of June, 2007.

G. B. M. KARIUKI

J U D G E