



**REPUBLIC OF KENYA**

**IN THE HIGH COURT OF KENYA**

**AT NAIROBI**

**CIVIL APPEAL NO. 286 OF 2009**

**MEENYE & KIRIMA ADVOCATES.....APPLICANT**

**VERSUS**

**CHRISTOPHER NDUNG’U.....RESPONDENT**

**RULING**

1. This ruling is the outcome of the Notice of Motion dated 26<sup>th</sup> February, 2019 brought by the applicant and supported by the grounds set out on its face and the facts deponed in the affidavit sworn by *Julius Mwangi Mugo*. In the aforesaid motion the applicant sought for *inter alia*:

***(i) THAT this Honourable Court be pleased to correct the erroneous entry on paragraph 10 of its judgment delivered on 2<sup>nd</sup> February, 2018 on the payment of costs so as to read “to be paid by the respondent” instead of “to be paid to the respondents.”***

***(ii) THAT the costs of the application be in the cause.***

2. In his affidavit, Julius Mwangi Mugo averred that the trial court having dismissed the applicant’s chamber summons seeking to have the *ex parte* judgment set aside, the applicant lodged an appeal against the said decision, and which appeal was allowed by this court vide its judgment delivered on 2<sup>nd</sup> February, 2018.

3. The consequence of the appeal is to the effect that the dismissal order of the trial court was set aside and a further order issued that the suit be heard afresh before another magistrate with competent jurisdiction.

4. The deponent averred that this court ordered that the costs of the appeal and those of the summons assessed at Kshs.20,000/ and Kshs.10,000/ respectively be paid to the respondents, which amounted to a slip/error since the respondent was the unsuccessful party in the appeal.

5. According to the deponent, the award made by this court ought to be amended so as to reflect the true position of the judgment delivered.

6. In response to the Motion, the replying affidavit sworn by *Christopher Ndung’u* was filed on 19<sup>th</sup> September, 2019. Therein, he stated *inter alia*, that an award of costs lies purely at the discretion of the court and that this court properly exercised its discretion in awarding costs to the respondent, since it is the applicant who dragged the respondent back to court on appeal after the *ex parte* judgment had been entered in his favour.

7. It was therefore the deponent’s assertion that the applicant has not met the required threshold for the correction of the award on costs since doing so will essentially deny him the costs which had been awarded by this court.

8. I have taken into consideration the grounds set out on the face of the Motion and the facts stated in the affidavits supporting and opposing the same. It is true that an *ex parte* judgment was entered in favour of the respondent in CMCC NO. 5281 OF 2007 after the applicant failed to attend the hearing of the suit. Thereafter, the applicant filed a Chamber Summons dated 17<sup>th</sup> March, 2009 seeking to have the *ex parte* judgment set aside on the basis that he was never informed of the hearing date. The Chamber Summons was heard and dismissed on 14<sup>th</sup> May, 2009.

9. The applicant then lodged an appeal against the dismissal order with this court. Upon considering the parties’ written submissions, this court held that the applicant had offered a reasonable explanation for failing to attend the hearing, hence it went ahead to allow the appeal and set aside the order of 14<sup>th</sup> May, 2009. However, this court found that the costs of the appeal as set out hereinabove.

10. The issue for determination, therefore, is whether the award made on costs constitutes an error requiring correction. The applicant referred to **Section 99** of the **Civil Procedure Act** which indeed grants the court the power to correct clerical or arithmetic errors be it on their own motion or upon application of a party.

11. Considering the wording of the award on costs as indicated in the judgment, it is evident that this court considered the circumstances of the appeal before awarding the same to the respondent. It is important to note that the appeal was against the trial court's ruling dismissing the applicant's Summons seeking to have the *ex parte* judgment set aside. Consequently, this court deemed it prudent to award costs of both the appeal and Summons to the respondent since he was inconvenienced by having to be taken through the court process afresh after having his judgment set aside.

12. In the premises, I am satisfied that the respondent deserved to be awarded costs in the circumstances. In the case of *Morgan Air Cargo Limited v Evrest Enterprises Limited [2014] eKLR* the court sought to explain the phrase '**costs follow the event**' in the following manner:

*"The Court takes the view that awarding costs is a matter of the discretion of the Court. It is not a matter of course. The exercise of the discretion, however, depends on the circumstances of each case. Therefore, the law in designing the legal phrase that "Cost follow the event" was driven by the fact that there could be no "one-size-fit-all" situation on the matter...my grounding is in the work of Justice Kuloba in Judicial Hints of Civil Procedure that:*

*"Furthermore a successful party cannot be deprived of his costs merely because the suit proceeded ex parte or uncontested. This is to say, the fact that the unsuccessful party did not contest the case is not in itself a ground for refusal of costs but it is a factor that can be taken into account if other good reason exists."*

13. It is apparent from this file that the suit proceeded for hearing *ex parte* through no fault of the respondent. The applicant indicated that it is the mistake of his advocate who failed to inform him of the hearing date.

14. I find no merit in the application, it is dismissed with costs to the respondent.

**Dated, signed and delivered at Nairobi this 11<sup>th</sup> day of October, 2019.**

.....

**J. K. SERGON**

**JUDGE**

**In the presence of:**

.....**for the Applicant**

.....**for the Respondent**