



REPUBLIC OF KENYA
IN THE HIGH COURT OF KENYA AT NAIROBI
CIVIL APPEAL NUMBER 371 OF 2010

STEPHEN MAINA MWANGI.....APPELLANT/APPLICANT

VERSUS

PETER MUGURO WAWERU SUING ON BEHALF OF

BARETA NJERI MUGURO-DECEASED.....RESPONDENT

R U L I N G

The application before the court is the Notice of Motion dated 19th April, 2013 brought by the Appellant herein under Order 45 Rule 1 and 2 of the Civil Procedure Rules, Section 80, 1A, 1B, 3A and 63(e) and Section 80 of the Civil Procedure Act. The application seeks review and/or setting aside of this court's judgment dated 13th March, 2013.

The applicant complains that the court, in computing "*Loss of Dependency*" alluded to the fact that the sum awarded by the court should be reduced by 1/3 but in actual computation, reduced the award by 2/3 awarding the Respondent with Ksh.320,000/- in excess of what was intended. The Applicant also complained that the court awarded both under the Fatal Accident Act and the Law Reform Act which is against the law and practice in such cases. They also complained that this Appellant court erred in interfering with the lower court's multiplicand of Ksh.4,000/- and replacing it with the courts figure of Ksh.4,270/- which had been claimed by the Plaintiff originally. The Applicant finally complained that the court awarded more than what was awarded by the lower court i.e. Ksh.640,000/- instead of Ksh.320,000/- and in the process awarded for pain and suffering and loss of dependency which is double compensation.

The Respondent in response, opposes the application and states that in first appeal such as this, the appellant court has power and discretion to arrive on different conclusions both on the facts and law if the circumstances of the case so demand. They should review the evidence on record and make its own findings both in facts and law.

The Respondent in response, opposes the application and states that in first appeal such as this, the Appellate court has power and discretion to arrive on different conclusions both on the facts and law if the circumstances of the case so demand. They should review the evidence on record and make its own findings both in facts and law.

Order 45 Rule 1 & 2 of the Civil Procedure Rules under which this application is brought provides that review of a judgment or order can only be done upon demonstration that there was a discovery of a new material which was not in the knowledge of the applicant and could not have been discovered by him by exercise at the time, of due diligence. The principle was stated by the Court of Appeal in the case of **MULEMBE FARM LIMITED & ANOTHER VS JOHN B MASIKA & 3 OTHES [2011] eKLR** as follows: -

“Those factors are, firstly, that an applicant must show that there exist new and important matter or evidence which after exercise of due diligence were not within his knowledge or could not be produced at the time the decree or order was made. Secondly, and in the alternative, that there is some mistake or error apparent on the face of the record. Thirdly, and in the alternative, for any other sufficient reason...”

...Whether or not a decision or order should be reviewed is a matter within a judge’s own discretion.

...The power of review is not the same as the power exercisable on appeal. That is why the jurisdiction of the court in review is circumscribed. The court in a review is called upon to exercise a discretion in a situation where, if the power is not exercised injustice or hardship will result and is invoked to help a party who is shown to have taken all essential steps in a matter but because of factors beyond his control he was not able to avail all relevant material or evidence, or that an error or mistake occurred.”

In this case as can be seen by the grounds of complaint raised by the Applicant, the applicant has not demonstrated discovery of any new or important matter or evidence. Exercise of due diligence on the Applicant’s part to discover such new material, does not, therefore, arise. He has not pointed out the mistake or error on the face of the record. All the court misapplied the law by applying wrong principles of law which made the court at a different finding or conclusion from the one the applicant would have expected. That is a ground of appeal and not a ground of review. All the grounds of complaint, in this court’s view are grounds of appeal against this court’s judgment complained of.

This court further notes that the judgment states the award complained of as follows: -

....” I will award what was sought by the plaintiff, with the results that the award would be 4000 x 20 (years) x 12 (months)=960,000 which should as a practice be reduced by 1/3 due to acceleration of the judgment sum to the plaintiff. The results would be 960,000 x 2/3= Ksh 640,000...”

This court does not find any error in the face of its judgment targeted by this application.

In the circumstances, this court finds no grounds upon which it can review its judgment aforesaid as sought by the Applicant.

As to the prayer for setting aside the judgments, the court cannot understand how a judgment based on the merits brought on record by both parties, arguments and submissions can be set aside. The Applicant did not argue this aspect of the application and the court would rather leave the matters where the applicant laid them.

The application dated 19th April, 2013 by the applicant is hereby dismissed with costs. Orders accordingly.

Dated and delivered at Nairobi this 22nd day of September, 2014.

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D A ONYANCHA

JUDGE