



**Fwamba (Suing as administrator of the Estate of Elias Wanjala) (Deceased) v Mashru
(Civil Appeal 68 of 2013) [2023] KEHC 27120 (KLR) (15 December 2023) (Ruling)**

Neutral citation: [2023] KEHC 27120 (KLR)

**REPUBLIC OF KENYA
IN THE HIGH COURT AT BUNGOMA
CIVIL APPEAL 68 OF 2013
REA OUGO, J
DECEMBER 15, 2023**

BETWEEN

**GILBERT WANJALA FWAMBA (SUING AS ADMINISTRATOR OF THE
ESTATE OF ELIAS WANJALA) (DECEASED) APPELLANT**

AND

PN MASHRU RESPONDENT

RULING

1. The appellant/applicant in a motion dated the 13th of June 2023 seeks the following orders that;
 - i. The Aggregate amount of money payable to the appellant be recalculated as it is above Kshs. 416,844.20 proposed by the respondent
 - ii. Costs be provided for.
2. The application is premised on the grounds on the face of the application and the affidavit of the applicant. It is deponed that the amount proposed by the respondent of Kshs. 416,844.20 if allowed to stand will amount to a miscarriage of justice. On the 10th day of February 2023, the respondent intimated to the court that the appellant was to be paid Kshs. 339,350. The cost taxed by the Hon. Deputy Registrar stood at Kshs. 148,359.20 are not included in the sum of Kshs. 339,350, which will now take the amount due to the appellant to Kshs. 489,709.20. The calculation of interest by the respondent is erroneous as the principal, interest and time are not plain nor shown to the court hence the need for re-calculation. The respondent is recalcitrant in settling the further court fees at the lower court to the tune of Kshs. 26,383. Judgment on liability was by consent and no appeal thereto was ever lodged. The respondent is willing to pay further court fees in the high court. The amount due to the applicant before adding interest stands at Kshs. 339,350 + 148,359.20+ 26,383= Kshs. 516,092.20.
3. The applicant was opposed. Achieng Twena Stacy swore a replying affidavit dated 23rd June 2023. It is deponed that after the appeal to the court of appeal and reduction of the amount awarded under



loss of dependency the amount due to the applicant was Kshs.822,547.50, together with the awarded costs of Kshs. 148,359.20 + 160,183, the total amount due to the applicant was Kshs. 1,131089.70. The applicant was paid Kshs. 714,245. 50 in settlement of the decretal award and costs of the lower court. The applicant did not raise any issue on the latter. The amount due to the applicant is the difference between the total decretal award plus costs being Kshs. 1,131089.70 and Kshs. 714,245.50 already paid to the applicant and which added is only Kshs.416844.20. The said amount was the subject of the consent order dated the 3rd May 2023. The applicant and the respondent were paid what was due per the letter dated 14th March 2023. The claim of interest cannot be allowed as the respondent immediately paid the applicant the amounts awarded in the lower court and immediately deposited the outstanding balance in court following the High Court judgment, interest, therefore, did not accrue. Any order made in the presence of the and with the consent of counsels is binding to all parties. The same cannot be varied or discharged unless obtained by fraud or collusion or by an agreement contrary to the policy of the court or if the consent was given without sufficient material facts or in misapprehension or in ignorance of material facts or in general for a reason which would enable the court to set aside an agreement. That the order sought under prayer no.1 is vague as it is not clear on the parameters of the recalculation expected by the applicant. The applicant has not adduced evidence of any fraud on the part of the counsel to enter into the consent adopted in court on the 3rd May 2023 nor is there proof of misinformation on the applicant's part which would render the consent a nullity.

4. The application was canvassed by way of written submissions. The appellant/ applicant filed his submissions on the 25th of July 2023 and the respondent on the 4th of September 2023. I have considered the rival affidavits and the written submissions, together with the court proceedings.
5. The issue is whether the parties recorded a consent or order and if so is it the applicant's intention to set aside the consent or order. The 2nd issue is whether there is an amount due to the applicant.
6. On 3.5.2023, I made the following order, "Deputy Registrar (DR) to act on the letter dated 14.3.2023'. The matter was not placed before the DR after 3.5.2023. The parties did not file any consent on 3.5.2023. In the letter dated 3.5.2023, the respondent's counsel explained what was due to the applicant and the amounts to be released to each counsel. It was copied to the applicant's counsel. With due respect the issue raised by counsel for the respondent, that the parties' recorded a consent is wrong. There was no consent recorded. Had consent been recorded then the cases cited by the respondent would apply.
7. My understanding of the application dated 13.6.2023 is that the applicant is seeking a recalculation of the aggregate amount. The applicant claims the aggregate amount is Kshs. 926,610. The applicant has failed to explain how he arrived at the said sum. Further interest is calculated at 12% and not 14%. The lower court file which I have perused shows that further court fees of Kshs. 65750/- was paid on 10.5.23. I am inclined to agree with the respondent that the sum of Kshs.822,547.50 was the net award due to the applicant after the court of appeal's judgment. The applicant was paid costs and, in my view, the respondent has demonstrated in their affidavit and submissions that there is nothing due to the applicant as he has been fully paid. The application is therefore dismissed with no order as to costs.

DATED, SIGNED AND DELIVERED AT BUNGOMA THIS 15TH DAY OF DECEMBER 2023.

R.E. OUGO

JUDGE

In the presence of;

Applicant - Absent



Miss Achieng -For the Respondent

Wilkister -C/A

