



REPUBLIC OF KENYA
IN THE HIGH COURT OF KENYA AT NAKURU

CIVIL APPEAL NO.162 OF 2013

SALIM BIN AHMED HANJI & CO

ASHUR AHMED TRANSPORTERS.....APPELLANTS

-VERSUS-

SIMON KIMTAI KIROR

LILIAN CHERUTO KORIR.....RESPONDENTS

(Suing as the next friends and parents of FANCY CHEPKURUI DECEASED)

(An Appeal from the judgment of the Senior Resident Magistrate Hon. A Towett delivered on 5th September, 2013 in Molo Principal Magistrate Court Civil Case No. 245 of 2012 Simon Kimtai Korir & Another – Salim Bin Ahmed Hanji & Another)

RULING

1. Judgment was delivered in this appeal on the 24th October 2017 upholding the trial magistrates judgment on the award of general damages following a fatal road accident that claimed the life of a child, Fancy Chepkurui (deceased).
2. By an application dated 15th February 2017 the appellants/defendants in the primary suit urge for an **order of review of the judgment and decree, to vary, set aside, vacate or rescind the order on costs, and award the costs to the Respondents.**
3. It is sought under **Order 45(1) of the Civil Procedure Rules** and **Section 3A and 80 of the Civil Procedure Act** – on grounds that in the judgment delivered on 24th October 2017 the court dismissed the appeal with no orders as to costs.

It is submitted that is against established principles that costs follow the event, and that no reasons were given for the denial of costs to the respondents. Thus, it is submitted that must have been an error, by the court.

4. I have considered submissions by both parties, as well as the judgment.

When the court considers it necessary to vary or review its judgment, it may do so *suo moto* or upon application to correct an obvious error that is self evident and that needs no elaborate explanation, See Section 99 Civil Procedure Act. Also **National Bank of Kenya Ltd -vs- Ndungu Njau (1997) e KLR.**

5. While awarding costs in a judgment, the court is guided by **Section 27(1) of the Civil Procedure Act**, that costs follow the event, but notwithstanding, costs are a matter of discretion of the court, which should be judiciously exercised – **Mbogo & Another -vs- Shah (1968) EA 93**.

6. The applicant was the successful party in the primary suit. The trial court awarded the applicant (then plaintiff) costs of the suit.

In my judgment on appeal by the appellant, I found in favour of the Respondent, now applicant, and made a finding that the appellants did not demonstrate that the awards of damages in the trial court were in any way excessive. I proceeded to dismiss the appeal with no orders as to costs.

7. Upon reflection and reconsideration of this judgment, I must admit that my exercise of discretion in the matter of the costs was not supported by any logical arguments or findings. I gave no explanation for denying the successful party its costs.

I agree that the failure to award costs to the applicant was an error that I must move to correct.

8. **Section 27 of the Civil Procedure Act** empowers a court to award. Costs of a suit, and has the power to determine by whom and out of which property such costs may be paid.

The proviso to the section that costs follow the event cannot be overlooked unless there are good reason to depart therefrom and upon sound exercise of discretion – In **Joseph Kithinji Gitonga & Another -v-s Kiogora Mutai & Co. Advocates**, the Court of Appeal held that:

“--- ordinarily an appellant court will not interfere with an order of costs unless in exercising discretion the learned judge arrived at a wrong decision or was clearly wrong in the exercise of his discretion.”

9. The trial court having awarded costs to the applicant, there is no reason why upon appeal, and without upsetting the trial court's decision, I would have denied the applicant costs as the successful party. I find the decision to have been an error.

10. For the above reasons, I allow the application dated 15th February 2017. The result is that the order on costs in the judgment dated 24th October 2017 is set aside, and varied to the effect that costs of the appeal which was dismissed are awarded to the Applicants as well as in the primary suit as awarded by the trial Magistrate.

11. No costs shall be awarded to any of the parties in this application.

Dated, Signed and delivered this 4th Day of October 2018

J.N. MULWA

JUDGE