REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT NYERI

CIVIL APPEAL NO. 122 OF 2012

HIGHLANDS WATER COMPANY CO. LTD…APPLICANT

VERSUS

PURITY WAMBUI MURIITHI…………….RESPONDENT

RULING

The applicant was the successful party in the appeal it lodged against a judgment delivered by the lower court in which it had been sued by the respondent for damages in compensation for the injuries the latter sustained while in the course of her employment. Inspite of its success, the court (Wakiaga, J.), awarded the respondent the costs of the appeal. The appellant has now sought to have the judgment reviewed and the costs awarded to it instead; this is vide a motion dated 17th March, 2015.

The motion is supported by the affidavit sworn by the counsel for the applicant, Mr Karomo Paul Ngigi, in which he has sworn that there is an error apparent on the face of record to the extent that being the successful party, the appellant and not the respondent, ought to have been awarded the costs. Counsel has sworn that though judgment was delivered on 27th June, 2014, he only became aware of the apparent error on 13th March, 2015 when his office was served with the bill of costs.

The respondent opposed the motion and her counsel swore a replying affidavit in which she denied that there was an error apparent on the face of record. According to counsel, though the appellant's appeal was successful, the respondent did not completely loose out because she was awarded a certain amount of damages. In her view, the applicant's motion is baseless and she sought to have it dismissed with costs.

Upon considering the applicant's application, the response thereto and submissions by both the learned counsel for the applicant and for the respondent, I find that there is no dispute that the appellant's appeal was successful; indeed my learned brother was clear in his judgment that, "*I therefore allow the appeal herein and set aside the judgment of the trial court and substitute the same with the following*…"

Section 27 of the **Civil Procedure Act, cap. 21** addresses, in detail, the subject of costs; subsection (1) of that section states as follows:-

27. Costs

> ***(1) 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 to try the suit***

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.

I understand this provision of the law to say that the court seized of any suit has a wide discretion to determine the extent of the costs payable and to whom between or amongst the parties to the suit those costs should be paid; however, this discretion is subject to the proviso that costs will always follow the event unless for good reason the court orders the contrary. Although the section talks of "suits" I believe it also applies to any appeal filed under the Civil Procedure Act, considering that there is no other express provision either in the Act itself or in rules made thereunder saying that the award of costs on appeals should be made on different considerations other than those expressed in **section 27.**

The proviso to **section 27** is essentially to the effect that costs follow the event, which generally, is an established principle on the award of costs in court proceedings. In **Laxmibai versus Radhabai (1917), 42 Bom. 327**, a decision cited with approval in **Wambugu versus Public Service Commission (1972) E.A 296,** the disputing parties were two women both of whom claimed to be widows of one person. The defendant is said to have lost throughout but the trial judge, regarding the plaintiff to be more at fault, ordered the costs to come out of the estate. On appeal, the High Court upset this order as a violation of the established principle that, in the absence of misconduct, a successful party must not be burdened with costs of the unsuccessful party. In other words the successful party should always have the costs.

This decision was obviously consistent with **section 27** of the **Civil Procedure Act** which is clear that costs will always go to the successful party unless for "good reason" the court thinks otherwise.

Coming back to the applicant's application, it cannot be said for certain that my learned brother intended to award the costs to the appellant rather than the respondent and therefore reference to the latter as the beneficiary of these costs should be deemed to be an error apparent on the face of record; the learned judge may as well have meant to award the respondent the costs if, in his view, there was a good reason that the respondent should have the costs. As noted the court always has the discretion to decide who should pay the costs where for some reason they need not necessarily follow the event.

Now, whether such "good reason" exists or not is not for me to determine; at any rate, I doubt it can be a question for review. I suppose that where a party feels aggrieved because the court has not exercised its discretion properly and awarded costs against the wrong party, the proper course is to appeal against such decision. In my view it is not an error apparent on the face of the record.

But even if the judgment of the court was eligible for review on the grounds given by the applicant, I am of the humble view that the application was made after an inordinate delay. The judgment was delivered on 27th June, 2014 but it was not until the 17th March, 2015, almost eight months later, that the applicant filed its application. Although counsel for the applicant swore that he only became aware of the error when his office was served with the bill of costs, he has not indicated when he became aware of the judgment. Where an applicant seeks for review for an order or decree, then it is mandatory that such an application must be made without unreasonable delay; an unexplained delay of eight months is, in my view, unreasonable.

For the foregoing reasons I decline the applicant's application dated 17th March, 2015 with costs. Orders accordingly.

Dated, signed and delivered in open court this 15th July, 2016

Ngaah Jairus

JUDGE