



Mutisya (Suing as the personal representative of the Estate of Simon Wambua Makau (Dcd)) v Macharia t/a Three Bins Services & another (Civil Appeal 327 of 2019) [2023] KECA 234 (KLR) (3 March 2023) (Judgment)

Neutral citation: [2023] KECA 234 (KLR)

**REPUBLIC OF KENYA
IN THE COURT OF APPEAL AT NAIROBI
CIVIL APPEAL 327 OF 2019
DK MUSINGA, HA OMONDI & PM GACHOKA, JJA
MARCH 3, 2023**

BETWEEN

**SARAH NGUNYI MUTISYA APPELLANT
SUING AS THE PERSONAL REPRESENTATIVE OF THE ESTATE OF SIMON
WAMBUA MAKAU (DCD)**

AND

**RICHARD KAMIRI MACHARIA T/A THREE BINS SERVICES 1ST
RESPONDENT
WAWERU NDUNGU 2ND RESPONDENT**

(An Appeal from the Judgment and Decree of the High Court of Kenya at Nairobi (F. Gikonyo, J.) dated on 13th March 2019 in HCCC 224 OF 2016)

JUDGMENT

1. On August 18, 2015 judgment was entered in favor of the appellant in the sum of Kshs 1,913,199.00 plus costs and damages as a result of a fatal injury to her husband, Simon Wambua Makau.
2. Thereafter an application for review was filed by the respondents, and the lower court found that there was discovery of new and important information to the effect that the estate of the deceased was paid a sum of Kshs 528,000.00 by the respondent's insurance, UAP, and it is on that basis that the trial court reviewed its judgment and deducted the sum of Kshs 528,000.00 the new decretal sum amounting to Kshs 1,389,119.00. It is this deduction by the trial court that the appellant was aggrieved with and filed an appeal to the High Court.
3. The appellant's argument at the High Court was that the payment of Kshs 528,000.00 was made to the deceased's relatives on March 22, 2103, a day after the suit was filed, and as such it was not a discovery



- of new important evidence as the information was within the respondents' knowledge for almost 3 years and they gave no explanation as to why the evidence was not produced.
4. That the said payment was made to the 1st respondent and not the appellant; and there was no evidence that monies were ever paid to the appellant in respect of her claim; and the 1st respondent was paid based on a different policy number from the appellants claims which was a different policy number.
 5. The respondents on the other hand argued that the appellant did not disprove the allegations that the new facts came to their knowledge after the decree had been made. Whereas the respondents acknowledged the difference in the policy numbers, they nonetheless asserted that the 1st respondent had to comply with Workman's Injury Benefit Act; that it was the employer who executed the discharge voucher, collected the settlement cheque for the employee, and the discharge voucher was executed by a family member of the appellant.
 6. In its judgment, the High Court flagged out the issue for determination as being whether the trial court erred in reviewing its judgment and deducting Kshs 528,000.00 therefrom. The High Court noted that the grounds for review under Order 45 and the unfettered discretion in the court to review its judgment and make such order as it saw fit. The learned Judge noted that as per the discharge voucher, the respondent's insurer issued the money to the 1st respondent as a result of a fatal injury to Simon Wambua and the monies were given to Patrick Makau, his brother, which fact was not refuted by the appellant.
 7. The learned Judge also noted that the insurance was not going to make double payment on the same head of damages, and was to make a deduction anyway. In finding that there was merit for review and thus dismissing the appeal, the learned Judge also pointed out that the sums deducted were in respect of the fatal injuries suffered by the deceased, so failure to deduct the said amount would amount to double compensation.
 8. Being aggrieved by the decision of the High Court, the appellant filed a memorandum of appeal challenging the judgment of the High Court on 8 grounds of appeal that the learned Judge erred in law and fact in: re- evaluation of the evidence of the trial court on review; erroneously applied the principle of double recovery or compensation; failed to appreciate the provisions of Section 4 of the Fatal Accident's Act; holding that payment made by the insurance to the a Third Party was a payment to the appellant and/or the estate of the deceased by the respondent; considering matters he should not have considered and failing to consider matters he should have considered when re-evaluating the evidence before the trial magistrate on review; not appreciating that the appellant could not refute and/or confirm a transaction and or payment by the Insurance to the respondent and by the respondent to one Patrick Musau; failing to appreciate the principle that neither the respondent herein nor one Patrick Musau was a dependant and/or were named as dependants in the pleadings or under the provisions of the Fatal Accident's Act or any written law; and failing to appreciate the overriding objective of the courts.
 9. Our considered view is that these grounds boil down to the same issues for determination as framed by the High Court especially in view of the fact that this is a second appeal and only matters of law arise for our determination. The main issues arising are whether there was sufficient reason for review in the lower court; and whether there was double compensation.
 10. On the first issue, Section 80 of the [Civil Procedure Act](#) and Order 45 rule 1 of the Civil Procedure Rules are instructive on the principles applicable in a review application. A reading of the above provisions clearly shows that while Section 80 (f) of the [Civil Procedure Act](#) grants the court power to make orders for review, Order 45 sets out the jurisdiction and scope of review by hinging review to discovery of new



and important matters or evidence, mistake or error on the face of the record and any other sufficient reason.

11. The respondents argue that the appellant did not deny the fact that Kshs 528,000.00 had been made out by the 1st respondent's insurer to the 1st respondent as evidenced by the discharge voucher dated March 14, 2013.
12. The appellant in the High Court argued that the payment of Kshs 528,000.00 was made to the deceased's relatives on March 22, 2013, a day after the suit was filed, and as such it was not a discovery of new important evidence as the same was within the respondents' knowledge for almost 3 years and they gave no explanation as to why the evidence was not produced.
13. The appellant also submits that the said payment was made to the 1st respondent and not the appellant and that there was no evidence that monies were ever paid to the appellant in respect of her claim; and that the 1st respondent was paid based on a different policy number from the appellants claims which was a different policy number.
14. The respondents on the other hand argue that the appellant did not disprove the allegations that the new facts came to their knowledge after the decree had been made; and that it in compliance with WIBA, the employer executed the discharge voucher and collected the settlement cheque for the employee and that the discharge voucher was executed by a family member of the appellant.
15. Looking at the Discharge Voucher dated March 14, 2013, it is clear that payment was made to the 1st respondent by its insurers. We are in agreement with the appellant that there is no proof that the Kshs 528,000.00 was ever paid to her. Without evidence to the contrary, this Court finds that the appellant never received the Kshs 528,000.00 in settlement of her claim; and there is also no evidence that Patrick Makau, the deceased's brother ever forwarded the Kshs 528,000.00 to the deceased's widow.
16. We are not persuaded that the 1st respondent after being paid by its insurers the Kshs 528,000.00 was not aware of the discharge voucher dated March 14, 2013, and as such, the respondents cannot now turn around and state that the discharge voucher is new evidence and/or new facts.
17. The High Court therefore erred in upholding the lower court's decision to review its decision and reduce the decretal amount by Kshs 528,000.00.
18. On the issue of double compensation, the appellant argues that neither the appellants nor the dependents in the suit were beneficiaries to the payment made to the 1st respondent by its insurer. The appellant further argues that the said payment was made to a third party and under a different policy/claim number from the appellant, and that this payment to the 1st respondent was in respect to WIBA, and such compensation cannot form part of the employee's estate as per section 20 of *WIBA, 2007*.
19. The respondents on the other hand submit that the estate of the deceased received compensation under WIBA, 2007 and that the additional sum of Kshs 528,000.00 would constitute double recovery and unjustly enrich the estate of the deceased.
20. This issue was settled by this Court in the case of *Hellen Waruguru Waweru (suing as the Legal representative of Peter Waweru Mwenja (deceased) v Kairie Shoe Stores Limited* [2015] eKLR:

“Finally on the third issue, counsel for the defendant was of the view that Hellen could not claim damages under both the *Law Reform Act* and *Fatal Accidents Act* because there would be double compensation since the dependents were the same, and therefore supported the two courts below which deducted the entire sum awarded under the LRA from the amount



awarded under the FAA. With respect, that approach was erroneous in law. This Court has explained the concept of double compensation in several decisions. The principle is logic enough; duplication occurs when the beneficiaries of the deceased's estate under the Law Reform Act and dependents under the Fatal Accidents Act are the same, and consequently the claim for lost years and dependency will go to the same persons. It does not mean that a claimant under FAA should be denied damages for pain and suffering and loss of expectation of life as those are only awarded under the LRA hence the issue of duplication does not arise.”

21. From the above reasoning it is clear that there is no legal requirement for the court to deduct the amount awarded under the Law Reform Act from the award made under the Fatal Accidents Act. The argument therefore by the respondents cannot stand.

22. In the case of George White v Jubitz Corporation Supreme Court of the State of Oregon (2009), the court stated as follows:

“Damages cannot be reduced by an amount which the Plaintiff may have received from third parties, acting independently of the defendant, though it is given to the plaintiff on account of the injury. For it is given not intended by the giver to be in lieu of damages, or else it is given in performance of a contract. In neither case the defendant any equitable or legal claim to share the benefit.”

23. The term double recovery implies that the plaintiff has received and will retain remuneration from two outside sources - the defendant and a third -party benefit provider to compensate for a single harm. However, rarely will that assumption prove entirely accurate.

24. With regard to the issue of double payment, this Court is satisfied that the recovery of the Kshs 528,000.00 from the 1st respondent would not amount to double payment. In any event, the 1st respondent would be at liberty to recover the Kshs 528,000.00 from the deceased's brother, Patrick Makau, as there has been no proof that this amount was given to the appellant in satisfaction of her claim.

25. The upshot is that this appeal has merit and is hereby allowed in the following terms:

- a. That the decision and decree of March 13, 2019 and the trial court's order of April 5, 2016, reviewing the court's judgment and decree be and are hereby set aside.
- b. That the respondents are directed to pay the sum of Kshs 528,000.00 deducted from the appellant's judgment sums together with costs and interest.
- c. We award costs of the appeal to the appellant.

DATED AND DELIVERED AT NAIROBI THIS 3RD DAY OF MARCH, 2023.

D. K. MUSINGA (P)

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JUDGE OF APPEAL

H. A. OMONDI

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JUDGE OF APPEAL



M. GACHOKA – CI Arb, FCIARB

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JUDGE OF APPEAL

I certify that this is a true copy of the original.

Signed.

DEPUTY REGISTRAR

