



REPUBLIC OF KENYA
IN THE HIGH COURT OF KENYA AT NAIROBI
CIVIL SUIT NO. 154 OF 2013

MILLICENT KIMURI & BENSON WANJOHI NJOGU

(Suing as the legal administrators of the estate

of EPHANTUS MURIMI WANJOHI – (Deceased)..... PLAINTIFFS

VERSUS

MBISI LINAH CATHERINE..... 1ST RESPONDENT

GEORGE WEKESA WECHULI..... 2ND RESPONDENT

RULING

1. Millicent Kimuri and Benson Wanjohi Njogu, being the 1st and 2nd Plaintiffs respectively, took out the motion dated 30.9.2015 in which they sought for the following orders:
 1. ***THAT the applicants be granted leave to act in person.***
 2. ***THAT the Hon. Court do give directions as to whether the decretal sum of kshs.7,484,435/= was subject to statutory deductions such as PAYE, NHIF and NSSF.***
 3. ***THAT the Respondents be compelled to refund funds deducted illegally as PAYE, NHIF and NSSF to the 1st applicant herein of ksh.1,169,112/= only.***
 4. ***THAT costs of this application be borne by the Respondents.***
 5. ***THAT the sum of ksh.1,169,112/- be utilised for the upkeep of the deceased's children.***
2. The motion is supported by the two affidavits of Millicent Kimuri Orare Jared Nchoe, filed a replying affidavit to oppose the motion. When the motion came up for interpartes hearing, learned counsels recorded a consent order to have the same disposed of by written submissions.
3. I have considered, the rival written submissions plus the grounds set on the face of the motion plus the facts deponed in the affidavits filed in support and against the application.
4. It is the submission of the Plaintiffs that statutory deductions are only applicable to living persons and not to the dead. It is further argued statutory deductions are subject to earnings and not to compensatory awards or benefits. The Defendants/ Respondents advocates admitted they took into account statutory deductions i.e. P.A.Y.E, N.S.S.F, and N.H.I.F while ascertaining the net

salary to be used to calculate the multiplicand. It was also pointed out that this court made an error when it failed to take into account those statutory deductions from the deceased's gross pay. This court was urged to find the motion to misconceived and an abuse of the court process as judgement has since been delivered and the decretal sum plus costs settled in favour of the Plaintiffs.

5. I have considered the rival submissions filed by the parties. I have also considered the grounds stated on the face of the motion plus the facts deponed in the affidavits. This suit is a compensatory suit for the damages filed by the Plaintiffs against the Defendants for the fatal injuries sustained by Ephantus Murimi Wanjohi in respect of a road traffic accident along Nairobi Nakuru Highway on 8.5.2011 involving motor registration KBK 977K.
6. The suit was heard and judgement in sum of kssh.7,484,435/= in favour of the Plaintiffs and against the Defendants was delivered on 17th July 2015. It would appear negotiations between the advocates from both sides began giving rise to the consent order dated 28.8.2015 marking the matter as settled at ksh.6,315,323/=. The Plaintiffs have now raised questions over the balance of the decretal sum of kshs.1,169,112/=. They aver that their previous advocate had informed them that the aforesaid amount were statutory deductions which he remitted to the relevant bodies. The Plaintiffs now want an order directing the recipients to refund the same. The Defendants' advocate is of the averred that they re-assessed the loss of dependency payable and reached a consent upon which they advised their client to release payments to the Plaintiffs in the sum of ksh.6,445,410 being the negotiated decretal sum to fully settle the claim due to the Plaintiffs. There is no dispute that the firm of Njoroge O, Kimani & Co. Advocates, the Plaintiffs' advocate negotiated with the firm of Kairu & Mccourrt Advocates for the Defendant to have the decretal principal sum adjusted by having statutory deductions taken into account. I have already stated that eventually the figure was adjusted downwards from ksh.7,484,435/- to kshs.6,445,410/=. Learned counsels eventually filed a consent order marking the dispute as settled. The Plaintiffs thereafter filed a notice to act in person before taking out the current motion. The Plaintiffs have not alleged that their urstwhile advocate did not have instructions to negotiate with the Defendants' advocates to have the decretal principal sum negotiated with a view of having it adjusted downwards. Even where a judgement sum as been given like in this case, parties are still at liberty to negotiate to have the figure adjusted either upwards or downwards. The court always encourages the parties to continually engage in negotiations to reach at amicable settlement of disputes. The learned advocates had full instructions to do so in this case. Parties are not allowed to go behind such agreements which they fully participated through their legal advisors. The parties are bound by the agreements reached by their legal advisors unless it is shown that such an agreement was reached through fraud or mistake or without authority. For this reason, I am inclined to dismiss the motion.
7. In the end, I find no merit in the motion dated 30.9.2015. The same is ordered dismissed, in the circumstances of this case, it is only fair to direct which, I hereby do that each party should bear his or her own costs.

Dated, Signed and Delivered in open court this 11th day of December, 2015.

J. K. SERGON

JUDGE

In the presence of:

..... for the Plaintiff

.....for the Defendant