



REPUBLIC OF KENYA

IN THE HIGH COURT AT MOMBASA

CIVIL CASE NO. 468 OF 1979

AMRITLAL BHAMJI DAVDAPLAINTIFF

VERSUS

ABDI AHMED

KENATCO TRANSPORT CO. LTD

MOHAMED M JABANEDEFENDANTS

RULING

The plaintiff filed a suit to recover special and general damages, interest and costs against the three defendants jointly and severally.

He averred in his amended plaint that the first defendant was the driver of the lorry which caused the accident and was either employed by the 2nd or 3rd defendant and that the trailer/tanker which caused the accident was either owned by the 2nd defendant or the 3rd defendant. The 2nd defendant filed a defence denying liability but did not seek any contribution or indemnity from the 3rd defendant. The 3rd defendant also filed a defence and did not also seek any contribution or indemnity from the second defendant.

Mr Satchu of M/s Atkinson Cleasby & Satchu advocates, appeared for the first and second defendant. Mr Master appeared for the plaintiff and Mrs Mugo for the 3rd defendant. When the suit was in progress Mr Satchu on May 26, 1987 informed the trial judge – R B Bhandari J, who has now been transferred to High Court of Kenya, Nairobi, as follows:-

“We are no more disputing the liability to the plaintiff and we have agreed on the amount as well. Judgment may therefore be entered in favour of the plaintiff as against the defendants jointly and severally in the sum of Kshs 81,000 plus costs. The issue that is unresolved is as to who is liable between the 2nd and 3rd defendant. In other words who is vicariously liable for the negligence of the first defendant. That issue the court shall have to resolve.”

The other two advocates agreed to what Mr Satchu said and consequently a consent judgment was entered as requested and the court ordered that the

“Hearing to proceed in order to decide who of the two defendants, that is D2 or D3 is liable as between themselves.”

The court eventually heard the 2nd and 3rd defendants and found that it was the 3rd defendant who was liable. The court did not make any orders as to costs. By a Notice of Motion brought under section 27 of the Civil Procedure Act (cap 21) Mr Satchu now applies for orders that the plaintiff or the 3rd defendant do pay the first and 2nd defendant “costs of and incidental to this suit”. In the affidavit to support the application Mr Satchu depones in paragraph 4 that no order was made as to the payment of the 1st and 2nd defendants’ costs. In his arguments in court Mr Satchu says that there was an omission to ask for costs and that they have been successful and somebody has to pay their costs.

Mr Master for the plaintiff/respondent argues that the 2nd and 3rd defendants were correctly joined in the suit and judgment was entered for the plaintiff against the defendants jointly and severally. Mr Master has his own application for approval of the decree which was argued at the same time as that of Mr Satchu.

Mr Gikandi for the 3rd defendant/respondent argued that under order XX rule 3 of the Civil Procedure Rules, judgment cannot be altered save under S 99 of Civil Procedure Act (cap 21) or by review and that the court is being asked to add something to the judgment and it is the plaintiff who should pay the costs of the first and 2nd defendant.

Section 27 of the Civil Procedure Act provides that costs shall be in the discretion of the court or judge provided that the costs of any action, costs or any other matter or issue shall follow the event unless the court or judge shall for good reason otherwise order. Under order 1 rule 3 of the Civil Procedure Rules all persons may be joined in a suit where if separate suits were brought against such persons any common question of law or fact would arise.

Mr Satchu referred to cases cited at page 118 of *Binghams Motor Claims Cases* 8th Ed by J A Taylor and page 874 62/2/45 of *The Supreme Court Practice* 1985 Vol I: The cases show the principle in awarding costs amongst co-defendants.

Section 27 of the Civil Procedure Act and the cases cited by Mr Satchu show the principle to be used by the court in awarding costs. It is admitted that in this case there was an omission to make orders as to costs. The problem is, how can the omission be corrected" As Mr Gikandi correctly pointed out, a judgment once signed shall not afterwards be altered or added to save as provided by S 99 of the Act or on review. Order XX rule 3(3) of the Civil Procedure Rules.

Mr Satchu's application is not a review application. It can only be taken as an application to correct clerical or arithmetical mistakes or errors arising in the judgment from any accidental slip or omission under section 99 of the Civil Procedure Act.

As provided in S 27 of the Civil Procedure Act the award of the costs is in the discretion of the judge. There is no principle which requires that the judge must necessarily order that the successful defendant should recover his costs from unsuccessful defendants or from the plaintiff and the matter is one of discretion – *Mayer v Marte* [1960] 2 All ER 340. In our case, from the agreement between the 3rd and 2nd defendant, it was reasonable for the plaintiff to have joined both the 2nd and 3rd defendants as either might have been liable and indeed all the three defendants were by a consent judgment held liable.

Order 20 rule 11 of the English Supreme Court Rules is almost in the same terms as S 99 of the Civil

Procedure Act. That order is discussed at page 351 of *The Supreme Court Practice* 1985 Vol 1. The error or omission must be an error in expressing the manifest intention of the court.

From the circumstances of this case, this is not a case where the learned judge forgot to make an order as to costs. The costs were awarded to the plaintiff against the first defendant. The application also involves his costs. The 3rd defendant was held liable. Therefore, it is the first and 3rd defendants who are jointly and severally liable to the plaintiff. If the first defendant was held liable, he cannot get costs from the 3rd defendant. As regards the 2nd defendant he did not claim contribution or indemnity or costs from the 3rd defendant. Mr Satchu framed the issue to be decided by the learned judge and the issue did not include an issue of costs between the 2nd and 3rd defendants. Even after the judgment was read Mr Satchu did not apply for costs. There was no provision for costs in the learned judge's judgment which can be perfected by correction and it cannot therefore be said that there was an error or omission in expressing the manifest intention of the court. If the court exercised its discretion to award costs, we do not know what order for costs could have been made. The High Court of Tanzania in *Quick Service Stores v Thakra* [1958] EA 357, a case where the trial magistrate omitted to make orders as to costs in his judgment and who had not given consideration to the question of costs, held that the omission to make an order as to costs was not an error arising in the judgment from accidental slip or omission. In this case, there was no error or omission which can be corrected under S 98 of the Civil Procedure Act. There was only lack of exercise of discretion in which case the applicants should have filed an application for revision or appealed.

The Decree prepared by Mr Master for the plaintiff has not been approved by the 3rd defendant Mr. Master applies that it be approved. The reason for failure to approve it is because it includes costs and interest. There is no ambiguity in the consent judgment entered on May 26, 1987. Judgment was entered for the plaintiff for Kshs 81,000 plus costs. The consent for the 3rd defendant was consent and consented to the judgment. The plaintiff is entitled to his costs.

It is true that the consent judgment did not mention interest. Under S 26(2) of Civil Procedure Act where the decree is silent on interest, interest is deemed to have been ordered. In any case the omission to order payment of interest is an omission which can be corrected under S 99 of the Civil Procedure Act. The Decree filed in court on 1st October, 1987 is approved but the application of the 1st and 2nd defendants is dismissed with costs.

Dated and delivered at Mombasa this 11th Day of November, 1987,

E.M. GITHINJI

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Ag JUDGE



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