



**REPUBLIC OF KENYA**

**IN THE HIGH COURT OF KENYA AT EMBU**

**CIVIL APPEAL NO. 16 OF 2016**

**ROBERT MWANIKI NDWIGA.....APPLICANT/ APPELLANT**

**VERSUS**

**AGATHA KAUGI RIUNGU.....RESPONDENT**

**RULING**

**A. Introduction**

1. The applicant/appellant in his application dated 19/09/2018 seeking orders that:

***“The court do rectify and or correct an error arising out of accidental slip in its judgement of 21<sup>st</sup> May 2018 namely “that the appellant to meet the costs of this appeal and of the court below” to read “that the respondent to meet the costs of this appeal and of the court below”***

2. The Respondents filed their grounds of opposition dated the 3<sup>rd</sup> day of October 2018 relying on the following grounds: -

***a) That the application is premised on an assumption that the court made an error when it made an order for costs***

***b) There is not error that is apparent on the face of the court record***

***c) Costs are always at the discretion of the court and the Applicant has not demonstrated any compelling reasons why the Respondents should be denied costs that were awarded by the court***

***d) In any event, the error that was being complained of was based on the subordinate court’s assessment of damages and the respondent should not be condemned to pay costs to the Appellant given that the trigger of the appeal was an exercise of judicial discretion in assessing damages and as such this is a fit case that each party bear its own costs of the appeal***

**B. The Determination**

3. Section 99 of the Civil Procedure court provide: -

***“Clerical or arithmetical mistakes in judgments, decrees or orders, or errors arising therein from any accidental slip or omission, may at any time be corrected by the court either of its own motion or on the application of any of the parties.”***

4. It is evident that this Court has the powers both under Section 99 of the *Civil Procedure Act* and its inherent jurisdiction to correct clerical or arithmetical mistakes in judgments, decrees or orders, or errors arising there-from.

5. Any accidental slip or omission, can without doubt, be corrected at any time by the court, either of its own motion or on the application of any of the parties. Courts have set out guidelines which govern the circumstances under which the exercise of the jurisdiction to correct clerical or arithmetical mistakes in judgments, decrees or orders, or errors arising therein from any accidental slips or omissions, are to be exercised. *The East Africa Court of Appeal in the case of VALLABHDAS KARSANDAS RANIGA VS MANSUKHLAL JIVRAJ AND OTHERS [1965] EA 780*, held:

***“Section 3(2) of the Appellate Jurisdiction Act confers on the Court of Appeal the same jurisdiction to amend judgments, decrees and orders that the High Court has under Section 99 of the Civil Procedure Act, making it unnecessary to look to the inherent powers of the court. The words “at any time” in Section 99 clearly allow the power of amendment to be exercised after the issue***

*of a formal order....“Slip orders” are made to rectify omissions resulting from the failure of counsel to ask for costs and other matters to which their clients are entitled.....A court will only apply the slip rules where it 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. In the present case, if the facts had been before the court when judgment was given on appeal, the court would, on application or indeed of its own motion, have made the order for refund, now sought, which was necessarily consequential on the decision on the main issues.”*

6. In the instant application, the Appellant/Applicant was the successful litigant not only in appeal but also in the trial court and he believed he ought to be awarded costs. In fact his appeal was limited to the decretal sum awarded in the trial court as such it is evident that this court made an error in awarding costs to the respondent.

7. In **RANIGA V. JIVRAJ [1965] EA 700**, the predecessor of the Court of Appeal was considering an application to vary its judgment. The Court stated that under **Section 3(2) of the Appellate Jurisdiction Act**, it had the same jurisdiction to amend judgments and orders that the High Court has under **Section 99 of the Civil Procedure Act**.

8. Regarding that jurisdiction, the Court was emphatic that the power to correct errors will only be made where the court is **fully satisfied** that it is **giving effect to intention of the court** at the time when judgment was given, or in the case where a matter was overlooked, where it is **satisfied beyond doubt** that as to the order which it would have made had the matter been brought to its attention.

9. Subsequently in **LAKHAMSHI BROTHERS LTD VS R. RAJA & SONS [1966] EA 313**, **Sir Charles Newbold, P.**, speaking for a unanimous Court said:

*“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.”*

10. It is my opinion that amending the judgement rendered herein by this court on the 21<sup>st</sup> May 2018 would give effect to the intention of the court when it made its judgement.

11. Further to this it is worth noting that regarding the issue of costs which is subject of the Appellant/Applicants application, the issue of costs is discretionary which should be exercised judiciously to ensure the ends of justice. **Section 27 of the Civil Procedure Act** states:

*“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 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”*

12. The Supreme Court in **JASBIR SINGH RAI & 3 OTHERS VS TARLOCHAN SINGH RAI & 4 OTHERS [2014] eKLR** held that:

*“It emerges that the award of costs would normally be guided by the principle that “costs follow the event”: the effect being that the party who calls forth the event by instituting suit, will bear the costs if the suit fails; but if this party shows legitimate occasion, by successful suit, then the defendant or Respondent will bear the costs. However, the vital factor in setting the preference, is the judiciously-exercised discretion of the Court, accommodating the special circumstances of the case, while being guided by ends of justice.”*

13. In **ORIX OIL (KENYA) LIMITED VS PAUL KABEU & 2 OTHER [2014] eKLR** where the court stated:

*“...the court should have been guided by the law that costs follow the event, and the Plaintiff being the successful party should ordinarily be awarded costs unless its conduct is such that it would be denied the costs or the successful issue was not attracting costs. None of those deviant factors are present in this case and the court would still have awarded costs to the Plaintiff, which I do.*

14. I have perused the judgment made by this court and noted that there were no issues that would have influenced this court to depart from the law that “costs follow the event”.

15. In my view, there were no special circumstances in the case that would have led to the exercise of the discretion of the court. Such circumstances if found to exist would involve the conduct of the parties prior or during pendency of the case or subsequent to the actual process of litigation.

16. The foregoing leads this court to the conclusion that the court had already made its mind to award costs to the appellant following the successful appeal.

17. The word “appellant” in the sentence pronouncing the award of costs was an error apparent on record on the part of the court.

18. I find the applicant merited and allow it by amending the relevant sentence to read: -

**The respondent to meet the costs of the appeal and of the court below.**

**DELIVERED, DATED AND SIGNED AT EMBU THIS 22<sup>ND</sup> DAY OF NOVEMBER, 2018.**

**F. MUCHEMI**

**JUDGE**

**In the presence of: -**

**Mr. Njenga for Ogweno for Applicant/Appellant**