Case Number:	Petition 390 of 2006
Date Delivered:	13 Feb 2009
Case Class:	Civil
Court:	High Court at Nairobi (Milimani Law Courts)
Case Action:	-
Judge:	Joseph Gregory Nyamu
Citation:	NEDERMAR TECHNOLOGY BV LIMITED v KENYA ANTI-CORRUPTION COMMISSION & another [2009] eKLR
Advocates:	-
Case Summary:	**Civil Practice and Procedure – slip rule** – application for correction of typographical errors – where the court awarded costs as against the plaintiff, the successful party – power of court to correct a mistake on its own motion or by the slip rule – whether it was the intention of the court to award costs to the respondents – Civil Procedure Act, section 99
Court Division:	-
History Magistrates:	-
County:	-
Docket Number:	-
History Docket Number:	-
Case Outcome:	-
History County:	-
Representation By Advocates:	-
Advocates For:	-
Advocates Against:	-
Sum Awarded:	-

REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA

AT NAIROBI (NAIROBI LAW COURTS)

Petition 390 of 2006

IN THE MATTER OF: SECTION 84 OF THE CONSTITUTION OF KENYA

IN THE MATTER OF: THE GOVERNMENT CONTRACTS ACT

IN THE MATTER OF: CONTRAVENTION AND/OR APPREHENDED CONTRAVENTION OF FUNDAMENTAL RIGHTS AND FREEDOMS

IN THE MATTER OF: THE ANTI-CORRUPTION AND ECONOMIC CRIMES ACT 2003

NEDERMAR TECHNOLOGY B.V ..... PETITIONER

VERSUS

THE KENYA ANTI-CORRUPTION COMMISSION ..... 1ST RESPONDENT

THE ATTORNEY GENERAL ..... 2ND RESPONDENT

RULING

The Petitioner in a judgment I delivered on 30th October, 2008 has brought a Notice of Motion invoking this Court's inherent powers seeking the following orders:

(a) That this Honourable Court do correct the typographical error regarding the awards of costs

(b) That costs of the application be provided for.

The grounds relied on include:-

(i) Costs do follow the event and the Petitioner is entitled to the costs.

(ii) Words appear to have been omitted during the typing thereby making it appear that the successful party has been penalized by an award of costs against itself.

(iii) The Honourable Court retains its inherent powers to correct and/or rectify an error.

The application was opposed by the 1st Respondent as follows:

(1) There is no typographical error or any other error in the judgment dated 30th October, 2008 as contemplated in section 99 of the Civil Procedure Act.

(2) The 1st Respondent was successful in opposing and having some of the Petitioners prayers

rejected or disallowed by the Court in its judgment dated 30th October, 2008.

(3) In view of 2 above the 1st Respondent could not be condemned to pay costs to the Petitioner when its petition was not wholly successful.

The first Respondent has relied on the following authorities:

1. ***R v CRIPPS, ex-parte MULDOON & 2 OTHERS (1993) I ALL FR*** 232.

2. ***Re ELGINDATA LTD (1993) I ALL ER 232***.

3. ***BAYLIS BAXTER LTD v SABATU (1958) 2 ALL ER 209.***

The second Respondent the Attorney General has opposed the application citing the following grounds.

(i) The Petitioner did not succeed in all the prayers.

(ii) That the Petitioner has not brought its case within the parameters of section 99 of the Civil Procedure Act.

(iii) That the Petitioner has failed to demonstrate that there was any ambiguity in the impugned ruling sufficient to fall within the slip rule.

The subject matter before me is the last sentence of my judgment delivered on 30th October, 2008 which reads:-

"**I award costs as against the Petitioners**."

The judgment, which touched on interalia jurisdiction, domestic and international arbitration law, public morality, domestic and international public policy, justiciability of national security issues, the effect of exclusion of public law on international commercial agreements and the effect of confidentiality provisions agreed upon by the parties in advance, granted to the Petitioner and not "petitioners," fifteen (15) declarations and orders in the petition out of 19 declarations and orders sought. The Petitioner was substantively successful and the Petitioner did not succeed on the four grounds because of any noticeable resistance from the Respondents, who with respect did not grasp basics, including arbitration law, jurisdiction of the Court and the applicable law.

The view of law held by any of the parties to the contest is of no consequence whatsoever - it is the courts of law who pronounce on what the law is through their findings and holdings.

As clearly stated in the judgment the public policy of Kenya never ever permitted the respondents to fight corruption outside the law - it empowers them to fight corruption within the law!

On the prayers where the Petitioner was not successful the Respondents were not therefore required to undertake any extra burden that would have any substantial bearing on the issue of costs. I have no hesitation observing at the outset that the Court's intention was to award costs of the Petition to the Petitioner who was successful on all the issues the court considered important. It was not the court's intention to award costs to the Respondents at all because they had lost on all critical issues and my judgment speaks for itself on this.

The last sentence was therefore an inadvertent typing error which was unfortunately not detected until it was raised by the Petitioners Counsel on a mention after the judgment had been delivered. For this reason I consider that the court is entitled to correct the error either under the slip rule or under its inherent powers. In addition, this having been a constitutional matter this Court is not limited in the orders it may make under s 84 of the Constitution in order to demonstrate to the parties that it does not pay to encroach on fundamental freedoms. The position I have taken is supported even by the authorities cited by the 1st Respondent Counsel as above. Thus in ***Re ELGINDATA LTD NO 2*** (above) the ratio of the case, is that the costs ought to follow the event except to the extent that the award of costs to the petitioners should be diminished by the amount of time and expense taken up by the allegations that failed. The case is therefore in line with the general principle that costs must follow the event except for reasons to be recorded by the Court. As stated above my recollection is that the unsuccessful prayers which failed was not due to any diligence on the part of the Respondents but solely due to the Court's own initiative in a case with a very complex interplay of international commercial arbitration and international public policy. The prayers upon which the Petitioner failed did not in any significant way increase the time for the hearing or the cost. However should the record reflect anything to the contrary, in our Country the issue of taxing off costs on any aspect of the case is a task for the taxing master or the Deputy Registrar when taxing the costs. Moreover the above cases set out the principles for the award of costs as under:

(1) Costs are in the discretion of the Court.

(2) They should follow the event, except when it appears to the Court that in the circumstances of the case some other order should be made.

(3) The general rule does not cease to apply simply because the successful party raises issues or makes allegations on which he fails but where that has caused a significant increase in the length or cost of the proceedings he may be deprived of the whole or part of the costs.

(4) Where a successful party raises issues or makes allegations improperly or unreasonably, the Court may not only deprive him of his costs but order him to pay the whole or a part of the unsuccessful party's costs.

In the circumstances of this case, the Court did not blame the Petitioner for improperly and unreasonably raising the issues or allegations upon which it was unsuccessful. The Respondents have not demonstrated this as per the judgment.

It could not therefore have been the intention of the Court to award costs to Respondents as erroneously stated in the last sentence in a situation where the petitioner was successful in15 critical issues out of 19! The Court could not have any basis in reason, logic or law to award costs to unsuccessful Respondents in a very unique case perhaps without precedent in this country. The mistake or error in the last sentence of the judgment is clear to all. The use of the plural "petitioners" whereas the Petitioner was one is itself indicative of error. This word was meant to read "Respondents" and if the substitution was made the sentence would convey the intended intention. It follows the sentence has a latent ambiguity which can be corrected.

In the case of ***R v CRIPPS*** cited above the purpose and extent of the slip rule is set at page 706 in these words:-

"Furthermore, the exercise of the slip rule was limited to correcting ambiguity in expression of an unambiguous decision. Since the formal order accurately reflected the Commission's

decision as to costs there was no room for the exercise of the slip rule."

What is critical is the court's intention on the issue of costs and it is clear that the offending sentence did not correctly express the Court's intention on costs which was that the costs should follow the event. There is no way the Court could have awarded costs in favour of unsuccessful Respondents in the circumstances and should this have been the intention of the Court it is trite law that the court would at any time have recorded or given the reasons for awarding costs to unsuccessful parties or denying costs to a successful party. In this case the court was silent because it did not intend to award costs in favour of the respondents but against them and even the use of the plural "Petitioners" in the last sentence clearly brings out this point.

Section 99 of the Civil Procedure Act on slip rule reads:-

"**Clerical or arithmetical mistakes on judgments, decree 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 the application of any of the parties**."

The primary purpose of the provision is akin to rectification, namely to allow the court to correct a formal order which by accident or error does not reflect the actual decision of the judge. It also authorizes the Court to make an order which it failed to make as a result of the accidental omission and counsel did not at the time ask for it. This would not constitute a variation or a new decision. In my view the rule ought to apply to all situations which when drawn to the Court's attention immediately enlists remarks from the Court such as "Ghosh it should not have happened" and situations where the Court upon detecting the error would be obligated to move on its own motion. In this case, had I noticed the error before any of the counsel did, I would certainly have promptly caused the Court to move on its own motion. There is no way the correction of the last sentence would result in a new decision on costs. It is still the same decision. I never intended to penalize a successful party by way of denying it of costs.

The holding in the case of ***RITTER v GODFREY [1920] 2 KB 47*** does in my view express the correct view on costs and the Court's discretion in these terms:

"A successful defendant in non injury case has no doubt, in the absence of special circumstances a reasonable expectation of obtaining an order for the payment of his costs by the plaintiff; but he has no right to costs unless and until the Court awards them to him and the court has an absolute unfettered discretion to award or not to award this. This discretion like any other discretion must of course be exercised judicially and the judge ought not to exercise it against the successful party except for some reason connected with the case."

I find no reason that would have made the Court to deny a successful Petitioner of its costs.

I therefore allow the application but I give no order as to costs as regards this application because the slip up was on the part of the court.

DATED and delivered at Nairobi this 13th day of February, 2009.

J.G. NYAMU

JUDGE