

REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT ELDORET
CIVIL SUIT NO. R.28 OF 2001

FESTUS WERE & ANO. :..... PLAINTIFFS

VERSUS

JOHN CHILIVA WAFULA

& ANOTHER :..... DEFENDANTS

R U L I N G

This is an application by way of Notice of Motion dated 15th January 2003. It is brought under Order 44 Rules, Order 50 Rule 1 of Civil Procedure Rules and section 3A of the Civil Procedure Act. It seeks for orders that there be orders of stay of execution of decree pending hearing of the application and that the judgment delivered on 23rd October 2002 be reviewed in as far as the award of damages for loss of consortium is concerned, and the sum of Kshs.100,000/= awarded to the 1st plaintiff be set aside.

At the hearing of the application Mr. Kuloba for the applicant submitted that they were asking for a review of the Judgment given by Justice Etyang on 23rd October 2002 in so far as it awarded damages for loss of consortium to 1st plaintiff. He submitted that in the judgment the court awarded kshs.327,000/= as damages in favour of the 1st plaintiff which included kshs.100,000/= for loss of consortium. This was a mistake on the face of the record, as loss of consortium will not be awarded where the spouse died. Under the commons law such damages can be awarded if the spouse is incapacitated but alive. When the spouse dies the marriage ceases.

He also submitted that under the Fatal Accidents Act, loss of consortium is not granted as the Act covers only dependency ie loss of income as provided for under section 4. He referred me to the case of *S.J. Chege & Another – vs- Johanna W M Vesters and Another (1982 –88) IKAR 1197* on award for loss of consortium. He also referred me to the case of *Nyamogo and Nyamogo Advocates – vs- Kogo (2001) E.A (CAK)* on the definition of error on the face of the record. He submitted that there was an error on the face of the record; therefore under Order 44 Rule 1 this court can review the judgment.

Mr. Ngala for the respondent submitted that they oppose the application. He submitted that this court cannot sit as an appellate court on a decision made by a Judge of equal jurisdiction. He referred to Order 41 Rule 4(4) and submitted that an appeal should have been preferred. He submitted that loss of consortium is awardable by this court. As such the award of damages for loss of consortium does not constitute an error. It is not a ground for review. He submitted that the judge made specific finding in judgment on the issue of loss of consortium. Additionally he submitted that there was inordinate delay in making this application.

I have considered the documents filed in the application and the submissions of the parties. It is not in dispute that the court made a specific award of damages for loss of consortium. It is clear to me that the court can make such an award. However the issue is whether, in this particular case that way award was a mistake on the face of the record, and whether I can review the Judge’s judgment on that particular issue.

Perusing page 10 and 11 of the judgment, the Judge specifically considered the 1st plaintiff’s claim for loss of consortium and awarded kshs.100,000/= as damages. He considered that it was justified in view of the HIV/AIDS epidemic. Is that an error on the face of the record? In my view it is not an error on the face of the record. Though in the case of *Nyamogo and Nyamogo Advocates –vs- Kogo* the court held that an error on the face of record cannot be defined precisely of exhaustively, the court went on to state at page 175 line (9) that “where error or wrong view is certainly no grounds for a review although it may

be for appeal.” In my view, the finding and award of damages for loss of consortium in this particular case could be wrong as the spouse died but it was not an error the face of the record. It can be challenged, but only through an appeal. It is no ground for a review.

I therefore dismiss this application with costs to the respondent.

Dated and delivered at Eldoret this 29th day of April 2004.

George Dulu

Judge

(I certify this a true copy of the original)

DEPUTY REGISTRAR