



REPUBLIC OF KENYA



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Butasi v CN alias CW (Next Friend/Guardian ad litem to GMM) (Civil Appeal E090 of 2022) [2023] KEHC 445 (KLR) (27 January 2023) (Ruling)

Neutral citation: [2023] KEHC 445 (KLR)

**REPUBLIC OF KENYA
IN THE HIGH COURT AT BUNGOMA
CIVIL APPEAL E090 OF 2022**

DK KEMEL, J

JANUARY 27, 2023

BETWEEN

EUPHEMIA NANZALA BUTASI APPELLANT

AND

**CN ALIAS CW (NEXT FRIEND/GUARDIAN AD LITEM TO
GMM) RESPONDENT**

RULING

1. The appellant/applicant herein has filed an application dated November 22, 2023 seeking the following reliefs:-
 1. Spent
 2. That this court be pleased to review and set aside its ruling and orders made on November 18, 2022.
 3. That pending the hearing and determination of the intended appeal, this court be pleased to issue interim orders restraining CNM Alias CNW the respondent herein from operating, withdrawing, transferring or dealing in any manner whatsoever with such account numbers:
 - a. SM Account No xxxx.
 - b. SBM Account No xxxx
 - c. SBM Account No xxxx
 - d. SMB Account No xxxx
 - e. SBM Account No xxxx
 - f. KB Account No xxxx



- g. CO-OPERATIVE BANK Account No xxxx
 - h. KCB Account No xxxx
 - i. KCB Account No xxxxx
 - j. KCB Account No xxxx and/or deal with all the properties of GMM and that Euphemia Nanzala Butasi as well as brothers and sister to GMM be allowed accessibility and due care to take him to Dr Wasike a neurosurgeon based in Eldoret Mediheal hospital forthwith.
4. That pending the hearing and determination of the intended appeal, the respondent, her relatives, agents or anybody acting on her behalf be restrained in terms of prayer 3 above.
 5. That pending hearing and determination of the intended appeal, there be stay of execution.
 6. That costs be in the cause.
2. The application is supported by the grounds on the face thereof and by the affidavit of the applicant sworn on even date. The appellants gravamen is *inter alia*; that this court dismissed the appellant's application dated October 7, 2022 *vide* its ruling dated November 18, 2022 on the basis of an existing application dated October 1, 2022 pending for review in the lower court in Bungoma Misc App No 179 of 2022 which has since been withdrawn; that at the time of making the ruling, the court was not made aware that GMM was involved in a road traffic accident on January 27, 2022 and sustained severe injuries including a stroke and thus the respondent is likely to interfere with his properties such as bank accounts if the court fails to intervene; that the trial court made *ex parte* and permanent orders without determining whether the proceedings were wrongly before it contrary to the [Mental Health Act](#); that the procedure for determining GMM unfit to protect his interests is under the [Mental Health Act](#) by way of a constitution petition; that the trial magistrate therefore issued illegal, unconstitutional and unlawful permanent orders without an inquiry having been conducted on the health of the said GMM; that the respondent is likely to interfere, transfer, withdraw monies from the disputed bank accounts and transfer or sell the properties at gave prejudice, losses and damage to the appellant, her children, brothers, beneficiaries of the estate if orders of stay of execution are not granted; that the application has been made without delay and that no prejudice will occur to the respondent if the orders sought are granted.
 3. The application is vehemently opposed by the respondent who filed a replying affidavit sworn on December 5, 2022 wherein she deposed *inter alia*; that the application is frivolous, vexatious and amounts to an abuse of court process as it is orchestrated at sanitizing a legal error already determined by this court *vide* its ruling dated November 18, 2022, to wit: the existence of a review application dated September 22, 2022; that this court is *functus officio*; that the applicant is gambling with this court; that it is unbelievable that the applicant could not have known of the existence of the said application dated September 22, 2022 yet she is the one who instructed the firm of Nabibia and Company Advocates to file the same on her behalf; that the review application before the trial court was withdrawn after this court pronounced itself on the application dated October 7, 2022 which had sought similar orders as the instant application; that the applicant wants to have a second bite at the cherry even after this court had rendered a ruling which captured the existence of the review application in the trial court and thus dismissed the application dated October 7, 2022 on the ground of the existence of the applicant's review application dated September 22, 2022; that the withdrawal of the said review application after delivery of the ruling delivered on November 18, 2022 is tainted with malice as it has been done with the sole objective of amending a legal irregularity as pointed out by this court in its ruling namely that the applicant had a choice of either reviewing or appealing the decision of the trial court but not both;



that the respondent's husband has already included her children in his employment documents and that the applicant and her children are strangers; that the request that she releases her sickly husband to third parties is in bad taste; that the application is intended to arm-twist this court into issuing orders that will compromise the conclusion of the matter as litigation must end.

4. The application was canvassed by way of written submissions.

Both parties have duly complied.

5. Mr Wachakana for the appellant submitted that when the court dismissed the application dated October 7, 2022 there was in existence other sufficient reasons including a medical report by the County Government of Trans-Nzoia state department of health at Mt Elgon, County Referral Hospital regarding the injuries sustained by GMM and who is needed to go there for further examination. It was also submitted that the ruling of November 18, 2022 ought to be reviewed because there was a pending application for review at the Magistrates court dated October 1, 2022 at the time of the ruling but which has now been withdrawn. Learned counsel further submitted that the applicant is a co-wife to the respondent as her status is recognized under Section 3 (5) of the [Law of Succession Act](#).

On the question whether an order of injunction should be issued, it was submitted that it was proper in order to protect the assets of GMM from being wasted by the respondent pending determination of the appeal.

On whether the trial magistrate had jurisdiction to issue the orders under the [Mental Health Act](#), it was submitted that the trial magistrate had no such jurisdiction under the said Act as it is only the High Court that has the requisite jurisdiction.

Reliance was placed in the case of [OWners Of Motor* Vessel Lilian "s" v Caltex Oil \(kenya\) Ltd](#) [1989]eKLR

6. Mrs Isiaho for the respondent submitted that the Appellant's application is almost similar to the one dated October 7, 2022 which this court dismissed on November 18, 2012. It was submitted that the only new prayers are the one for review and setting aside of the ruling dated November 18, 2022 and an order for access by relatives of GMM to access him and to take him to hospital. On whether a review should be granted, it was submitted that the applicant is out to have a second bite at the cherry in that it is orchestrated at sanitizing a legal error already determined by this court *vide* its ruling delivered on November 18, 2022. It was contended that the applicant is gambling with the court since the applicant withdrew the review application pending in the lower court after this court pronounced itself on the application dated October 7, 2022. It was further submitted that the applicant has not established any of the grounds for review under Order 45 Rule (1) and (2) of the [Civil Procedure Rules](#) to warrant the orders sought. Reliance was placed in the cases of *Pancras T Swai and Another v Jacob Kumali Mungala* C A No 149 of 2001 (unreported). *Abasi Belinda v Fredrick Kangwamu and another* [1963] E A 557.

Finally, it was submitted that the prayer for stay of execution must fail because of the lack of security being furnished by the Applicant for the due performance of the decree. It was urged that the application ought to be dismissed with costs.

7. I have considered the applicant's application, the rival affidavits and the submissions by both learned counsel. It is not in dispute that this court dismissed the applicant's application dated October 7, 2022 *vide* the ruling of November 18, 2022 now sought to be reviewed and/or set aside. It is also not in dispute that the main reason for the dismissal of that application was due to the pendency of a review and stay application dated September 22, 2022 pending determination by the trial. It is also not in dispute that a raft of the prayers save for a prayer for review and access in the present application are similar to those in the dismissed application dated October 7, 2022. It is not in dispute that based on



the foregoing, this court will not endeavor to analyze those other prayers that were dealt with in the ruling dated November 18, 2022 but will only deal with the new prayers with a view to determining whether the application herein has merit.

8. As regards the issue of whether the grounds for review have been met, it is necessary to look at the provisions of order 45(1) and (2) of the Civil Procedure Rules. They are as follows:

- “(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 judgement to the court which passed the decree or made the order without unreasonable delay.
- (2) A party who is not appealing from a decree or order may apply for a review of judgement notwithstanding the pendency of an appeal by some other party except where the ground of such appeal is common to the applicant and the appellant, or when being respondent, he can present to the appellate court the case on which he applies for review.”

From the foregoing provisions a court can only review its orders if the following grounds exist namely;

- a. There must be discovery of a new and important matter which, after the exercise of due diligence, was not within the knowledge of the applicant at the time the decree was passed or the order was made; or
- b. There was a mistake or error apparent on the face of the record; or
- c. There were other sufficient reasons; and
- d. The application must have been made without undue delay.

The applicant herein has maintained that the reason she is seeking for a review of the orders made on November 18, 2022 is that she has discovered a new and important matter which was not within her knowledge at the time the order was made namely the existence of withdrawal of a pending application for review before the trial court and that, had this court been aware of the same, then the ruling could not have gone the way it went. Indeed, vide the ruling of this court dated November 18, 2022, the court noted the existence of the review application dated September 22, 2022 pending before the trial court and that the court noted as follows;

“ If the review and stay application in the lower court succeeds, then the present application will become moot as the applicant will then have been vindicated and given an opportunity by the trial court to participate in the trial.”



It is noted that the applicant's pending application dated September 22, 2022 in the trial court which had been filed by the firm of Nabibia & Co Advocates on instructions of the Applicant was finally withdrawn on the November 22, 2022 four days after this court delivered the ruling dated November 18, 2022. It is therefore obvious that the Applicant had knowledge of the existence of the application at the time of filing her application dated October 7, 2022 which was dismissed on that ground and that she needed to remove the obstacle which had led to the dismissal of her application dated October 7, 2022 by this court. Hence, I find the conduct of the applicant in withdrawing the application dated September 22, 2022 in the trial court four days after the court's ruling to be mischievous and aimed at having a second bite at the cherry. I am inclined to agree with the respondent's claim that the applicant's objective is to amend or sanitize a legal irregularity as pointed out by this court's ruling namely that the applicant had a choice of either reviewing or appealing the decision of the trial court but not both. I am satisfied that the applicant had knowledge of the pending application dated September 22, 2022 in the trial court and hence the same is not a discovery of a new matter at all. In fact, the respondent had annexed a copy of the said application in her response to the applicant's application dated October 7, 2022 and that the same was one of the issues deliberated upon by this court in its ruling dated November 18, 2022 in which the applicant's application dated October 7, 2022 was dismissed on that ground. The Court of Appeal in the case of *Pancras T Swai v Kenya Breweries Ltd* [2014] eKLR held that:

“ In *Francis Origo and another vs Jacob Kumali Mungala* [CA Civil Appeal No 149 of 2001 (unreported), the High Court dismissed an application for review because the applicants did not show that they had made discovery of new and important matter or evidence as the witness they intended to call was all along known to them and in any case, the applicants had filed an appeal which was struck out before the filing of the application for review. The court stated.

“ Our parting shot is that an erroneous conclusion of law or evidence is not a ground for a review but may be a good ground for appeal. Once the appellants took the option of review rather than appeal, they were proceeding in the wrong direction. They have now come to a dead end. As for this appeal, we are satisfied that the learned commissioner was right when he found that there was absolutely no basis for the appellant's application for review. We have therefore no option but to dismiss this appeal with costs to the Respondent.”

Again, in *Abasi Belinda v Fredrick Kangwamu* [1963] EA 557 the court held as follows; -

“ a point which may be a good ground of appeal may not be a good ground for an application for review and an erroneous view of evidence or of law is not a ground for review though it may be a good ground for appeal.”

The applicant herein seems to suggest that this court went into error while dismissing her application dated October 7, 2022 oblivious of the withdrawal of the application dated September 22, 2022 pending before the trial court. However, I find that the Applicant has not availed any evidence to the effect that there is an error apparent on the face of the record since what is on record is that the applicant's application dated September 22, 2022 filed in the trial court was available to see like a sore thumb and that the same formed the basis of the arguments by learned counsels leading to the ruling dated November 18, 2022. It is trite that a review may be granted whenever the court considers that it is necessary to correct an apparent error or omission on the part of the court and that the error must be self-evident and should not require an elaborate argument to be established. I find no such error exists on the record as the applicant has not availed evidence in that regard.



9. Order 45 of the *Civil Procedure Rules* also provides for review on other sufficient reasons. The applicant has not presented any other sufficient reasons to justify this court to interfere with the ruling of November 18, 2022. If the applicant is talking of the other prayers in the application, then it is clear that the same prayers are similar to those in the dismissed application dated October 7, 2022. The only issue raised is for an order that the relatives of GMM be given access so as to enable them take him to hospital for medical check-up. The Respondent has countered this assertion by contending that the Applicant and her associates are strangers and that she has been the one taking care of the said GMM all along before this case was lodged. The respondent has also indicated that she is on top of things regarding the management of the said GMM. As the issue of the status of the applicant as a wife to the said GMM is yet to be determined either in this appeal or elsewhere, I find it would be appropriate to let the *status quo* remain regarding the management of GMM with respondent pending the determination of the appeal. Hence, the said prayer is declined.
10. It is noted that the application by the applicant has sought for orders of injunction and stay of execution. I find the same orders to be a replica of those in the application dated October 7, 2022 which was dismissed culminating in the ruling dated November 18, 2022 now sought to be reviewed. If the prayers contained in the dismissed application dated October 7, 2022 have again been raised in the present application, then the doctrine of *functus officio* must kick in in the sense that this court had already determined the matter and it cannot re-examine them again. In any event, the application though seeking for stay of execution pending appeal, has utterly failed to comply with the clear provisions of Order 42 Rule 6 of the *Civil Procedure Rules* regarding the furnishing of security for the due performance of the decree which will ultimately be binding upon her.
11. Finally, the applicant has raised an issue to do with lack of jurisdiction by the trial court to hear and determine the dispute in question. I am not sure whether the same was raised as an objection on point of law or through an application. The memorandum of appeal filed herein is also silent on the same. Be that as it may, the applicant should reserve the said issue and to canvass the same during the hearing of the appeal.
12. In view of the foregoing observations, it is my finding that the appellant's application dated November 4, 2022 lacks merit. The same is dismissed with costs to the respondent. Parties are hereby directed to set down the appeal for hearing as a matter of priority.

DATED AND DELIVERED AT BUNGOMA THIS 27TH DAY OF JANUARY, 2023

D. KEMEI

JUDGE

In the presence of

Miss Kwoba for Wachakana for Appellant/Applicant

No appearance Mrs. Isiaho for Respondent

Kizito Court Assistant

