



REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT NAIROBI

CIVIL APPEAL NO. 174 OF 2004

H. Z. COMPANY LIMITED.....APPELLANT

V E R S U S

MUNGAI MUCHUNGI KIARIE (Suing on behalf of the

Estate of NELLY NJERI MUNGAI -Deceased.....RESPONDENT

RULING

1) Mungai Muchungi Kiarie, the Respondent herein, took out the motion dated 30.10.2012 in which he sought for an order for the review of the judgment and decree of this court delivered on 12.08.2011. The motion is supported by the affidavit of Dunstar Mutuku wambua. When served, H. Z. & Co. Ltd filed the replying affidavit of Paul Karibu to oppose the motion.

2) I have considered the grounds stated on the face of the motion plus the facts deponed in the supporting and replying affidavits. I have also taken into account the rival oral submissions of learned counsels. It is the submission of Mr. Wambua, learned advocate for the Respondent that the Respondent was only entitled to costs for both the cross-appeal and the appeal itself. Mr. Wambua pointed out that the Appellant had filed this appeal to challenge the trial court's findings on quantum claiming that the award was inordinately high. By the judgement delivered on 12.8.2011, this court enhanced the award on damages by the trial magistrate from ksh.432,806/= to ksh.1,302,806/= hence the Respondent cross appeal succeeded while the Appellant's appeal failed. It was argued that the Appellant was awarded one-third of the costs of the appeal and held that the cross-appeal had been dismissed with costs to the Appellant. The learned advocate further argued that the aforesaid findings was a clear error on the face of the judgment hence it should be reviewed so that the Respondent is given costs of the cross-appeal and that of the dismissed appeal. The Respondent admitted that there was a delay in filing the motion due to the failure to obtain the decree in time. This court was urged to find the delay not inordinate.

3) The Appellant on the other hand is of the view that the Respondent is not entitled to costs of the cross-appeal since the same was technically dismissed since the Respondent abandoned two of his grounds which he had sought to challenge the multiplier and damages for pain and suffering and that the only ground challenging damages was for lost years having been dismissed. According to Mr. Omukaba, learned advocate for the Appellant, the judge on appeal agreed with the Appellant company that the ratio and the expected number of years to work was clearly wrong and for this reason the appeal succeeded in part only hence the Appellant company was rightly awarded 1/3 of costs.

4) After a careful consideration of the rival submissions, it is clear to me that the question which has been left to this court to grapple with is whether there is an error which is apparent on the face of the judgement? There is no dispute that the trial court entered judgment in favour of the Respondent herein and against the Appellant in the following terms:

- i. Loss of expectation of life ksh.100,000/=
- ii. Pain and suffering ksh. 10,000/=
- iii. years ksh.300,000/=
- iv. Special damages ksh. 22,806/=
- v. Costs and interest

5) It is on record that the Appellant sought to challenge on various grounds the aforesaid judgment before this court on appeal. In fact the Appellant urged this court to set aside the same and substitute it with such other judgement as this court deems fit.

6) The Respondent on the other hand also felt aggrieved and decided to file a cross-appeal claiming the award given by the trial court to be set aside and be substituted with an award assessed upwards.

7) After a careful consideration of the arguments presented on appeal, Lady Justice Sitati came to the conclusion that ratio of 2/3 and the multiplier of 30 years was erroneous. She instead gave a multiplier of 20 years on the ratio of 1/3 of kshs.15000 per month. Thus the figure in respect of lost years was adjusted to 1,200,000/= on appeal.

8) The honourable judge specifically stated that the appeal partially succeeds. The Appellant was awarded 1/3 costs of the appeal. The learned judge dismissed the cross-appeal with costs to the Appellant.

9) In my humble view there is no error which is apparent on the face of the judgement. It's plain on the face of the judgment that the honourable judge partially allowed the appeal. She did not interfere with the awards on loss of expectation of life, pain and suffering and special damages but she instead interfered with the applicable multiplier and the ratio for lost years. I am satisfied that the Appellant having partially succeeded on appeal was entitled to costs. It is also clear to me that the honourable judge dismissed the Respondent's cross-appeal with costs to the Appellant.

10) In the end, I find no merit in this motion. The same is dismissed with costs to the Appellant.

Dated, Signed and Delivered in open court this 19th day of August, 2016.

J. K. SERGON

JUDGE

In the presence of:

..... for the Appellant

..... for the Respondent