



REPUBLIC OF KENYA  
IN THE HIGH COURT OF KENYA AT NAIROBI

CIVIL CASE NO 415 OF 1992

TABITHA WANJIKU NJENGA .....1ST PLAINTIFF

MIGAYO KAMAU MUCHOGI .....2ND PLAINTIFF

VERSUS

GEOFFREY KIMANI .....1ST DEFENDANT

SAMUEL KAMAU WAKABA .....2ND DEFENDANT

RULING ON SETTLEMENT OF THIS COURT DECREE

**1. PROCEDURE**

1. On the 16th March 2005, the parties through their advocates appeared before this court seeking for order that this court settle the decree of a judgment delivered by me on the 20.2.01. I asked the parties to make a formal application. The plaintiff subsequently filed a notice of motion dated the 18.5.05 on the 21.3.05. They sought order:-

*“The decree pursuant to the judgment delivered herein on 20th February 2001 by Hon. Lady Justice Ang’awa be settled.”*

*That costs be provided for of he application.*

The grounds of the application was based on the fact “that the parties advocates had failed to agree on the consent of the decree.” This application was opposed by the respondent defendants.

2. When the hearing of the application came on 16.6.05, I was surprised to find that there were two files before me. On perusing both files it was the first time that this court had seen a file described as the “Original file” in which certain orders had been made that I was not aware of. Namely, that the court files contained orders that Ksh.300,000/- had been paid to the plaintiff. This amount had nothing to do with the judgment I delivered and would certainly effect the judgment if I had been aware of it. I ordered that the two files be combined and arranged in the chronological order. For ease of reference the following is the background to this case.

**II: BACKGROUND**

3. On the 28.1.92 the plaintiffs on behalf of the estate of the late Stephen Njenga Migago sued the two defendants herein for the wrongful death of the deceased as a result of a motor vehicle accident collision between two vehicles. The defendants failed to enter appearance or file defence. A request for

interlocutory judgment was made and as a result Interlocutory Judgment should have been entered. There appears to be no record reflected this but his may have been as a result of there being missing pages. Letters of correspondence to the deputy registrar reflects indeed that an interlocutory judgment was duly approved.

4. In March 1993 Mbitio J heard the trial in absence of the defendant and judgment on assessment of damages was duly entered at Ksh.518,400/- in general damages and final General damages to Ksh.583,400/- and Special damages Ksh.10,000/-.

5. The plaintiff executed, the defendants resisted. Aluoch J on 12.5.94 granted stay of execution to the defendants but ordered that this be conditional of Ksh.667,823/- be deposited to court. The inter parties hearing for setting aside the judgment of Mbitio J was placed before Shields J to hear. It is unclear why Mbitio J did not hear the said application.

6. Shields J on 9.6 94 heard the oral evidence of the two defendants and concluded that they were not truthful in stating that they were not served. The plaintiff though failed to avail the process server who filed the “returns of service” (as it was then called). On this doubt of the service upon the defendants the exparte judgment by Mbitio J was set aside.

THIS was on condition:-

***“The judgment will be set aside on the defendants paying to the plaintiff a sum of Ksh.300,000/- and providing security for the payment of the balances of the decretal amounts on the costs of the action. Costs of this application will await the result of the trial.”***

7. Githinji, J was to hear the trial but parties appeared before him on 1.10.97 and 29.10.97 seeking to pursue a settlement. This failed and by 27.11.97 no compromise was reached.

8. The original file went missing

9. C. Njai – Principal Deputy Registrar (as he then was) made orders on 4.12.98 to reconstitute the file referred herein as the skeleton file.

10. Amin J was allocated the file for hearing. The parties again pursued the issue of settlement on 15.11.00, 16.1.00 and 6.12.00. The matter was adjourned to 31.1.01

11. On 31.1.01, I believe Amin J had reached the normal retirement age and retired from the bench. The law would permit him (under Order 17 CPR) to proceed and conclude this part heard. The parties informed me that the matter was a part heard but from the records of the court this was not the case. I proceeded to hear this matter on the 31.1.01, 6.2.01 and 15.2.01 and delivered the judgment on 20.2.01. During the trial the original file was not before the court. The parties, I believe, never disclosed to this court the orders of Shields.J.

### **III: JUDGMENT OF THE COURT**

12. The interesting thing about this case is the frequency of missing files. During the trial the defendants disclosed an inquest was heard (Solomon Wamwai Chief Magistrate, now retired) whereby the court stated that “the deceased was the author of his own misfortune.” The inquest file was closed. The file was later found to have gone missing together with the police file.

13. The defendants claimed that as a result of the inquest file findings, the issue of liability is settled and as such this suit ought to be dismissed. I found that there occurred an accident between two motor vehicles that saw the deceased/driver sustain fatal injuries. I apportioned liability to 50% against the defendant and 50% against the deceased/plaintiffs. As to quantum, I found that the deceased aged 37 years at the time of death and a driver earning Ksh.3,600/-. I awarded a multiplier of 18 years multiplicand of 2,000/- giving a total

of Ksh.432,000/-

say Ksh.430,000/-

I discounted Ksh.100,000/-

To give a net total Ksh.330,000/- Applying contributory.

Negligence of 50% Ksh.160,000/-

This said sum was apportioned to the widow Ksh.60,000/- Son Ksh.50,000/-

Daughter Ksh.50,000/-

Ksh.160,000/-

13. The problem that arises from this case is that the plaintiff wants to be paid Ksh.160,000/- together with costs and interest. The defendants says that the plaintiff had already been paid Ksh.300,000/- as ordered by Shields J as the condition of setting aside the ex parte judgment. The plaintiff claims his Ksh.300,000/- was actually a condition for setting aside the ex parte judgment – really a gift and had nothing to do with the decretal sum.

14. As stated earlier, this court was not aware of the order by shields J till 16th June 2005. It was also noted that C. Njai PDR (as he then was) actually found the missing files and placed the said two files in the strong room. The files never returned to me until the issue of the settling of the decree arose. I am indeed glad that I insisted a formal application be made otherwise the issue of Ksh.300,000/- from the original file would have not been clear.

#### **IV: SETTLING OF THE DECREE**

15. The said sum of Ksh.300,000/- was the original decretal sum from the judgment of Mbitio J. The total sum that came before the court on obtaining stay of execution was Ksh.667,823/-. Aluoch J ordered this sum be deposited in court. Shields J ordered on setting aside the ex parte judgment that out of this sum Ksh.300,000/- be paid to the plaintiffs because the plaintiff was a young family. The balance of the decretal amount Ksh.367,823/- security was to be provided for by the defendants. The defendants obliged.

16. The plaintiff cannot now come to say that the sum of Ksh.300,000/- had nothing to do with the deceetal sum. It most certainly has. The plaintiff cannot have a double enrichment from the sum due. This court awarded Ksh.405,000/-. Because the liability was found at 50%, the plaintiff is entitled to Ksh.202,500/- only together with costs. As the plaintiff was paid Ksh.300,000/- the balance is Ksh.97,500/-. This sum should be off set as to the issue of costs due to the plaintiff.

17. I therefore find the correct decree is in summary:-

17.1. Motor vehicle collision between two vehicles

17.2 Driver male adult aged 37 years in 1991

17.3 Injuries Fatal

17.4 Liability 50%:50% Against the defendant

17.5. Quantum

#### **I: Law Reform Act**

- a) Pain and suffering Ksh.5,000/-
- b) Loss of expectation of life Ksh.60,000/-

**II: Fatal Accidents Act**

Loss of dependency

18 x 12 x 2,000/- Ksh.432,000/-

Say Ksh.430,000/-

Less discounted Ksh100,000/-

Ksh.330,000/-

**III: Special Damages Ksh. 10,000/-**

Total Ksh.405,000/-

Less 50% contributory negligence Ksh.202,500/-

That the sum of Ksh.160,000/- be approved to:-

- a) Widow Ksh.60,000/-
- b) Son Ksh.50,000/-
- c) Daughter Ksh.50,000/-

Order : That the sum of Ksh.300,000/- already paid to the plaintiff which fact is not denied, be off set the decretal sum of Ksh.202,500/-

That the balance of Ksh.97,500/- be held by the plaintiff until the finalization of the issue of costs on taxation.

By further order, the costs for the application dated 12.5.94 for setting aside the exparte judgment of Mbito J be awarded to the plaintiff as per Shields J's directions.

Dated this 7th day of July 2005 at Nairobi.

**M.A. ANG'AWA**

**JUDGE**

Njoroge Regeru & Co. Advocates for the Plaintiff

Dally & Figgis Co. Advocates for the Defendant