



**REPUBLIC OF KENYA**  
**IN THE HIGH COURT OF KENYA AT NAKURU**  
**CIVIL APPEAL NO. 254 OF 2009**

J MW (A minor suing  
through his father and next friend  
DW) .....APPLICANT

VERSUS

1. JOSEPH NG'ANG'A KUNG'U .....1<sup>ST</sup> RESPONDENT
2. XYZ..... 2<sup>ND</sup> RESPONDENT

*(An appeal from the Judgment of Hon. B. Etyang - Resident Magistrate,  
in Nakuru CMCC No. 570 of 2006 dated on the 28<sup>th</sup> October, 2009)*

**RULING**

1. Before me is an application by the Appellant dated 22<sup>nd</sup> July 2014. It is brought under the provisions of Section 27 and 99 of the Civil Procedure Act. The Applicant seeks an order that costs of the Appeal and lower court be awarded to the Appellant.

The Appeal hereof was allowed on the 16<sup>th</sup> December 2013 but was silent on the award of costs. The trial court's case arose from a traffic road accident when the appellant's son was injured while a awful passenger on the Respondent's Motor vehicle Registration Number KAU 008D on the 5<sup>th</sup> August 2005. The trial court found the Respondent wholly liable and awarded the Plaintiff KShs.7,000/= in general damages and KShs.2,000/= special damages and costs of the suit. The Appellant appealed against the award on general damages and the same was enhanced to KShs.20,000/=. The judgment on appeal was however silent on costs.

In his application, the appellant states that the court omitted to address itself on the issue of costs and that Section 27 of the Civil Procedure Act provides that costs shall follow the event unless the court for good reason shall otherwise order. He submits that a successful party should not be denied costs. The application is supported by an affidavit sworn by the applicant on the 22<sup>nd</sup> July, 2014.

2. The application is opposed by a Replying Affidavit sworn by Steven Muregi Chege, Advocate for the Respondent. He deposes that the Learned Judge in exercise of her discretion made no order on costs on the appeal and that it cannot be termed as an omission and that the court was rendered *functus officio* once it delivered its judgment. He urged that the application be dismissed. Both parties filed written submissions.

3. Section 27 of the Civil Procedure Act provides that costs of and incidental to all suits shall be in the discretion of the court or Judge, and the Judge shall have full power to determine by whom and out of what property, and to what extent such costs are to be paid.

A proviso to the Section states that the costs of any action cause or other matter or issue shall follow the event unless the court or Judge for good reason otherwise orders.

Section 99 of the Act allows clerical or arithmetical mistakes in Judgments and decrees to be corrected by the court on its motion or by application by any party.

4. The appellant/applicant submitted that as the successful litigant both in the trial court and on appeal, he ought to have been awarded costs and that there are no good reasons for the court to have ordered otherwise. He relied on the numerous authorities that collectively hold that, to award costs is in the courts discretion that ought to be exercised judicially upon good reasons, and that the general rule under Section 27 of the Civil Procedure Act should not be departed from without exercise of good grounds, and principles. Among the authorities are **Attorney General -vs- Geoffrey Ndungu Theuri (1986) e KLR, Lily K. Musinga & 2 Others -vs- Municipal Council of Mombasa (2014) KLR and Leah Gacheru -vs- J.M. Karanja t/a Karanja Mbugua Co. Advocates HCCC 252 of 2005 (O.S).**

5. The Respondent on the other hand submitted that the matter of costs is not automatic but an exercise of discretion by court, and that in this matter; there was no omission, but a deliberate exercise of discretion and therefore, not an error. He referred to **Halsbury's Laws of England 4<sup>th</sup> Edition (2010) Vol, 10 Paragraph 16** of that states:

***“..... where the costs are in the discretion of the court, a party has not right to costs unless and until the court awards them to him, and the court has an absolute and unfettered discretion to award or not to award them...”***

He relied on the ruling in **Misc. Civil Application No. 274 of 2013** where the court held that the rule **“that costs follow the event.”** has to be applied with caution and in relation to peculiar circumstances of each case.

6. I have considered the application, the affidavits on record and oral submissions by counsel. It has been submitted that the court became *factus officio* once the judgment was delivered.

The applicant by its application seek to re-open the case by the court that delivered the judgment, not by way of Review of the Judgment but by invoking Section 99 of the Civil Procedure Act on the basis that there was an error of omission or accidental slip in the judgment. I have carefully considered the Judgment delivered by the Honourable Justice H. Omondi on the 16<sup>th</sup> December, 2013. I am unable to detect any apparent error or omission therein. The Honourable Judge enhanced general damages to KShs.20,000/= and stated, **“to that extent the appeal succeeds, the judgment is set aside in terms of general damages awarded a substituted with the sum of KShs.20,000/=.”**

As stated above, the only recourse to the applicant is in Review proceedings and/or appeal. To that extent this court is *functus officio*. This is a principle that prevents the re-opening of a matter before the court that renders judgment or a final decision.

7. The Supreme court in the **Raila Odinga Presidential Election-vs- IEBC** cited with approval an extract from an article by ”Daniel Malan Puetorius entitled

“The origins of *functus officio* Doctrine --- where the author stated:

***“The functus officio doctrine is one of the mechanisms by means of which the law gives expression to the principle of finality--- such that once a decision has been given, (it is subject to any right of appeal to superior body or functionary) final and conclusive such a decision cannot be reviewed or varied by the decision maker.”***

In the case **Telcom Kenya Ltd -vs- John Ochanda** (2014) KLR, it was held that what the above principle bars is a merit-based decisional re-engagement with the case once final judgment has been rendered. I have no reason to depart from the well reasoned judgment by the Learned Judges.

In that case, the court failed to declare itself *functus officio* and proceeded to re-assess damages and gave other orders to the applicant after a final judgment had been rendered. The appeal was allowed – by a five Judge bench.

8. In the matter before this court, it is noted that the trial court awarded the applicant general and special damages with costs. My understanding of the judgment was that the costs were to be borne by the Respondent.

On appeal, the court allowed the appeal, and as stated,

***“---To that extent the appeal succeeds, the Judgment is set aside in terms of general damages awarded and substituted with the sum of KShs.20,000/=.”***

The award of costs in the lower court was not distributed so was the award on special damages. In exercise of its unfettered discretion the appellate court found it proper not to award costs to any party on the appeal, notwithstanding the provisions of Section 27 of the Civil Procedure Act. In the result, this court declares itself *functus officio* and declines to re-open the case. The position as pronounced by the court on the 16<sup>th</sup> December 2013 remains, that costs in the lower court were awarded to the Appellant, and no orders on costs on the appeal.

The application dated 22<sup>nd</sup> July 2015 is therefore disallowed.

Each party shall bear its costs of this application.

**Dated, signed and delivered in open court this 16<sup>th</sup> day of July 2015**

**JANET MULWA**

**JUDGE**

**In the presence of:**

Mbiyu for the Appellant

No appearance for Respondent

Court clerk – Linah.