



REPUBLIC OF KENYA
IN THE HIGH COURT OF KENYA
AT MALINDI
CIVIL APPEAL 7 OF 2003

MOHAMED SHAFI.....APPELLANT

VERSUS

MARIAM JUMA & FOUR OTHERS

SUING THR' AMINA HASSAN.....RESPONDENT

R U L I N G

By an application by way of Notice of Motion dated 5th July 2007, pursuant to the provisions of Order XLIV Rule 2 of the Civil Procedure Rules, the applicant seeks orders:

- 1) *That this application be certified as urgent and service thereof be dispensed with in the first instance.***
- 2) *That this honourable Court be pleased to review its judgment dated and delivered on 19th September 2005 with a view only of making a specific order on costs of the appeal.***
- 3) *That this honourable Court be pleased to award the costs of the appeal and this application to the appellant who was the successful party in the appeal.***

The application is based on the grounds that:

- 1) *That this honourable Court delivered judgment herein on 19th September 2005 allowing the appeal, setting a side the order and decree and any subsequent orders of the subordinate court but the said judgment remained silent on the issue of the costs of the appeal.***
- 2) *That the appellant being the successful party and operating under the assumption that costs always follow the event unless the Court specifically states otherwise, proceeded to prepare and file a party and party bill of costs and set it down for taxation before the Taxing Master.***
- 3) *That when the appellant's party and party Bill of Costs came up for taxation before the Deputy Registrar on 27th June 2007 the respondent's advocates raised the question of whether or not costs were actually payable in view of the failure by the court to specifically order for costs in the cause of the judgment.***

4) That the appellant had prayed for costs of the appeal in the Memorandum of Appeal.

The application is predicated upon the annexed affidavit of Asha Juma Safi sworn on the 5th day of July 2007.

It was argued on behalf of the applicant, that having applied for and obtained a grant of letters of administration in respect of the estate of the late Mohammed Saffi he was competent to bring the application.

That the judgment in respect of an appeal on behalf of the estate of the late Mohamed Saffi was delivered on 19th September 2005. However, the honourable court made no order as to costs.

That he has been informed by his advocate on record, and it is a well known principle of judicial practice, that where a court makes a final order determining the rights of the parties on any issue before the court but fails to make a specific order on costs such costs are presumed to belong to the successful party. In a nutshell "**costs follow the event**".

That since he was a successful party he is thus entitled to the costs of the appeal.

That failing to provide for costs is an omission or error apparent on the face of the record that can be corrected by the trial judge on application.

The application was opposed by the respondent who filed grounds of opposition dated 18th July 2007. The respondent relied on the said grounds and by way of submissions argued that costs is at the discretion of the court. There is, no evidence that the court intended to award costs and inadvertently omitted to do so.

That in any event the application is defective in that the decree or order to be reviewed has not been extracted and attached to the application.

In any event the application is belated. Judgment was delivered on 19th September 2005 in the presence of the applicant's advocates. It is now two years since delivery of judgment. The delay is inordinate and no reasons have advanced to explain the delay.

I have anxiously weighed the rivaling arguments and the law on the point which is now well settled. An omission to annex the order or decree to be reviewed renders the application defective. See **DAVID OMBEE OMBEE VS. ISAAC OLUOCH OPI KSM.H.C.C.C. NO. 115 OF 2007 (TANUI J. ON 31 OCTOBER 2001)**. I prefer to rest my judgment on this point on the basis of this authority.

The up-shot is that the application fails and is dismissed with costs to the respondent.

Dated and delivered at Malindi this 5th day of September 2007.

N.R.O.OMBIJA

JUDGE

Mr.Mayaka for Alwenya } for applicant

Mr.Shujaa } for respondent.