REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT NAIROBI

CIVIL APPEAL NO. 606 OF 2013

DIPLOY PLASTICS LIMITED.....APPELLANT/RESPONDENT

-VERSUS-

KENNEDY ONWONGA MOKAYA.....RESPONDENT/APPLICANT

RULING

1. The respondent/applicant herein has filed a Notice of Motion dated 26th September, 2018 and which Motion is supported by the grounds set out on the face thereof together with the affidavit sworn by *Nelson Kaburu Felix*. The following orders are sought therein:

> ***i) THAT the order made on 20th August, 2018 be reviewed.***
>
> ***ii) THAT the taxing master do tax the respondent's/applicant's bill of costs and render a ruling thereof.***
>
> ***iii) THAT costs be provided for.***

2. The deponent being the advocate for the respondent/applicant, stated that on 1st November, 2017, the Honourable Mr. Justice Mbogholi Msagha made a correction to his judgment in regards to costs, which costs he subsequently awarded to the respondent/applicant. The deponent asserted that when the respondent's/applicant's bill of costs came up for taxing, the same was struck out by the taxing master on the ground that no costs were awarded to him, which was an erroneous finding in light of the amendment.

3. In response thereto, *Agnes Wangari Gichohi* swore a replying affidavit on behalf of the appellant/respondent. The said deponent stated that the issue of costs had already been clarified notwithstanding the order of 1st November, 2017 and that this was taken into consideration by the taxing master in striking out the bill of costs. Consequently, the deponent's position was that the amendment by the Honourable Judge in no way supports a granting of the orders sought, since the respondent/applicant has not met the threshold for a review.

4. The parties filed and served their respective submissions in respect to the Motion. The respondent/applicant generally submitted that the taxing master struck out the bill of costs in disregard of the amendment made to the judgment as relates to costs. The appellant/respondent on its part maintained that the threshold for a review has not been met and that the court order made on 1st November, 2017 did not change the legal position that the costs on appeal had been awarded to the successful party, adding that the items drawn in the bill of costs relate to the appeal and not the lower court proceedings.

5. Having considered the rival submissions and cited authorities together with the grounds in the application, supporting affidavit and reply thereto, I wish to first address the issue concerning whether or not a court can correct an error made in the delivery of its judgment, as was the case here. This is commonly referred to as the 'slip rule' and applies in instances where a court can recall a decision already made so as to correct an error where necessary to reflect its true intention at the time of making the decision.

6. The Court of Appeal in *Nguruman Limited v Shompole Group Ranch & Another [2014] eKLR* addressed its mind to the concept and referred inter alia to the analysis in *Vallabhdas Karsandas Ranica v Mansukhlal Jivra J and others [1965] EA700* 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 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."***

As well as *Lakhamshi Brothers Limited v R. Raja & Sons [1966] EA313* in this sense:

> ***"Indeed there has been a multitude of decisions by this Court on what is known generally as the slip rule, in which the inherent Jurisdiction of the Court to recall a Judgment in order to give effect to its manifest intention has been held to exist. The***

circumstances however, of the exercise of any such jurisdiction are very clearly circumscribed. Broadly these circumstances are where the court is asked in the application subsequent to Judgment to give effect to the intention of the Court when it gave its Judgment or to give effect to what clearly would have been the intention of the Court had the matter not inadvertently been omitted…"

7. That said, I have established from the court record that the judgment was delivered by the appellate court on 26th April, 2017 thereby allowing the appeal on quantum and granting costs to the appellant subject to 20% contributory negligence. Soon thereafter, the respondent's/applicant's advocate raised concerns in respect to the order made on costs and which the judge responded with an amendment to the effect that the costs of the suit together with interest are awarded to the respondent.

8. Further to the above, the said judgment did note that the parties had entered into a consent on liability before the lower court in the ratio of 80%:20% in favour of the respondent/applicant. In this sense, it would appear a genuine error was made in initially awarding costs to the appellant/respondent and in any case, the appeal as lodged was only limited to the quantum of general damages awarded by the lower court. It can therefore be interpreted from the circumstances that the judge's intention was to award the costs of the suit to the respondent/applicant subject to the 20% contributory negligence. In making his amendment, I am persuaded that the judge exercised his inherent jurisdiction properly. This is in due consideration of the reasoning portrayed in *Cecilia Karuru Ngayu v Barclays Bank of Kenya & another [2016] eKLR* cited by the appellant/respondent that the granting of costs is at the discretion of the court. As such, there was really nothing prohibiting the judge from granting costs to the respondent/applicant as he did.

9. The second substantive issue relates to whether or not the threshold for a review has been met. The respondent's/applicant's Motion is evidently brought under *Order 45* of the Civil Procedure Rules and more specifically, on the ground of error or mistake apparent on the face of the record. Having found that there was a genuine mistake on the award of costs on appeal and which mistake was corrected on 1st November, 2017, it is for me to determine whether the decision by the taxing master was erroneous.

10. It is correct that the bill of costs followed the amendment. I have taken the time to peruse the ruling arising therefrom and observed that the issue of costs was raised by way of an objection by the appellant/respondent herein. The taxing master made reference to the judgment of 26th April 2017 in which costs and interest thereon were awarded to the said appellant/respondent. Whereas the taxing master appreciated that the appeal succeeded only in part, he declared the bill of costs invalid and moved to strike out the same on the basis that the respondent/applicant was not awarded costs on the appeal.

11. In view of the above, it is apparent that the taxing master did not take into account the amendment on costs and in failing to do so, arrived at an erroneous decision in my view. Had he considered the amendment to the judgment, I am convinced he would have proceeded to tax the bill of costs accordingly. It is fair to state that there was an error or mistake on the face of the record which was seemingly overlooked by the taxing master, resulting in a wrong decision. Consequently, I am satisfied that the respondent/applicant has established the necessary threshold warranting a review of the ruling.

12. The upshot is that prayers i) and ii) of the Motion are allowed on merit. Consequently, I make the following orders:

a) The ruling delivered on 20th August, 2018 by the taxing master is hereby set aside.

b) The bill of costs dated 8th November, 2017 shall be taxed afresh before a different taxing master.

c) Each party shall bear its own costs of the application.

Dated, signed and delivered at NAIROBI this 1st day of March, 2019

L. NJUGUNA

JUDGE

In the presence of:

.....for the Appellant/Respondent

.....for the Respondent/Applicant