

REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA

AT NAIROBI

CIVIL APPEAL NO. 220 OF 2015

W.E. TILLEY (M) LTD.....APPELLANT

VERSUS

STEPHEN WAIGANJO MWANGIRESPONDENT

RULING

This court delivered a judgment dated 27th November, 2018 following an appeal by the appellant herein. In that judgment the award of damages in favour of the respondent was reduced from Kshs. 900,000/= to Kshs. 300,000/=. The respondent was awarded costs in full in the lower court and 1/3 costs in the appeal.

There is now before me an application by way of Notice of Motion under Order 45 Rule 1 and Order 51 Rule 1 of the Civil Procedure Rules, for the court to review its Order on costs made in that judgment, and the appellant be awarded the costs of the appeal. The reasons advanced are that the appellant was the successful party in the appeal and that the award of 1/3 costs in favour of the respondent was thus made in error. It is therefore in the interest of justice that the order sought be granted.

There is a supporting affidavit sworn by a director of the appellant to which there is a replying affidavit sworn by the respondent. I have heard both counsel in this matter. Costs are awarded at the discretion of the court but ordinarily should follow the event, unless the court or Judge for good reason orders otherwise – See Section 27 Civil Procedure Act.

It was the appellant that filed the appeal. The reduction of the award set out above was at the instance of the appellant. The appellant was therefore the successful party in the appeal. The success was substantial. Under such circumstances, an order for costs should have been in its favour. However, it should not be forgotten that the respondent moved to court after breach of duty and negligence attributed to the appellant.

In that judgment the respondent was awarded costs in full in the lower court. A balance should be struck in that regard. I am persuaded that the order for costs should be reviewed. This however should not be to the prejudice of the respondent who, other than the award that has been disturbed, was successful in the initial litigation.

In balancing the interest of both parties, the order that commends itself is that the order for costs in the judgment in favour of the respondent as relates to the appeal is set aside and in place thereof, I make an order that each party shall bear their own costs of the appeal.

Dated, signed and delivered at Nairobi this 19th day of December, 2019.

A. MBOGHOLI MSAGHA

JUDGE