



REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT KITALE

MISC APPLICATION NO. 17 OF 2018

BOCOTY KOECHAPPLICANT

VERSUS

ISAAC ASEMBO ASONGARESPONDENT

RULING

1. By her application dated 19th April 2018 the Applicant prays for leave to file appeal out of time in respect to Civil case No. 382 of 2016 at Kitale which judgment was delivered on 16/10/2017. The substantive grounds of the said application is that the applicant was not made aware of the judgment date and that they got to know when they received notice of taxation.

2. They therefore according to the affidavit of the Applicant dated 19/4/2018 notified the Insurance company who advised them to appeal. According to her the judgment was based on wrong legal premise. At any rate, the Respondent stands to suffer no loss.

3. The affidavit of Jeremiah Samba Advocate responded to the application on behalf of the Respondent. He deponed that the Applicant were well aware of the proceedings at the trial court all through and that they choose to offer no defence.

4. The Applicant on 3/3/2018 filed an application to reopen the case which was however compromised vide a consent dated 22/3/2018 in which the loss of dependancy was reduced from 2,520,000/= to 2,144,785.50 and arrived at a figure of Kshs 2,296,232.50.

5. Subsequently costs were assessed by consent at Kshs 190,000/= on 27/3/2018. The Applicants counsel then requested for the Respondents counsel account so as to wire the awarded damages I presume.

6. In light of the above position it was argued by the Respondent that the application was unmeritorious and having compromised the judgment by consent, the applicant was precluded from appealing against the same.

7. The court has perused the entire proceedings as well as the written submissions on record. Although the lower court proceedings have not been availed it is not disputed that the original judgment by the trial court was compromised by the consent of the parties. Equally, the costs were assessed by consent.

8. The only argument raised by the applicant is that the trial court used a wrong multiplier in assessing the general damages due to the deceased estate. That it ought to have used a dependency ratio of 1/3 instead of 1/2 interalia.

9. I respectively do not think that this is the forum to agitate now considering the circumstances obtaining at the trial court namely that;

a) the application dated 3/3/20188 which sought to reopen the case so that the Applicant could offer her defence was compromised by the consent of 22/3/2018.

b) that the costs were infact assessed by consent.

The appellant has not demonstrated any fraud or misrepresentation on the part of the Respondent. Neither have they counteracted the averments contained in the replying affidavit of Jeremiah Samba Advocate.

10. Had it not been that they compromised the judgment through a consent it would have been easier for this court to allow the application. I presume that by the time the consent was entered and the amount of damages infact reduced the applicant counsel on records must have considered all the relevant legal and factual parameters. More significantly, considering that they did not offer any defence, they must have been discred enough to analyse and gleen the trial court's judgment.

11. In my view therefore, the final award by the trial court was compromised by the consent which can only be varied by the now accepted principles set in **Setton on judgments and Orders (7th Edition) Vol 1 Pg 124** which states that;

“ prima facie, any order made in the presence and with the consent of counsel is binding on all parties to the proceedings or action, and on those claiming under them 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 fact, or in general for a reason which would enable the court to set aside an agreement.”

12. In the premises I do not find that there was any fraud, collusion or misrepresentation in the said consents. The same was entered dutifully by the counsels on record and in the premises this court shall not wade into it.

13. The application is hereby dismissed with costs to the Respondents.

Delivered, signed and dated at Kitale this 30th day of January 2019.

H.K. CHEMITEI

JUDGE

30/1/19

In the presence of:

Mr Wanyama for Wattanga for the Appellant

No appearance for the Respondent

Court Assistant – Kirong

Ruling delivered in open court.