



REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA

AT MERU

HIGH COURT CIVIL APPEAL CASE NO. 57 OF 2007

DHARA WHOLESALERS LTD. APPELLANT

VERSUS

TERESIAH KAIMENYI MUTHAMIA (*Suing as the administratrix of the estate*

***of the deceased*) ZAKARIA KITHURE M'MBIJIWE RESPONDENT**

RULING

The respondent obtained judgment against the appellant in Meru CMCC No. 249 of 2003 in damages in a case she had filed on behalf of the estate of Zacharia Kithure M'Mbijiwe deceased. The damages that were awarded in that case were in respect of the accident which resulted in the death of Zacharia Kithure M'Mbijiwe deceased. On hearing the case, the Chief Magistrate Court gave the respondent an award of Kshs. 396,000/= for loss of expectation of life. and also awarded special damages of Kshs. 17,575/=. The learned magistrate in error in his final paragraph of his judgment stated:-

“.....Consequently, I enter judgment for the plaintiff (respondent) against the defendant (appellant) jointly and severally in the sum of Kshs. 533,575/= together with costs of the suit.”

The defendant in that lower court case appealed against that judgment in this appeal. This court heard the appeal and delivered its judgment dated 22nd May 2009. The court in that judgment stated:-

“Save that when dependants sum of Kshs. 396,000/= is added to the special damages Kshs. 17,575/=.....the correct total figure is Kshs. 413,575/= and not Kshs. 533,575/=..... I would dismiss with costs to the respondent the appellant’s appeal dated and filed on 28th May 2008.”

That judgment of this appeal is now in contention. The contention that has arisen is because there was an amount of Kshs. 103,285.80/= held in the joint account under the names of the law firm representing the appellant and the law firm representing the respondent. Following the judgment of this appeal, the respondent requested the appellant do release that amount to her that was deposited. The appellant declined. In declining, the appellant argued that this court judgment in this appeal adjusted the judgment of the chief magistrate court and that being so, the amount already so far paid to the respondent is Kshs. 475,799/=. The appellant argued that the amount so far paid to the respondent more than meets the figure adjusted by this court when it delivered its judgment. It will be recalled that this court found that the correct total award of the chief magistrate court should have been Kshs. 413,575/=. The learned magistrate however in doing his additions of the respondent’s claim stated erroneously that the total

award was of Kshs. 533,575/=. Because of that contention, the respondent filed a Notice of Motion dated 3rd March 2011. In that Notice of Motion, the respondent seeks the following orders:-

1. That this Honourable Court be pleased to order the release of the sum of Kshs. 103,285.80/= together with the accrued interest deposited in the joint account of Kiogora Ariithi & Associates Advocates and Wakini Kiarie & Company Equity Bank Ltd Meru Branch vide fixed deposit receipt Number 57466 dated 4th September 2009 to M/S Kiogora Ariithi & Associates Advocates for onward transmission to the applicant/deGREE holder.

The respondent's application was opposed by the appellant as stated above. My reading of this court's judgment is that the judge found that subject to the correct award being reflected, that is, Kshs. 413,575/=, the appellant's appeal was dismissed. In other words the judge in that judgment adjusted the respondent's award to be Kshs. 413,575/=. It follows therefore that the respondent having been paid by the appellant Kshs. 475,799/= is not now entitled to further payment. It is for that reason that the Notice of Motion dated 3rd March 2011 is dismissed. There shall be no orders as to costs in respect of that Notice of Motion. The court further makes an order that the amount held at Equity Bank Ltd Meru Branch in favour of **Jeminia Wakini Kiarie & Julius Kiogora** be released forthwith to **Jeminia Wakini Kiarie**.

Dated, signed and delivered at Meru this 30th day of June 2011.

MARY KASANGO
JUDGE