REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT MACHAKOS

(APPELLATE SIDE)

(Coram: Odunga, J)

CIVIL APPEAL NO 136 OF 2014

JAMES MULANDI.....1ST APPELLANT

LOCHAB BROS LIMITED.....2ND APPELLANT

VERSUS

PETRONILA NGINA MAKAU (Suing as the Legal Representative of the Estate of

Japheth Mwendwa Makau (Deceased).....RESPONDENT

(Being an appeal from the judgement and decree of the Chief Magistrates Court at Machakos by the Hon. Patrick Wangige (SPM) dated the 19th June, 2014 in CMCC No. 496 of 2012)

BETWEEN

PETRONILA NGINA MAKAU (Suing as the Legal Representative of the Estate of

Japheth Mwendwa Makau (Deceased) PLAINTIFF

VERSUS

JAMES MULANDI.....1ST APPELLANT

LOCHAB BROS LIMITED..... 2ND APPELLANT

RULING

1. On 4th February, 2020 upon hearing this appeal, this Court expressed itself, *inter alia*, as hereunder:

a) In the premises, the appeal is allowed, the award made by the learned trial magistrate set aside and substitute with the following:

b) Pain and Suffering ……..Kshs 10,000.00

c) Loss of expectation of life……..Kshs 100,000.00

d) Loss of dependency…….Kshs 1,500,000.00

e) Special damages ……..Kshs 53,000.00

f) Total……Kshs 1,663,000.00

g) Less 20%.....Kshs 332,600.00

h) Total award……Kshs 1,330,400.00

i) The costs of the proceedings before the trial court are awarded to the Appellant. The award on general damages will attract interest from the date of the judgement in the trial suit at court rates till payment in full while the interest on special damages will accrue from the date of filing the suit till payment in full at court rates.

j) Each party will bear own costs of the appeal.

2. By an application dated 21st July, 2020, the Respondent in the appeal sought a review of the order on costs on the ground that the Respondent and the Appellants had agreed on the issue of the costs of the trial court which costs had been paid.

3. In the supporting affidavit sworn by **Nzilani Muteti**, Learned Counsel for the Respondent, it was deposed that she was informed by the counsel holding her brief during the delivery of the judgement that the costs of the trial court were awarded to the Respondent while those of the appeal were to be borne by each party. However, upon perusing the judgement, the deponent noted that it was held that the costs of the trial court were awarded to the Appellant.

4. It was deposed that prior to the hearing of the appeal, the parties had agreed on the costs of the suit and the same had been paid and that the appeal was merely on quantum of damages.

5. It was the view of the Respondent that since a successful litigant is entitled to costs of the trial, it must have been a typographical error to indicate that the costs were payable to the appellant instead of the Respondent hence the application for review.

6. The application was opposed vide a replying affidavit sworn by counsel for the Appellant. In his view the parties never agreed on the issue of costs as alleged. It was deposed that the appeal was not merely on quantum of damages since in the memorandum of appeal it was indicated that the learned trial magistrate erred in law and fact in awarding the costs. Accordingly, the issue of costs in the trial court was part of the appeal and was rightly awarded to the appellant.

7. According to the Appellant this court was very clear on who was awarded costs both of the trial and the appeal and the Respondent cannot impose her opinion on the judgement.

8. It was the Appellant's view that the application did not meet the criteria for review of orders and that the orders sought are likely to prejudice the Appellants.

9. On behalf of the Respondent it was submitted that the Respondent herein who were the original Plaintiffs before the trial court successfully prosecuted her case and was awarded the costs and the Appellants being dissatisfied with the award on quantum lodged the appeal on quantum but paid half the decretal sum and agreed costs hence the appeal was restricted to award of quantum as there was no dispute as regards the costs which issue was not even addressed in the appeal. It was therefore submitted that this court's findings on the issue of costs was an inadvertent error and reliance was placed on **Valla Bhdas Karsandas Ronica Versus Mansukhlal Jivraj and others [1965] EA**, **Lakhamshi Brothers Limited Versus R. Raja & Sons [1966] EA 313, Somanis Versus Shirinkhanu (No2)[1971] EA 79**, **Party of Independent Candidates of Kenya Versus Mutula Kilonzo & 2 others HC EP No. 6 of 2013**, and **Richard Kuloba, *Judicial Hints on Civil Procedure* 2nd Edition page at Page 101** and it was submitted that the law of costs as it is understood by Courts in Kenya, that where a Plaintiff comes to enforce a legal right and there has been no misconduct on his part – no omission or neglect and no vexatious or oppressive conduct is attributed to him, which would induce the court to deprive him of his costs – the court has no discretion and cannot take away the Plaintiffs rights of costs if the defendant however innocently has infringed a legal right of the Plaintiff, the Plaintiff is entitled to enforce his legal right and in the absence of any reason such as misconduct, is entitled to costs of the suit as a matter of course.

10. It was therefore submitted that a successful litigant is entitled to costs of the trial and there must have been a typographical error in a Paragraph 35 of the judgment to indicate costs payable to the Appellant instead of the Respondent and that this court has the jurisdiction to review the judgment and pronounce itself to give effect to its intention at the time it gave the judgment.

11. On behalf of the Appellant, the contents of the replying affidavit were reiterated and reliance was placed on **Parbarunye Ololkumomoru vs. Minister of Lands and 3 Others [2017] KLR**.

Determinations

12. I have considered the application, the supporting affidavit as well as the submissions filed.

13. The general rule as to costs is provided for in **section 27** of the ***Civil Procedure Act*** which provides as follows:

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.

14. This provision has been the subject of several judicial pronouncements. In the case of **Supermarine Handling Services Ltd vs. Kenya Revenue Authority Civil Appeal No. 85 of 2006** the Court of Appeal expressed itself thus:

> **"Costs of any action or other matter or issue shall follow the event unless the court or Judge shall for good reason otherwise order. It is well established that when the decision of such a matter as the right of a successful litigant to recover his costs is left to the discretion of the Judge who tried his case, that discretion is a judicial discretion, and if it be so its exercise must be based on facts. If, however, there be, in fact, some grounds to support the exercise by the trial Judge of the discretion he purports to exercise, the question of sufficiency of those grounds for this purpose is entirely a matter for the Judge himself to decide, and the Court of Appeal will not interfere with his discretion in that instance...Thus, where a trial court has exercised its discretion on costs, an appellate court should not interfere unless the discretion has been exercised unjudicially or on wrong principles. Where it gives no reason for its decision the Appellate Court will interfere if it is satisfied that the order is wrong. It will also interfere where the reasons are given if it considers that those reasons do not constitute "good reason" within the meaning of the rule...In the instant case the learned Judge gave no reasons whatsoever for his decision to deprive the successful plaintiff of its costs and yet it was not shown that the defendant had been guilty of some misconduct which led to litigation. In the court's view the learned Judge's order was wrong and for the foregoing reasons, the plaintiff's appeal succeeds as to the award of interest and costs on the principal sum awarded."**

15. In **Devram Manji Daltani vs. Danda [1949] 16 EACA 35** it was held that a successful litigant can only be deprived of his costs where his conduct has led to litigation, which might have been averted.

16. In **Party of Independent Candidate of Kenya & Another vs. Mutula Kilonzo & 2 Others HCEP No. 6 of 2013**, it was held:

> **"The main reason why this Petition should be withdrawn is due to the demise of the 1st Respondent. This would call upon the Court considering ordering each party to bear their own costs. In the case of *Nedbank Swaziland Ltd verses Sandile Dlamini No.(144/2010) [2013] SZHC30* (*2013)* Maphalala J. referred to the holding of *Murray C J in the case of Levben Products VS Alexander Films (SA) (PTY)Ltd 1957 (4) SA 225 (SR) at 227*, who stated as follows:**
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> > ***"It is clear from authorities that the fundamental principle underlying the award of costs is two-fold. In the first place the award of costs is matter in which the trial Judge is given discretion (Fripp vs Gibbon & Co., 1913 AD D 354). But this is a judicial discretion and must be exercised upon grounds on which a reasonable man could have come to the conclusion arrived at…In the second place the general rule that costs should be awarded to the successful party, a rule which should not be departed from without the exercise of good grounds for doing so."***

17. In determining the issue of costs, the Court is entitled to look at *inter alia* the conduct of the parties, the subject of litigation, the circumstances which led to the institution of the legal proceedings, the events which eventually led to their termination, the stage at which the proceedings were terminated, the manner in which they were terminated, the relationship between the parties and the need to promote reconciliation amongst the disputing parties pursuant to Article 159(2)(c) of the Constitution. In other words, the court may not only consider the conduct of the party in the actual litigation, but the matters which led up to litigation, the eventual termination thereof and the likely consequences of the order for costs. See **Hussein Janmohamed & Sons vs. Twentsche Overseas Trading Co. Ltd [1967] EA 287** and ***Mulla (12th Edn) P. 150.***

18. In my view section 27 of the ***Civil Procedure Act*** provides for the general rule which ought to be followed unless for good reasons to be recorded.

19. When all things are equal, however, the only consideration is the "event". As was held by the Supreme Court of Uganda in **Impressa Ing Fortunato Federice vs. Nabwire [2001] 2 EA 383**:

> **"The effect of section 27 of the Civil Procedure Act is that the Judge or court dealing with the issue of costs in any suit, action, cause or matter has absolute discretion to determine by whom and to what extent such costs are to be paid; of course like all judicial discretions, the discretion on costs must be exercised judiciously and how a court or a judge exercises such discretion depends on the facts of each case. If there were mathematical formula, it would nolonger be discretion… While it is true that ordinarily, costs should follow the event unless for some good reason the court orders otherwise, the principles to be applied are: - (i). Under section 27(1) of the Civil Procedure Act (Chapter 65), costs should follow the event unless the court orders otherwise. This provision gives the judge discretion in awarding costs but that discretion has to be exercised judicially. (ii). A successful party can be denied costs if it is proved that but for his conduct the action would not have been brought. The costs should follow the event even when the party succeeds only in the main purpose of the suit…It is trite law that where judgement is given on the basis of consent of parties, a court may not inquire into what motivated the parties to consent or to admit liability since admission of liability implied acceptance of the particulars of injuries enumerated in the plaint and the evidence in favour of the Respondent, including loss of hearing and speech."**

20. I associate myself with the decision of Kampala High Court in **Re Ebuneiri Waisswa Kafuko (Deceased) Kampala HCMA No. 81 of 1993** in which it was held that:

> **"The Judge in his discretion may say expressly that he makes no order as to costs and in that case each party must pay his own costs. If he does not make an order as to costs, the general rule is that he shall order that the costs follow the event except where it appears to him in the circumstances of the case some other order should be made as to the whole or any part of the costs. But he must not apply this or any other general rule in such a way as to exclude the exercise of the discretion entrusted to him and the material must exist upon which the discretion can be exercised. This discretion, like any other discretion, must be exercised judicially and the judge ought not to exercise it against the successful party except for some**

reason connected with the case. It is not judicial exercise of the judge's discretion to order a party who has been completely successful and against whom no misconduct is even alleged to pay costs."

21. In this case the Respondent herein instituted a suit as the legal representative of the estate of **Japheth Mwendwa Makau** (deceased) against the Respondents herein claiming Special Damages in the sum of Kshs 53,300/- General Damages, Costs and interests. From the judgement and the submissions made on behalf of the parties herein, it has been disclosed that on the 18th February 2014, parties recorded and filed a consent in which judgement was entered for the Respondent against the 2nd Appellant in in the ratio 80%:20% in favour of the Respondent. In his judgement the learned trial magistrate awarded Kshs 30,000.00 as damages for pain and suffering, Kshs 100,000.00 for loss of expectation of life and Kshs 2,400,000.00 for loss of dependency. He also awarded Kshs 53,000.00 as special damages. From the decree, the Respondent was also awarded the costs of the suit.

22. It is true that the Memorandum of Appeal in ground 1 challenged the award of costs. However, no arguments were made in respect thereof and the appeal was concentrated on the quantum of damages. Before the trial court, the Respondent herein was the successful party and was no doubt entitled to the costs. Before me, the Appellant was partly successful but was not wholly successful. Therefore, the Respondent could not be lawfully deprived of the costs of the trial court unless there were reasons for doing so. I agree with the Respondent that the apparent award of costs of the trial court was clearly a typographical error, an inadvertence that can be properly corrected by this Court both under section 99 of the ***Civil Procedure Act*** and Order 45 rule 1 of the ***Civil Procedure Rules*** as read with Section 80 of the ***Civil Procedure Act*** since, in my view, it amounts to an error apparent on the face of the record. An error apparent on the face of the record, it has been held, cannot be defined precisely or exhaustively, there being an element of indefiniteness inherent in its very nature, and it must be left to be determined judicially on the facts of each case. See **Muyodi vs. Industrial and Commercial Development Corporation and Another [2006] 1 EA 243** and **Nyamogo & Nyamogo Advocates vs. Moses Kipkolum Kogo Civil Appeal No. 322 of 2000 [2001] 1 EA 173.**

23. The law is that it is incumbent upon judges at the stage of the hearing of an application for review to inquire fully into the correctness of the facts and that it would suffice if the court is satisfied that the facts brought up after the event are such as to merit a review of the judgement.

24. Section 27 of the ***Civil Procedure Act*** mandates the Court to expressly address its mind to the issue of costs and where the Court decides not to follow the general rule, the Court is required to give its reasons for not so doing. Where a Court of law fails to address its mind to a legal requirement that may constitute a ground for review as opposed to where the Court addresses its mind to the same and makes a decision thereon. In this case there was clearly no reason to deprive the Respondent, a successful party before the trial court, of her costs therein.

25. Accordingly, I am satisfied that this is a proper case in which the Court ought to review the order made on 6th June 2010. As was held in in **Mahinda vs. Kenya Power & Lighting Co. Ltd [2005] 2 KLR 418** the Courts jurisdiction in such cases is meant to give effect to its intention at the time the decision was made. Since there is no contrary intention manifested by the Court in its appellate decision, and as costs follow the event, I hereby review and correct the judgement delivered herein on 4th February, 2020 at paragraph 35 thereof and substitute therefor an order that the costs of the proceedings before the trial court are awarded to the Respondent in the appeal. That is all I wish to say based on the material placed before me.

26. There will be no order as to the costs of this application.

27. It is so ordered.

Ruling read, signed and delivered in open Court at Machakos this 15th day of March, 2021.

G V ODUNGA

JUDGE

Delivered in the presence of:

Miss Watta for Mr Maina for the Appellant

Mr Nzuva for the Respondent

CA Simon