



REPUBLIC OF KENYA
IN THE HIGH COURT OF KENYA AT KAKAMEGA
CIVIL APPEAL NO.131 OF 2013

JOSEPH JUMBA EGALAAPPELLANT

AND

**MESHACK OMURNGA SANDE(Suing as personal representative and
administrator of SARAH MAKOKHA**

SANDE(Deceased)RESPONDENT

R U L I N G

Introduction

1. Judgment in this appeal was delivered on 25/11/2015. Judgment on damages was as follows:-

a. Pain and suffering	-	Kshs. 50,000/=
b. Loss of Dependency	-	Kshs.354,000/=
c. Funeral expenses	-	Kshs. <u>62,100/=</u>
Total		Kshs. <u>466,100/=</u>

In the Court below, judgment had been entered in favour of the Respondent as follows:

a. Pain and suffering	-	Kshs. 50,000/=
b. Loss of Expectation of life	-	Kshs.150,000/=
c. Funeral Expenses	-	Kshs. 62,100/=
d. Loss of dependency	-	Kshs. <u>504,000/=</u>
Total		Kshs. <u>766,000/=</u>

2. In his judgment, Hon. Mr. Justice Mrima stated the following at paragraph 14: “I would have proceeded to dismiss this appeal had the trial Court adhered to the requirement of deducting the damages on loss of expectation of life from the award on the loss of dependency.” The learned Judge, on whose behalf I delivered the judgment proceeded to deduct the Kshs.150,000/= being award for loss of expectation of life from Kshs.504,000/= being loss of dependency and awarded Kshs.354000/= under loss of dependency head.

The Application

3. On 01/02/2016, the firm of M/s Mukisu & Co. Advocates, filed a Notice of Motion of even date

seeking a review of the judgment above stated on the ground that there is an error apparent on the face of the record and that the true award under loss of dependency should have been Kshs.504000/=. The application is premised on 6 grounds set out on the face thereof and is further supported by the affidavit sworn by the applicant on 23/12/2015. The applicant herein is the respondent. The applicant prays for orders as prayed.

4. The application is opposed vide the affidavit in reply sworn by Dancan Otieno Njoga, an advocate practicing with the firm of L.G. Menezes who appear for the appellant. In brief the deponent says that there is no clerical error apparent on the face of the record and that this application is frivolous, vexatious and lacks merit. The appellant/respondent prays that the application be dismissed.

Submissions

5. Counsel appeared before me on 23/02/2016 and made their submissions. Mr. Mukisu for the applicant reiterated the averments as contained in the grounds and the affidavit in support of the application. Mr. Wang'oda for the respondent/appellant submitted that the applicant's application must fail for reason that it does not meet the threshold of the provisions of Order 45 Rules 1, 2 and 3(2). Counsel submitted that the learned Judge rightly deducted Kshs.150,000/= from the award of loss of dependency of Kshs.504,000/= and that in the circumstances there is nothing to correct. He prayed that the application be dismissed with costs.

Analysis and Determination

6. The application having been brought under Order 45 – Rules 1,2 and 3(2) of the CPR, the applicant must satisfy this Court that the conditions set out thereunder are fulfilled if the application is to succeed. These conditions are that:-
 - i) there is discovery of new and important matter or evidence, which after due diligence, was not within applicant's knowledge at the time the order was made or decree passed;
 - ii) there is some mistake or error apparent on the face of the record;
 - iii) there is some other sufficient reason to warrant the review sought;
7. Upon carefully considering the application as filed the replying affidavit the submissions and the law, I find and hold that this application lacks merit. In the first place, I find that the applicant has seriously misapprehended the judgment of the learned trial Court and that indeed as correctly submitted by Counsel for the respondent/appellant, there is no error apparent on the face of the record. The rationale of the Court's decision is found at paragraphs 9 and 14 of the judgment. I therefore find no justification for a review of the said judgment.

Conclusion

8. In conclusion, I find and hold that the instant application lacks merit, is frivolous and vexatious. The same is accordingly dismissed with costs to the respondent/appellant.
9. Orders accordingly.

Judgment delivered, dated and signed in open Court at Kakamega this 7th day of April 2016.

RUTH N. SITATI

J U D G E

In the presence of:

Mr. Getanda for Mukisi - For Applicant/Respondent

N/A For Respondent/Appellant

Mr. Lagat - Court Assistant