**Chepkorir & another (Suing as the Legal Representatives of the Estate of the Late Edwin Kipng'eno Chepkwony) v Hari Oum Autospares (Civil Suit E004 of 2021) [2024] KEHC 4081 (KLR) (25 April 2024) (Ruling)**

Neutral citation: [2024] KEHC 4081 (KLR)

**REPUBLIC OF KENYA**

**IN THE HIGH COURT AT ELDORET**

**CIVIL SUIT E004 OF 2021**

**RN NYAKUNDI, J**

**APRIL 25, 2024**

**BETWEEN**

**ZEDDY CHEPKORIR ..... 1ST APPLICANT**

**KIRUI WILSON KIPYEGO ..... 2ND APPLICANT**

**SUING AS THE LEGAL REPRESENTATIVES OF THE ESTATE OF THE LATE EDWIN KIPNG'ENO CHEPKWONY**

**AND**

**HARI OUM AUTOSPARES ..... RESPONDENT**

**RULING**

1. What is before this court is the Notice of Motion dated 15th December 2023 seeking the following orders

    1. Spent

    2. That the loss of dependency of Kshs. 2,946,327/- awarded by this Honourable court be set aside and varied/reviewed to an appropriate award of Kshs. 35,355,927.60 after applying the correct multiplier.

    3. The cost of this application be in the cause.

2. The application is premised on the grounds set out on the face of it and the averments in the supporting affidavit sworn by Morgan Omusundi, counsel for the plaintiff.

3. The applicant's case is that the court awarded judgment in favour of the plaintiff on account of loss of dependency. The applicant contends that the award of Kshs. 2,946,327/- was erroneous as the court failed to consider that the deceased's income was Kshs. 163,684/- which was a monthly income and not

an annual income. Counsel urged that it is prudent that the award be set aside and be revised upwards to reflect a cumulative award of Kshs. 35,630,477.60/- i.e. 163,684 x 12 x27 x 2/3.

4. The respondent opposed the application vide a replying affidavit dated 6th February 2024 sworn by Khimji Vekaria, the director of the respondent herein. He urged that the application is frivolous and vexatious. Further, that the applicants, being aggrieved by the court's judgment should seek redress vide an appeal and not through the current application disguised as an application for review. Further, that by this court entertaining this application, the same will amount to sitting on appeal on its own decision which is against the law. The deponent stated that the court analysed the evidence in court and arrived at the computation of loss of dependency correctly.

5. The respondent stated that the applicants have not advanced any reasons to warrant the orders for review and further, that the application does not meet the requirements set out under order 45 rules 1 & 2 of the Civil Procedure Rules 2010 for review and therefore has to fail with costs.

It follows that the issue for determination is as follows;

**Whether the application for review is merited**

6. Review of judgment is governed by Order 45 Rule 1 of the *Civil Procedure Rules* which states;

(1) Any person considering himself aggrieved—

(a) by a decree or order from which an appeal is allowed, but from which no appeal has been preferred; or

(b) by a decree or order from which no appeal is hereby allowed, and who from the discovery of new and important matter or evidence which, after the exercise of due diligence, was not within his knowledge or could not be produced by him at the time when the decree was passed or the order made, or on account of some mistake or error apparent on the face of the record, or for any other sufficient reason, desires to obtain a review of the decree or order, may apply for a review of judgment to the court which passed the decree or made the order without unreasonable delay.

7. In *Republic v Public Procurement Administrative Review Board & 2 others* [2018] e KLR it was held: -

> "Section 80 gives the power of review and Order 45 sets out the rules. The rules restrict the grounds for review. The rules lay down the jurisdiction and scope of review limiting it to the following grounds; (a) discovery of new and important matter or evidence which after the exercise of due diligence, was not within the knowledge of the applicant or could not be produced by him at the time when the decree was passed or the order made or; (b) on account of some mistake or error apparent on the face of the record, or (c) for any other sufficient reason and whatever the ground there is a requirement that the application has to be made without unreasonable delay."

8. It follows that in order for an application for review of judgement to succeed, the applicant must demonstrate to the court that;There is discovery of new and important matter or evidence which, after the exercise of due diligence, was not within his knowledge or could not be produced by him at the time when the decree was passed or the order made.That there is a mistake or error apparent on the face of the record.

9. The application is premised on the ground that there was an error by the court in computing the award with regards to the deceased's income. The respondent contends that there is no error apparent on

the face of the record and thus, the application lacks merit. It follows that the court must determine whether there is an error on the face of the record.

An error apparent on the face of the record is defined in *Paul Mwaniki vs. National Hospital Insurance Fund Board of Management* [2020] eKLR where the court expressed itself as follows;

The term "mistake or error apparent" by its very connotation signifies an error which is evident per se from the record of the case and does not require detailed examination, scrutiny and elucidation either of the facts or the legal position. If an error is not self-evident and detection thereof requires long debate and process of reasoning, it cannot be treated as an error apparent on the face of the record for the purpose of Order 45 Rule 1 of the Civil Procedure Rules and Section 80 of the Act. Put it differently an order, decision, or judgment cannot be corrected merely because it is erroneous in law or on the ground that a different view could have been taken by the court/tribunal on a point of fact or law. In any case, while exercising the power of review, the court/tribunal concerned cannot sit in appeal over its judgment/decision.

The wisdom flowing from jurisprudence on this subject is that no error can be said to be apparent on the face of the record if it is not manifest or self-evident and requires an examination or argument to establish it."

10. It is evident from the record of the court and the judgment that the plaintiff had brought it to the attention of the court that the deceased's last payslip confirmed earnings of Kshs. 309,930/-. When calculating the dependency, the court stated that the formula it used was the multiplicand (being the annual net income) multiplied by a suitable multiplier of expected working life lost by the deceased and then by the factor of the dependency ratio. However, the court used Kshs. 163,684.85/- as the multiplicand which amount was the deceased's monthly net income and not the annual net income. It is my considered view that the same is an error apparent on the face of the record. It doesn't require extensive debate to determine that the court, after laying down the formula for calculating dependency, miscalculated the same by using the wrong multiplicand.

11. The concerns raised by the applicant seeking to invoke review jurisdiction falls within the confines of whether the decision rendered by the court in matters of quantum did proceed to error on facts and the law to occasion prejudice or an injustice to the Applicant. The subject matter here was on determining the multiplier and multiplicand of the claim raised before the trial court in the first instance. Thereafter, an appeal was filed before this court which was essentially dismissed for lack of merit save for the question on assessment of general for loss of dependency. I have made a comparison on the decision taken in the judgement dated 14.12.2023. Addressing myself, to the judgement of the court below on the facts and the law before it the learned trial magistrate adhered and observed the condition precedent that the deceased through the legal representative had proved the actual earnings or money's worth contributing to the support of the dependency before the date of his death. The dependence therefore had a reason of expectation or a pecuniary benefit from the continuous of his life. The starting point in the estimate of the dependency was value income provided for in the evidence before that court. The near relations to the deceased being the wife, the child, or other proved dependence pursuant to this action are illegible appropriately to benefit from the claim under dependency. The kind of trajectory in cases of this nature, follow within the scope of the principles in *Cookson v Knowles* (1978) 2 ALL ER 604 in which the court stated as follows:

> " This kind of assessment, artificial though it may be, nevertheless calls for consideration of a number of highly speculative factors, since it requires the assessor to make assumptions not only as to the degree of likelihood that something may actually happen in the future, such as the widow's death, but also as to the hypothetical degree of likelihood that all sort of things

might happen in an imaginary future in which the deceased lived on and did not die when in actual fact he did. What in that event would have been the likelihood of his continuing to work until the usual retiring age? Would his earnings have been terminated by death or disability before the usual retiring age or interrupted by unemployment or health? Would they have increased and if so, when and by how much? To what extent if any would he have passed on the benefit of any increase to his wife and dependent children?"

12. The court had the advantage of assessing the facts and legal arguments placed and advanced before it by the Applicant. It is also worth noting the subject matter on quantum being challenged had gone through a trial on the merits before the trial court. Accordingly, that court ideally afforded the first opportunity for the parties to canvas and ventilate the issues. It can be deduced from a proper reading of the judgment of this court which shows clearly there was an error apparent on the phase of the record which gave rise to an error of law. Having established that the court has jurisdiction to exercise review on the matter it suffices to say that the Applicant has made the threshold set in Paul Mwaniki (Supra). There are therefore, compelling reasons for this decision to be judicially reviewed. This error of law is decisive in leading the seating aside of the erroneous assessment on general damages for dependency arrived at on appeal as being Kshs 2,946,327 instead of a correct interpretation of the facts in answer to this question on the dependency stands at Kshs 35,630, 477. With that question in mind, the principal criterion and the rationality of this court reviewing its own decision and substitute it with the enshrined applicable guidelines on calculation of dependency as founded by the trial court is of significance to the justice of the matter. It is plausible that the error of law is within the jurisdiction of this court. The full potential of the case which was brought to the fore demonstrates that the errors of law in the face of the record were arrived on this court not exercising correct legal principals which were exhaustively dealt with by the primary court.

13. In the premises, the application for review is merited. I hereby set aside the award delivered on 14th December 2023 and substitute it as follows;

    The plaintiff's claim succeeds as follows;

    a. Liability at 100% in favour of the plaintiff

    b. General damages for loss of dependency Kshs. 35, 355, 927/-

    c. Loss of expectation of life Kshs. 100,000/-

    d. Pain & Suffering Kshs. 50,000/-

    e. Funeral expenses Kshs. 100,000/-

    f. Special damages Kshs. 24,550

    Total Kshs. 35, 630, 477/-

    The applicant shall have the costs of the application.

14. It is so ordered.

**DELIVERED, DATED AND SIGNED AT ELDORET ON THIS 25TH DAY OF APRIL 2024**

**R. NYAKUNDI**

**JUDGE**

In the Presence of

M/s Odwa for the Respondent/Appellant.

**morganomusundilawfirm@yahoo.com, office@nyairoadvocates.co.**