



REPUBLIC OF KENYA

IN THE HIGH COURT AT KISUMU

CIVIL SUIT NO. 4 OF 2014

BETWEEN

JOE OWAKA AGER suing as the administrator

of the estate of MARY SLECCOR AGERPLAINTIFF

AND

JOHN OTIENO AWINJE.....1ST DEFENDANT

ROLEX DAN OMONDI.....2ND DEFENDANT

KODIENY SYPRIAN.....3RD DEFENDANT

JUDGMENT

1. This case has been brought by Joe Owaka Ager who sues as the representative of the estate and on behalf of the dependants of Mary Sleccor Adera Ager (deceased). He was issued with a grant of letters of administration for her estate dated 29th July 2013 in *Nairobi High Court Succession Case Number 849 of 2013*.

2. The plaintiff has sued the defendants because of a road accident that took place on 8th October 2012. Joe Owaka Ager (PW 1) told the court that he was traveling with the deceased, who was his wife, from Bondo to Kisumu in Toyota Saloon registration number KBQ 303L being driven by the second defendant. When they reached Kolenyo area, the driver began to overtake and while driving on a wrong side at a bend, he saw another vehicle coming towards him. He tried to return to his proper lane and in that course rammed into another motor vehicle registration number KBD 144U.

3. PW 1 and his wife were seriously injured. They were rushed to Aga Khan Hospital Kisumu for initial treatment and were then airlifted to Nairobi Hospital. The deceased remained in Intensive Care Unit (ICU) for a period and succumbed to her injuries on 25th October 2012.

4. The accident was reported at Maseno Police Station and in due course PW 1 recorded his statement. The 2nd defendant was charged with the offence of causing death by dangerous driving contrary to section 46 of the *Traffic Act (Chapter 403 of the Laws of Kenya)* in *Maseno Principal Magistrate's Court Traffic Case Number 398 of 2012*. He pleaded guilty, was convicted and fined Kshs. 20,000 in default to serve 18-month imprisonment.

5. The plaintiff brought these proceedings against the defendants after confirming that the first and third defendants were the legal and beneficial owners of motor vehicle registration number KBQ 303L. His advocates issued the necessary demand letters and filed suit thereafter. Summons to enter appearance were duly served but the defendants neither entered appearance nor filed defence. Interlocutory judgment was accordingly entered against them on 6th July 2013. The only issue for the court at this stage is to assess damages.

6. This claim is brought under the *Law Reforms Act (Chapter 26 of the Laws of Kenya)* and the *Fatal Accidents Act (Chapter 31 of the Laws of Kenya)*. Under their provisions the following heads of damages are awarded:

- (a) Loss of dependency under the *Fatal Accidents Act*.
- (b) Lost years under the *Law Reform Act*.
- (c) Loss of expectations of life under the *Law Reform Act*.
- (d) Damages for pain and suffering under the *Law Reform Act*.
- (e) Special damages.

7. The general principle is that in awarding damages under the *Law Reform Act*, the court will take into account the award made under the *Fatal Accidents Act* if the beneficiaries are the same to avoid double compensation (*Hellen Waruguru Waweru (suing as the legal representative of Peter Waweru Mwenja (Deceased) v Kiarie Shoe Stores Limited* NYR CA Civil Appeal No. 22 of 2014 [2015] eKLR). The other principle that commends itself to this court is that special damages must be pleaded and proved (*Coast Bus Service Ltd v Murunga Danyi* CA Civil Appeal No. 192 of 1992 (UR)).

8. According to the plaint, the deceased was aged 59 years old working as a senior nurse in the United Kingdom. Although the plaint refers to her as a Quality Surveyor, I consider this a mistake as PW 1 testified that she worked as a senior nurse for the Wrighton Wegan Leigh NHS Trust. The deceased's income was not pleaded in the plaint. However, PW 1 testified and produced documents to show that she was earning an equivalent of about Kshs 380,000 per month. PW 1 told the court that the deceased was paying a mortgage for a house in the United Kingdom and that they both supported the family as he worked as an electrical consultant. The family comprised the following children as pleaded in the plaint; Oscar Odhiambo (28 years), Michael Owaka (26 years) and Priscilla Adhiambo (24 years).

9. After appreciating the evidence, I find that a multiplier approach in this matter would not be useful. The deceased was 59 years old at the time of her death and it was not stated when she would be expected to retire or leave service in the United Kingdom given her age. I note that the children were old and that the deceased and her husband were both supporting the family. I have no doubt that she supported the children. In the circumstances, I would award a global sum of **Kshs. 2,000,000.00** taking into account the deceased's age, income and other imponderables.

10. Under the *Law Reform Act*, the plaintiff is entitled to an award for loss of expectation of life which is a fairly standard or conventional figure. I would award **Kshs 150,000.00**. As regards pain and suffering, Doctor P. Olima (PW 1), a consultant surgeon, reviewed her treatment records from Aga Khan and Nairobi Hospitals. He told the court that following the accident the deceased sustained a transection of the large and small intestines, bleeding in the abdominal cavity and blunt chest injuries. She also suffered a fracture of the right humerus and traumatic paraplegia. After the initial treatment at Aga Khan Hospital her condition got worse and she was transferred to Nairobi Hospital where she was placed in ICU until her death. No doubt she must have suffered some pain and doing the best I can, I award **Kshs. 300,000.00**.

11. The item of special damages comprised costs incurred in treatment, transport and funeral expenses. The plaintiff produced a bundle of documents and receipts evidencing payments to Nairobi Hospital, Aga

Khan Hospital, various doctors and service suppliers. I am satisfied that the plaintiff has proved that he incurred expenses amounting to **Kshs. 6,453,482.90** as pleaded in the plaint.

12. Following findings, I have set out above, I enter judgment for the plaintiff against the defendants jointly and severally for the sum of **Kshs. 8,902,789.90** made up as follows;

Loss of Dependency under <i>Fatal Accident Act</i>	Kshs. 2,000,000.00
Loss of expectation of life	Kshs. 150,000.00
Pain and suffering	Kshs. 300,000.00
Special damages	Kshs. 6,452,789.90

13. The plaintiff shall have the costs of this suit which I assess at **Kshs. 300,000**. Interest shall accrue on the special damages from the date of filing suit and on other damages and costs from the date of this judgment.

DATED and DELIVERED at KISUMU this 1st day of March 2017.

D.S. MAJANJA

JUDGE

Mr Mwesigwa instructed by Oraro and Company Advocates for the plaintiff.