REPUBLIC OF KENYA
IN THE HIGH COURT OF KENYA
AT MOMBASA

CIVIL CASE NO. 118 OF 2000

JACQUELYN RITA WANJIRU NYANGE …….. PLAINTIFF

- Versus -

DASO DES LIMITED

UNIVERSITY OF NAIROBI ……. DEFENDANTS

J U D G M E N T

The Plaintiff in this case is a widow. Her husband was the late Dr. Patrick Mwamburi Nyange (the Deceased) who was killed on the 14th December 1995 in a road accident involving vehicles belonging to the defendants. After obtaining letters of administration the Plaintiff filed this suit on the 7th March 2000 against the two defendants, the owners of the accident vehicles. The defendants failed to enter appearance or file defence and interlocutory judgments were entered by the Deputy Registrar against them. Against the second defendant on the 12th June 2000 and against the first defendant on 3rd November 2000.

The case was formally proved before the Commissioner of Assize, Mrs. P. Tutui, who delivered judgment. On the application of the second defendant the judgment on formal proof was set aside. Subsequently the case against the second defendant was withdrawn wholly. That left the case to proceed against the first defendant with the interlocutory judgment against him still intact.

The case came for formal proof before me. During the hearing the plaintiff produced an order issued on 2nd March 2001 by Waki J. (as he then was) in Misc. Civil Suit No. 14 of 2000 granting the Plaintiff leave to file a suit against the defendants out of time. That order made no reference to this suit which as I have said had been filed on the 7th March 2000. It did not deem this suit as having been duly filed in time. In the circumstances I did ask counsel for the plaintiff if the claim against the first defendant had not been time barred under the Limitation of Actions. He said he would cover that in his submissions. And he has done so.

In his written submission counsel strongly submitted that interlocutory judgment having been obtained against the first defendant, the issue of liability was a foregone conclusion. He relied on the Court of Appeal decision in **Makala Mailu Mumende Vs Nyali Golf & Country Club Civil Appeal No. 16 of 1989 (CA)** (unreported). In that appeal the late Justice Nyarangi said:-

> **"A judgment which is entered in default of appearance …. Presupposes that there is a cause of action".**

Earlier on he had stated:-

"In my judgment therefore, the issue of liability was already settled (in favour of the plaintiff of course) by the time the Judge embarked on the task of assessment of damages. So that as a matter of law and fact, it was no long open to the judge to consider whether the plaintiff's claim had or did have a firm basis."

In that case the Plaintiff, a watchman who had been employed by the defendant was injured by robbers. Bosire J. (as he then was) had held that it was an implied term of the contract of employment at common law that an employee takes upon himself risks necessarily incidental to his employment. Overruling him the Court of Appeal held that although the position at common law was as stated by Bosire J. the employer was also under a duty to take reasonable care for the protection of the employee. In that case the defendant had failed to provide the plaintiff with a helmet as had been recommended by the plaintiff's Trade Union. That court of appeal decision is clearly distinguishable. The plaintiffs claim in that case was well founded in law. In this case the plaintiff's claim is clearly time barred under the section of Limitation of Actions Act.

True there is an interlocutory judgment in favour of the plaintiff which has not been set aside and I am not considering an application to set it aside. But in the assessment of damages I have to apply the law. I have to be satisfied that the plaintiff's claim is well founded in law before I proceed to award her damages. I am not so satisfied. The plaintiffs claim, notwithstanding the interlocutory judgment in her favour, is statute barred. The interlocutory judgment entered by the Deputy Registrar in her favour is, in my view, irregular and should be set aside. Setting aside such a judgment is **"as a matter of judicial duty in order to uphold the integrity of the judicial process itself." - Ringera J. in Remco Ltd. -Vs- Mistry Parbat and Co. Ltd. and Others [2002] 1 EA 233 at page 236. In the case of Mwalia -Vs- Kenya Bureau of Standards [2001] 1 EA 151** Justice Ringera stated at page 156 that:

"**Where on the other hand, the judgment sought to be set aside is an irregular one, for instance, one obtained either where there is no proper service or any service at all of the summons to enter appearance or when there is a memorandum of appearance or defence on record but the same was inadvertently overlooked, the same ought to be set aside not as a matter of discretion but *ex debito justitiae* for a court should not countenance an irregular judgment on its records".** Emphasis supplied.

Those are authorities where irregular judgments were obtained on no or no proper service. The same principle applies in this case. In the circumstances I set aside the ex-parte interlocutory judgment entered herein by the Deputy Registrar on the 3rd November 2000 against the first defendant and dismiss the plaintiff's claim against the first defendant.

I now proceed to assess the damages I would have awarded to the plaintiff if I had found for her on the issue of liability.

The deceased in this case was a young doctor, aged about 35 years at the time of his death. Doctors, like other professionals work up to the age of about 65 years. Counsel for the plaintiff recommended a multiplier of 20 years. He relied on the cases of

1. **Beatrice Mutinda Musyoki Kuti Vs Ann Wangui Mwicharo Mombasa HCCC No. 445 of 1994 (un reported)** in which the deceased was 36 years old and a multiplier of 19 was applied.

2. **Rosemary Ondele Vs KenyaPorts Authority Mombasa HCCC No. 773 of 1995** (un reported) in which the deceased was 38 years old and a multiplier of 17 was applied.

In considering the multiplier to be applied the court has to bear in mind the fact that the dependants are being paid in lump sum what they would otherwise have earned over a long period of time. The court has also to consider that the deceased could have died from other causes or could for one reason or the other have been prevented from earning. Taking into account all these factors I consider a multiplier of 18 years appropriate in this case.

The plaintiff in her evidence produced a copy of a letter giving the deceased's salary as sh. 27,510/= per month which works to sh. 330,120/= per year. I take this figure as the multiplicand and assess the loss of dependancy at sh. 3,961,440/= (330,120 x 18 x 2/3). For loss of expectation of life I award a sum of sh. 100,000/= and sh. 5,000/= for pain and suffering. The plaintiff has also claimed damages for loss of consortium. Counsel proposed a sum of sh. 250,000/= under this head and relied on the decision in the case of **Gloria Nakhumicha Vs Tashrif Bus Service Mombasa HCCC No. 258 of 1997** in which a sum of sh. 120,000/= was awarded under this head on 8th April 2003. I consider the same amount as reasonable in this case. The plaintiff claimed a sum of sh. 100,150/= as special damages. She was able to prove sh. 40,150/= and I award her the same.

In total, if I had found for the plaintiff I would have awarded her a sum of sh. 4,226,590/00 made out as follows:-

Pain and suffering	sh. 5,000/00
Loss of expectation of life	sh. 100,000/00
Loss of consortium	sh. 120,000/00
Loss of dependence (330,120 x 18 x 2/3)	sh.3,961,000/00
Special damages	sh. 40,150/00

Total sh. 4,226,590/00

Given my earlier holding on the issue of liability this case stands dismissed with no order as to costs.

DATED this 20th day of January 2004.

D.K. Maraga

Ag. **JUDGE**