



REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT MACHAKOS

(APPELLATE SIDE)

(Coram: Odunga, J)

CIVIL APPEAL. NO. 68 OF 2018

MATIGARI GENERAL MERCHANTS LTD.....1ST APPELLANT

PAUL MUCHINA KABIRA.....2ND APPELLANT

-VERSUS-

NELLY WAIRIMU MUTHONI & FRANCIS MUIRURI WAINAINA

(Suing as the administrators to the estate of the late KENNEDY

KIERUKA WAINAINA.....RESPONDENTS

AND

ROSE WAMUYU WANDAKA.....INTERESTED PARTY

(Being an appeal against the decree and judgment delivered on 15th May, 2018 by (Hon. M. Opanga S.R.M) at Kangundo, Civil Suit No. 134 of 2016)

RULING

1. On 17th December, 2019, after considering this appeal, I expressed myself as hereunder:

“In the result, I allow the appeal and substitute the award given with the following:

Pain and Suffering Kshs. 50,000/-

Loss of expectation of life Kshs. 150,000/-

Loss of dependency Kshs 3,448,568.00.

Special damages Kshs. 110,920/-

The gross amount is therefore Kshs 3,659,488.00 which is to be discounted by 20% leading the net sum due to the Appellant as Kshs 2,927,590.40. 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. Each party will bear own costs of the appeal.”

2. By a Notice of Motion dated 10th February, 2020 expressed to be brought by the firm of Musili Mbiti & Associates, Advocates for the Appellant (sic) seeks an order reviewing or varying the said judgement and the resultant decree by awarding costs of the proceedings in the trial court to the Respondents. It is however clear that the said firm of Musili Mbiti & Associates, Advocates is appearing for the Respondent in this appeal. This is clear from the submissions filed on 23rd October, 2019 as well as the Memorandum of Appeal in which the firm of Advocates appearing for the Appellant is indicated as J. Maluki & Company Advocates. The confusion is however not just on the part of the

Respondent. In the submissions dated 23rd October 2018 filed by the firm of J. Maluki & Company Advocates, it is indicated that the said firm is acting for the Respondents.

3. The suit before the trial court was instituted by the Respondents herein as legal representatives of the estate of **Kennedy Kieruka Wainaina** who died on the 3rd day of September, 2015 following injuries received in a road traffic accident on the 30th August, 2015 involving the appellant's motor vehicle registration no. KCA 115B. The suit was in respect of a claim for compensation under both the **Fatal Accidents Act** and the **Law Reform Act** in which the Respondents claimed General Damages, Special Damages, Costs and Interests. On 19th September, 2017 a consent order on liability was recorded in which judgement was entered in favour of the Respondents against the Appellant in the ratio of 80:20 and the parties agreed to proceed with the hearing on the assessment of damages.

4. In her judgement the Learned Trial Magistrate found that the deceased's death was not instantaneous and awarded Kshs 100,000/- for pain and suffering. Under the loss of expectation of life, the court awarded Kshs 200,000.00. As for the loss of dependency it was noted that the deceased was 21 years and would have worked up to the age of 65 years. At the time of his death he was earning Kshs 1,000/- per day making Kshs 31,000/- per month. In the absence of evidence of earning, the court adopted the minimum wage at the time which was Kshs 14,785 with a multiplier of 44 years and adopted dependency ratio of 2/3 and arrived at the figure of 5,204,566.40. She also awarded Kshs 110,920/- being special damaged. In the end the total gross amount was Kshs 5,615,486.40 to which he deducted 20% being the agreed contribution and arrived at a net figure of Kshs 4,492,389.12. She also awarded costs and interests to the Respondent.

5. According to the Appellant, the said judgement with regards to award of costs of trial court proceedings constitutes an error on the face of the record as the Court ought to award the said costs to the Respondents since the Respondents were successful parties in the trial court proceedings and they were awarded costs thereof. Since the said award has not been challenged, it was the Respondents' position that the same ought not to have been interfered with by this Court since costs follow the event.

6. It was the Respondent's view that the application is premised on the ground that the award of the costs of the proceedings in the lower court to the appellants constitutes an error apparent on the face of the record which can be cured by the review sought.

7. On behalf of the Respondents it was submitted that there is a mistake on the face of the records since the court posited at paragraph 43 of its judgment that the costs of the proceedings go to the appellants which is contrary to the filings of the Court that each party was to bear their costs of the Appeal. Accordingly, this meant that the Respondent, who was the successful party in the trial court, was entitled to the costs of proceedings therein. Further, it was submitted that awarding of costs of trial court to the Appellants would be against the well-established principles of awarding costs including the principle that 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. In the Respondents' submissions, the Court was well alive to this matter and therefore, did not intentionally choose to decide against the same.

8. To the Respondents, the fact that the Court did not find or give any reasons for reversing the decision of the trial court to award costs to the Respondent, it was not an issue of great thought by the Court and therefore, the Court meant not to reverse the said decision by the trial Court. In support of the said submissions, the Respondents relied on the case of **Morgan Air Cargo Limited vs. Everest Enterprises Limited [2014] eKLR**. It was further submitted that the error that the applicants are claiming is that which can be seen by one who runs and reads, that is, an obvious and patent mistake and not something which can be established by a long drawn process of reading on points on which may be conceivably be two opinions, as was held by Court of Appeal in **Stephen Wanyoike Kinuthia (Suing on behalf of John Kinuthia Marega (deceased) vs. Kariuki Marega & Another [2018] eKLR**.

9. The Respondents maintained that there exist sufficient grounds for the Court to review its Judgment and rectify the judgment by awarding the costs of proceedings in the trial court to the Respondents. Whereas the decision to award costs is a discretion of the Court, it was urged that the said discretion ought to be exercised in favour of the Respondents, being the successful parties in the trial court.

10. In their averment, the Respondents had the legitimate expectations that, having been successful in trial court and gotten the award for costs therein, the same would be maintained by this Court since their suit had not been dismissed. Further, the issue of costs was not contested by parties neither was the same made a ground of appeal to warrant prosecution during the court of hearing of the Appeal. Mentioning of costs in the prayers of a memorandum of appeal does not make it a Ground of Appeal and therefore, the same may not be given consideration. Be that as it may, the Appellant did not at any way lead any evidence to prove that the Trial Court made any error in awarding costs of proceedings thereto to the Respondents. Therefore, the Appellants may not benefit from orders which they had never convinced the court to be awarded.

11. It was submitted that in the interest of justice, the Respondents are entitled to award of costs in the trial court. It would be an action of punishing the Respondents in condemning them to bear costs of a case necessitated by the actions of the Appellants which resulted to fatal injuries to the late **Kennedy Kieruka Wainaina**.

12. According to the Respondents, judgment in this suit was delivered on the 17th December 2019 by the Court and the Respondents moved court on the 14th February, 2020 after getting further instructions from the Respondents. Given the period of December, when the judgment was delivered, is characterized with holidays and Advocates chambers are closed until later in the month of January, the Advocates delayed in getting the typed Judgment of the Court until later in January. Further, immediately the Respondents got informed of the full details of the judgment, the instant Application was filed and therefore, the delay as a result cannot be said to have undue in moving court.

13. In support of the said submissions the Respondents relied on the case of **Mohmed Dagane Falir vs. Alfonse Mutuku Muli & Another [2020] eKLR** where this Court cited the decision of **Supermarine Handling Services Ltd vs. Kenya Revenue Authority Civil Appeal No. 85 of 2006**.

14. It was argued that this Court is obligated to dispense justice at all times and it is in the best interests of justice that this application be allowed and consequently, costs of the trial court be awarded to the Respondent.

15. The application was opposed by the interested party herein based on the following grounds:

1. **That there is no error apparent on the face of the record to enable this honourable court to review its judgment delivered on the 17th of December, 2019.**
2. **That this honourable court delivered its judgment and awarded costs of the proceedings before the trial court to the appellant having been successful in the appeal.**
3. **That the applicant herein is aggrieved by that decision and seeks to challenge the exercise of discretion by this honourable court.**
4. **That this is not the appropriate forum for challenging the exercise of the discretion by this honourable court in awarding costs.**
5. **That this honourable court will be sitting on appeal of its own decision if it proceeds to issue the orders sought by the applicant.**
6. **That the applicant is raising issues of law that cannot be delved into by this honourable court while exercising its jurisdiction under Order 45 of the Civil Procedure Rules.**
7. **That the applicant has not established the grounds precedent to the grant of the orders sought on account of there being an error apparent on the face of the record.**
8. **That it is in the interest of justice that the orders sought be denied.**

16. The appellants also opposed the application by way of a replying affidavit sworn by their advocates in which it was deposed that no explanation has been given for the inordinate delay of over two months in moving the court to review its judgement. Further, there is no error apparent on the face of the record to justify the review sought since the award of costs is at the discretion of the decision maker and no basis has been laid to demonstrate that the said discretion was not judiciously exercised.

17. It was deposed that the Appellants' memorandum of appeal sought to have the appellant awarded the costs of the appeal and the lower court and after hearing this court exercised its discretion in favour of the appellant. In the Appellants' view, the recourse available to the Respondents is to appeal and not review. According to the Appellants since the issue of costs has been hotly contested in the appeal, the same cannot be reviewed by the same court which had adjudicated upon it since in their view, the Court in its decision was conscious of the decision on an issue placed before the court for hearing and determination.

18. It was submitted on behalf of the Appellants that the Respondents have not exhibited the decree sought to be reviewed and that there was no evidence of any attempt in obtaining the same. As such the Application was dead on arrival and ought to be dismissed.

19. The Appellants further submitted that the Supporting Affidavit of **Musili Mbiti** is ex-facie incompetent, fatally defective and inadmissible as the *jurat* is overleaf thus the same ought to be struck out as it is null and void.

20. In support of these submissions, the appellants relied on section 5 of the *Oaths and Statutory Declarations Act*, **Edward Kings Onyancha Maina T/A Matra International Associates vs China Jiangsu International Economic Technical Co-operation Corporation (2001) eKLR**, **Gulamhusein Mulla Jivanji & Another vs. Ebrahim Mulla Jivenji & Another (1929-30)**, **Bernard Githii on behalf of Muthathini Farmers Company vs. Kihoto Farmers Co. Ltd (NAIROBI H.C.C.C. No 32 of 1974)**, **Uhuru Highway Development Ltd V. Central Bank of Kenya Ltd & 2 Others (NAIROBI H.C.C.C. No 29 of 1995)**, **Dr. Pere Malande Olindo & Ano. vs. Diamond Trust Bank Kenya Ltd (Nairobi H.C.C.C. No. 1230 of 1990)** and **Abigeal Wanjiru Tatei V. Margret Njeri Wanjiku & Another (2015) eKLR**.

21. According to the Appellants, there is no error apparent at paragraph 43 of the impugned judgement as the Court awarded the costs before the Trial Court to the Appellant and that the Court did proceed on an incorrect exposition of the law therefore, reaching an erroneous conclusion as costs follow the event. In their view, the Respondents are attacking the legal veracity of the judgement, not pointing out an error or mistake and that they seek a different conclusion from the one reached in the guise of review while in actual sense what they seek is tantamount to an appeal on which this Court cannot sit on its own decision.

22. The Appellants submitted that the Respondents wrongfully allege that the Appellants did not challenge the award of the costs by the trial court yet the issue of costs before the trial court was raised in the Appeal herein. The Appellants/Respondents submit that the Applicants having being served with the Record of Appeal and having fully participated in the hearing were fully aware that the issues of costs before the lower court was contested yet they failed to address the issue at the hearing and cannot therefore at this stage turn and seek to complain of the same.

23. According to the Appellants, the Order under paragraph 43 of the Honourable Court's Judgement was not a slip of the pen as the same was a conscious decision on an issue put before the Court for hearing and determination.

24. In support of their position the Appellants relied on **Ryce Motors Limited vs. Johnathan Kiprono Ruto & Another (2016) eKLR**, **Nyamogo and Nyamogo Advocates vs. Kogo (2001)1 E.A 173**, **Republic vs. Advocates Disciplinary Tribunal Ex Parte Apollo Mboya (2019) eKLR** and **Khelef Khalifa & 2 Others vs. Independent Electoral and Boundaries Commission & Another (2018) eKLR** and contended that an award of costs is a matter of discretion and if the discretion is exercised wrongly, the same is not an error on the face of the

record. The same is an issue to be taken up on appeal as only an appellate Court can reverse errors in exercise of discretion.

25. In the Appellants' view, it was not shown that there was any new evidence discovered and that the award of costs was an error apparent as submitted herein above. The Applicants legitimate expectation that they would be awarded costs in the trial court having been the successful party is without basis. In their view, legitimate expectation cannot apply as the issue was open for the Court to determine.

26. It was argued that it is in the interest of justice that the appellants are awarded costs before the trial court. Considering the issue and award costs to the Appellants in the lower court, the Appellants appeal herein wholly succeeded and going by the argument by the Applicants they were to be awarded the costs of the appeal as the successful party. However, the Court exercised its discretion and applied justice to the matter. In support of their case, the appellants relied on the case of **Mohammed Dagaini Falir vs. Alfonse Mutuku Muli & Another (2020) eKLR, Nnasibwa, Wakenya Moses vs. University of Nairobi & Another (2019) eKLR Sadar Mohamed vs. Chrran Signh and Another Eward Kings Onyancha Maina T/A Matra International Economic Technical Co-operation Corporation (2001) eKLR** quoting the case of **National Bank of Kenya Ltd v. Ndungu Njau Nairobi C.A Civil Appeal No. 211 of 1996.**

27. It was however argued that should the Court be inclined to allow the present application; the Appellants should not bear the costs of the same.

28. Nevertheless, the Appellants urged the Court to find that the Applicants have not satisfied the conditions for grant of the Orders sought and dismiss the Notice of Motion Application dated 10th February, 2019 with costs to the Appellants/Respondents.

29. On behalf of the Interested Party, it was submitted that the award of costs to the Respondents/Applicants in the lower court was one of the grounds of appeal before this Court. Being partially successful in the appeal, this Court awarded the Appellants costs in the Lower Court and that such cannot amount to an error apparent on the face of the record the same having been a ground for appeal and this Court having conclusively delivered itself based on submissions by the Appellants, Respondents and the Interested Party.

30. According to the Interested Party, there is no error apparent on the face of the record to enable this Court to review its judgement since the Respondents/Applicants have failed to establish grounds to warrant grant of the Orders sought. According to him, the issues raised by the Respondents/Applicants are grounds for appeal and not review since the Respondents are challenging the exercise of discretion by this Court in favour of successful Appellants which involves a long drawn process of reasoning and the same cannot amount to an error on the face of the record and hence the Application does not meet the legal threshold for the grant of Orders for review.

31. In support of his submissions, he relied on **Martha Wambui vs. Irene Wanjiru Mwangi & The Registered Trustees the Matter Hospital (2018) eKLR** and **Chandrakant Joshibhai Patel vs. R (2004) TLR, 218.**

Determinations

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

33. It was submitted that the application is incompetent due to the failure to exhibit the decree sought to be reviewed.

34. Order 45 rule 1(1) of the ***Civil Procedure Rules*** states as follows:

1. (1) Any person considering himself aggrieved—

(a) by a decree or order from which an appeal is allowed, but from which no appeal has been preferred; or

(b) by a decree or order from which no appeal is hereby allowed,

and who from the discovery of new and important matter or evidence which, after the exercise of due diligence, was not within his knowledge or could not be produced by him at the time when the decree was passed or the order made, or on account of some mistake or error apparent on the face of the record, or for any other sufficient reason, desires to obtain a review of the decree or order, may apply for a review of judgment to the court which passed the decree or made the order without unreasonable delay.

35. It is therefore clear that for a party to apply for review there ought to be a decree or order which is sought to be reviewed. The purpose for extracting the decree was stated in the case of **Peninah Wambui Mugo vs. Moses Njaramba Kamau Nakuru HCCS No. 238 of 2004** where **Koome, J** (as she then was) stated that the purpose of the decree or order to be reviewed being annexed is to enable the court appreciate the order or decree that the applicant is unhappy with. In that case the court declined to agree with the respondent's counsel because the opposing side had actually annexed a copy of the order to their own affidavit.

36. I do agree that the purpose of the order is to enable the court appreciate the nature of the decision the applicant is aggrieved with. Where, therefore, the decree sought to be reviewed is extracted whether by the applicant or the respondent or any other party to the suit and the same is on record, the failure to annex the same to the application or the supporting affidavit does not *ipso facto* render the application fatally defective. It, however, would be prudent to annex a copy thereof to the affidavit.

37. Even if the position was that the same was required to be annexed, failure to annex an order which is already on record would be excusable in light of the "Oxygen principles" under section 1A of the ***Civil Procedure Act***. Dealing with those principles in the case of **Deepak Chamanlal Kamani & Another vs. Kenya Anti-Corruption Commission & 2 Others Civil Appeal (Application) No. 152 of 2009** the Court of Appeal held:

“the initial approach of the courts must now not be to automatically strike out a pleading but to first examine whether the striking out will be in conformity with the overriding objectives set out in the legislation. If a way or ways alternative to striking out are available, the courts must consider those alternatives and see if they are more consonant with the overriding objective than a striking out.”

38. Again in Kenya Commercial Bank Limited vs. Kenya Planters Co-Operative Union Civil Application No. Nai. 85 of 2010 Nyamu, JA expressed himself as hereunder:

“where there is a conflict between the statute (overriding objective principle) and a subsidiary legislation (rules of the court) the statute must prevail. Although the rules have their value and shall continue to apply subject to being O2 complaint, the O2 principle is not there to fulfil them but to supplant them where they prove to be a hindrance to the O2 principle or attainment of justice and fairness in the circumstances of each case”.

39. The same position was taken in the case of John Gakure & 148 Others vs. Dawa Pharmaceutical Co. Ltd & 7 Others Civil Application No. 299 of 2007, where Waki, JA expressed himself thus:

“jurisdiction of the Court has been enhanced and its latitude expanded in order for the court to drive the civil process and to hold firmly the steering wheel of the process in order to attain the overriding objective and its principal aims. In the court’s view, dealing with a case justly includes inter alia, reducing delay, and costs, expenses at the same time acting expeditiously and fairly. To operationalise or implement the overriding objective calls for a new thinking and innovation and actively managing the cases before the court, including the granting of appropriate interim relief in deserving cases”.

40. Therefore, the question that the court must ask itself when faced with an application to strike out or dismiss a process is whether the said process is capable of being sustained and if so the court must strive to sustain the same if the other side would not be unduly prejudiced. Most of the decisions that have been in the past been relied upon to dismiss or strike out applications for the failure to annex copies of the decrees sought to be reviewed before section 1A of the *Civil Procedure Act* was enacted and may, in my respectful view, not be very appropriate currently.

41. In VR M vs. MR M & Another [2006] eKLR, it was held that:

“A technical issue was raised that the application for review was incompetent for the reason that it did not annex to the application a copy of the decree intended to be reviewed. Indeed that was one of the reasons given by the learned Judge for disallowing the review. Once again we think, with respect, that the legal position is too widely stated. The authority relied on for that proposition was Gulamhussein Mulla Jivangi & Another v. Ebrahim Mulla Jivenji & Another (1929 – 30) KLR 41 where Pickering C.J. stated:-

“But in my opinion, however aggrieved a person may be at the various expressions contained in a judgment or even at various rulings embodied therein, unless that person is aggrieved at the formal decree or the formal order based upon the judgment as a whole, the person cannot under Order XLII appear before the judge who passed the judgment and argue whether this or that passage in the judgment is tenable or untenable. The ratio decidendi expressed in a judgment cannot be called in question in review unless the resultant decree is a source of legitimate grievance to a party to a suit.”

In that authority, no resultant decree had come into existence, and no attempt had been made at drawing one up, by the time the application for review was filed. That however is not the case before us. The decree ensuing from the judgment given on 12th July, 2001 was issued on 1st August, 2001 and was certified by the deputy registrar of the superior court. The summons for review on the other hand is dated 1st August, 2001, the supporting affidavit was sworn on 2nd August 2001 and the application was filed on the same day, 2nd August 2001. On that score we agree with Mr. Ngatia that there was substantial compliance with the procedure and it was a drastic sanction to dismiss the application on the mere basis that there was no copy of the decree annexed to an application filed in the same record which bore the decree.”

42. The respondents have not shown any prejudice they stand to suffer by the mere failure to annex a copy of the decree complained of more so as the issue herein revolves around an error on the face of the record.

43. I agree with Musinga, J (as he then was) in Equity Bank Ltd vs. Capital Construction Ltd & 3 Others [2012] eKLR that in the circumstances of this case Article 159(2)(d) of the Constitution would come in aid of the applicants.

44. As regards the *jurat*, I associate myself with Ringera, J (as he then was) in Standard Chartered Bank Ltd. vs. Lucton (Kenya) Ltd. Nairobi (Milimani) Hccc No. 462 of 1997 that such defect is an irregularity of form, which the Court can excuse in the exercise of its discretion and unless the irregularity is prejudicial to the other side. In my view, to disallow the application based on the said ground, in my view would amount to elevating procedural rules to a fetish. As was held in Republic Ex Parte Chudasama vs. The Chief Magistrate’s Court, Nairobi and Another Nairobi HCCC No. 473 of 2006 [2008] 2 EA 311, in which the Court cited with approval *The Judicial Review Handbook* (3rd Edn) by Michael Fordham at 361, Republic vs. Kensington and Chelsea Royal LBC [1989] All ER 1202 at 1215, *Role of a Judge* by J Cardozo 52 Harvard LR 361 at 363; Seaford Court Estates Ltd vs. Asher [1994] 2 All ER 155 at 164:

“The Court is always faced with variety of facts and circumstances and to place it into a straight jacket of a procedure, especially in the field of very important, sensitive and special jurisdiction touching on liberties and rights of subjects shall be a blot on independence and many faceted jurisdiction and discretionary powers of the High Court... It is well settled that ‘rule of procedure cannot be allowed to become mistress of justice; it is the handmaid of justice. Rules of procedure are not

themselves an end but the means to achieve the ends of justice. Rules of procedure are tools targeted to achieve justice and are not hurdles to obstruct the pathway of justice...A judge must think of himself as an artist who, although he must know the handbooks, should never trust them for his guidelines; in the end he must rely upon his almost instinctive senses of where the line lay between the word and the purpose which lay behind it. A Judge must not alter the material of which the Act is known but he can and should iron out the creases.”

45. It has been held time and again that rules of procedure are the handmaids and not the mistresses of justice and should not be elevated to a fetish since theirs is to facilitate the administration of justice in a fair, orderly and predictable manner, not to fetter or choke it and where it is evident that a party has attempted to comply with the rules, but has fallen short of the prescribed standards, it would be to elevate form and procedure to fetish to strike out the suit. Deviations from, or lapses in form and procedure, which do not go to jurisdiction of the court or prejudice the adverse party in any fundamental respect ought not to be treated as nullifying the legal instruments thus affected. In those instances, the court should rise to its calling to do justice by saving the proceedings in issue. See Microsoft Corporation vs. Mitsumi Garage Ltd & Another Nairobi HCCC No. 810 of 2001; [2001] 2 EA 460.

46. 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.

47. 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.”

48. 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.

49. 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:

“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.”

50. 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.

51. 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.

52. 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 no longer 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.”

53. 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.”

54. In this case the Respondent herein instituted a suit as the legal representative of the estate of **Kennedy Kieruka Wainaina** (deceased) against the Respondents herein claiming Damages arising a road traffic accident on the 30th August, 2015 involving the appellant’s motor vehicle registration no. KCA 115B from which the deceased died. The suit was in respect of a claim for compensation under both the **Fatal Accidents Act** and the **Law Reform Act** in which the Respondents claimed General Damages, Special Damages, Costs and Interests. On 19th September, 2017 a consent order on liability was recorded in which judgement was entered in favour of the Respondents against the Appellant in the ratio of 80:20 and the parties agreed to proceed with the hearing on the assessment of damages. At the conclusion of the case, the trial court assessed damages which the Appellants herein challenged and this Court re-assessed the same.

55. It is true that the Memorandum of Appeal challenged the award of costs by the trial Court. However, no serious arguments were made in respect thereof and rightly so in my view considering that liability was not in dispute and the appeal was concentrated on the quantum of damages. Before the trial court, the Respondents herein were the successful party and were no doubt entitled to the costs pursuant to Section 27 of the **Civil Procedure Act**. Before me, the Appellants were only partly successful. Therefore, the Respondents substantially remained the successful parties in so far as the trial court proceedings were concerned. They could therefore not be lawfully deprived of the costs of the trial court unless there were reasons for doing so. I agree with the Respondents that the apparent award of costs of the trial court was clearly an error apparent on the face of the record, 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**. As stated at the beginning of this ruling, the parties herein contributed to the said error by the manner in which their respective counsel interchangeably misrepresented the parties for whom they were acting. 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.**

56. 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. I associate myself with the position adopted in **V R M vs. M R M & Another [2006] eKLR.**

“The application for review as acknowledged by the learned Judge was not merely based on discovery of new and important matter but also “for any other sufficient reason”. In considering the latter ground, the learned Judge stated: -

“The grounds of review under any other sufficient reason must be something which existed at the date of the decree and the rule does not authorise the review of a decree which was right when it was made on the ground of the happening of some subsequent event”

With respect, we think that reasoning is restrictive of the unfettered discretion donated to the court under section 80 of the Civil Procedure Act and Order 44 of the rules. We think the correct statement of the law was that followed by this Court in Narodhco Kenya Ltd vs. Loria Michelle Civil Appeal No. 24 of 1998 (ur) when it stated: -

“There was nothing on record to disprove the defendant’s allegations to the effect that the said new facts came to its knowledge only after the decree. The power to review is not confined to mistakes or errors in the decree. The power is given by Section 80 of the Civil Procedure Code (sic) and Order 44 of the Civil Procedure Rules as was stated by this court in the case of Shanzu Investments Limited. This court said:”

“In Wangechi Kimita & Another vs. Mutahi Wakabiru (C.A. No. 80 of 1985) (unreported) it was held that, any other sufficient reason need not be analogous with the other grounds set out in the rule because such a restriction would be a clog on the unfettered right given to the court by section 80 of the Civil Procedure Act. The court further went on to hold 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.

The current position would, then, appear to be that the court has unfettered discretion to review its own decrees or orders for any sufficient reason”.

In our view it is not incumbent upon the judges at the stage of the hearing of an application for review, such as was before the judge here, to inquire fully into the correctness of facts. 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 judgment.”

The evidence that was intended to be introduced was crucial in determining with finality whether the appellant was still lawfully married to another person. Refusing to look at or even consider it would not be proof that she was so married. Indeed it would lead to the absurd conclusion that the appellant was married when, from all indications, she was lawfully divorced. We have looked at the documents ourselves and we find no valid reason for their rejection. Coupled with the finding we made earlier that a favourable finding in that respect would affect the decree, we think there was sufficient reason to grant the application. Whether one therefore applies the test of discovery of new and important matter or sufficient reason in the circumstances of this case, it is our judgment that this appeal should be allowed..We must now consider the final orders that we should make in this appeal. Ordinarily we would have adopted the orders similar to those made by this Court in the Norodhco Kenya Ltd Case (Supra) when it stated: -

“We would go by order 44 Rule 6 of the Civil Procedure Rules. This rule reads: -

“6. When an application for review is granted, a note thereof shall be made in the register, and the court may at once re-hear the case or make such order in regard to the re-hearing as it thinks fits”

We would allow this appeal, set aside the ruling and order of Angáwa, J and substitute therefore an order remitting the application for review for hearing by another judge.”

We are mindful however that a considerable period of time has elapsed since the ruling and order of Visram J. was made on 14th November, 2001. The administration of the vast estate of the deceased is still held in limbo by this litigation, and an order for remittance of the application for review to another Judge of the superior court would cause a further delay. We have already expressed our strong view on the basis of the documents on record that the application for review ought to have been granted and that there was credible and un rebutted presumption of marriage between the appellant and the deceased. We think in the circumstances of this case that those are issues which this Court may consider in the application of *Rule 31* of the rules of this Court in order to meet the ends of justice. The rule states:

“On any appeal the court shall have power, so far as its jurisdiction permits, to confirm, reverse or vary the decision of the superior court, or to remit the proceedings to the superior court with such directions as may be appropriate, or to order a new trial, and to make any necessary incidental or consequential orders, including orders as to costs.”

Accordingly, this appeal is allowed with the result that the ruling of Visram J made on 14th November, 2001 is set aside and we substitute therefor an order granting the summons for review dated 1st August, 2001. The inevitable consequence of that order is the variation of the decree ensuing from the judgment dated 12th July, 2001 to the extent that the appellant here, *V R M* had the capacity to marry and that there was a presumption of marriage between her and the deceased which operates in her favour. The issue submitted to the superior court for decision would then remain: Who under *section 66* of the *Law of Succession Act* is the rightful administrator of the estate of the deceased? That is a matter within the discretion of the superior court and we make no pronouncement on it. Accordingly, we direct that the matter be placed before a Judge of the superior court, other than Visram J., to exercise its discretion as to the person or persons to whom a grant of Letters of Administration should be made in accordance with the relevant law, on the basis that *V R M* was the wife of the deceased *G J M* at the time of his death on 3rd March, 1999.

Finally, it is self-evident that an unusual delay has been occasioned in the delivery of this judgment and the parties are entitled to an apology. The appeal had its peculiar complexity. It cannot also be gainsaid that this Court has been labouring under a heavy workload at half its judicial capacity for reasons beyond its control. Hopefully the situation will be ameliorated sooner than later.”

57. 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 and the apparent decision to do so was occasioned purely by misdescription of the parties in the pleadings filed by their counsel. That mistake ought not to be visited on their clients.

58. Accordingly, I am satisfied that this is a proper case in which the Court ought to review the judgement delivered herein. 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 herein on 17th December, 2019 at paragraph 43 thereof and substitute therefor an order that the costs of the proceedings before the trial court are awarded to the Respondents in the appeal.

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

60. It is so ordered.

RULING READ, SIGNED AND DELIVERED IN OPEN COURT AT MACHAKOS THIS 8TH DAY OF APRIL, 2021.

G V ODUNGA

JUDGE

Delivered online by email by concurrence of the parties' legal representatives

CA Geoffrey