SSB v MLM (Family Appeal E037 of 2021)
[2023] KEHC 27425 (KLR) (22 November 2023) (Judgment)

Neutral citation: [2023] KEHC 27425 (KLR)

REPUBLIC OF KENYA

IN THE HIGH COURT AT MOMBASA

FAMILY APPEAL E037 OF 2021

G MUTAI, J

NOVEMBER 22, 2023

BETWEEN

SSB ..... APPELLANT

AND

MLM ..... RESPONDENT

(Appeal from the ruling and the decree of the Trial Court delivered on 31st November 2021 by Hon. V. Yator, Principal Magistrate, in Tononoka Children Case No. 250 of 2019.)

JUDGMENT

Introduction

1. This Appeal arises from the ruling and the decree of the Trial Court delivered on 31st November 2021 by Hon. V. Yator, Principal Magistrate, in Tononoka Children Case No. 250 of 2019.

2. The Appellant was the Defendant in the trial court case, while the Respondent was the Plaintiff. The Court granted custody to the Respondent with reasonable access by the Appellant.

3. The Appellant, being aggrieved, appealed against the said decision. Her appeal was premised on 10 grounds, which, in my view, may be condensed into 1, that the trial court erred in reviewing its judgment.

The Pleadings in the Trial Court

4. From the outset, it is necessary to set out that the Appellant and the Respondent are, respectively, the mother and father of two male children, MM , born on 3rd May 2016 and AM , born on 3rd December 2017. At the time of the delivery of this Judgement, the two children are respectively 7 years, 6 months and 5 years, 11 months old.

5. The Respondent instituted the Children Court Case vide the Plaint dated 27th May 2019, substantively seeking the following reliefs:

    1. A declaration that both the Plaintiff and Defendant have equal parental responsibility for the issues MM and AM ;

    2. The legal custody of the minors be joint between the parties;

    3. Actual or physical custody do vest in the Plaintiff with reasonable access by the Defendant; and

    4. Costs.

6. The Respondent further averred in the Plaint that the parties separated in 2018, with the Defendant retaining custody of the minors.

7. The Respondent was thus apprehensive that without the intervention of the Children's Court, the Appellant would interfere with the welfare and best interest of the children.

8. The Appellant entered appearance and filed Defence dated 17th June 2019, in which the averments in the Plaint were entirely denied, and the Appellant prayed that the suit be dismissed.

Evidence Adduced by the Parties

9. During trial, PW1, the Respondent testified that he was the biological father of the minors. He relied on his witness statement and documents filed in court.

10. It was his case that they separated on 25th April 2018, and the Appellant retained the custody of the minors.

11. He testified that the Appellant denied him the custody of the minors and frustrated his effort to see them.

12. He deposed that the Appellant was suicidal and ought not to have custody of the minors.

13. He testified that the children were hesitant to return to the Appellant whenever they visited him.

14. He further testified that the Appellant was using the children to revenge against him following the love lost between them.

15. The Appellant, as Defendant, in her oral testimony, denied that she had frustrated the Respondent, then the Plaintiff, from seeing the children.

16. She testified that there was a parental responsibility agreement dated 9th April 2019 vide which she was to have actual custody with the Respondent having limited access for 2 hours every weekend.

17. Pursuant to the parental agreement, the Respondent was to provide for the children's educational needs until the Appellant secured employment and also to provide for their maintenance by paying her Kes.12000/- per month.

18. The Trial Court considered the matter and delivered its Judgement on 27th May 2020. In the Judgement, the court directed as follows:

    a. The Plaintiff and Defendant shall have joint legal custody, the Defendant shall have actual custody and the Plaintiff unlimited access;

    b. The Plaintiff to pay fees and the Defendant to cater for school-related expenses;

c. Plaintiff to continue paying Kes.12,000/- monthly maintenance;

d. Both parties to cater for clothing needs;

e. Plaintiff shall cater for the medical needs of the children;

f. Each party to bear own costs.

19. Subsequently, the parties entered a consent dated 19th April 2021, and the Respondent also filed an Application dated 5th July 2021 seeking to review the Judgement dated 27th May 2020. Vide its Ruling and Order dated 3rd November 2021 and issued on 5th November 2021, the court below reviewed the Judgement to the effect thus:

a. That Plaintiff will henceforth have actual custody, with the Defendant having custody on alternate weekends from Saturday morning to Sunday evening and half of the period on school holidays;

b. The Defendant to be picking and dropping the children at the Plaintiff's place;

c. Access to begin from 1st week of December 2021 to allow the children to settle;

d. The Defendant to enjoy access by way of phone calls in the evenings and weekend and important Muslim holidays to be shared in an alternating manner;

e. Defendant to cater for half the school fees from January 2022; and

f. The Plaintiff will continue providing for medical expenses through NHIF, and the Defendant will cater to costs not provided by NHIF.

20. The Order also stated that it was premised on the email and consent of both Plaintiff and Defendant.

21. The Appellant was aggrieved with the review hence this Appeal.

Submissions of the Parties

22. The Appellant submitted substantively that the impugned review of the Judgement dated 27th May 2020 amounted to the trial court sitting on its own appeal.

23. It was submitted that the review did not meet the legal threshold for review under Section 80 of the *Civil Procedure Act* and Order 45 of the *Civil Procedure Rules*.

24. The Respondent urged the Court to dismiss the appeal.

Analysis

25. I have perused the Record of Appeal as well as the submissions and authorities filed in court.

26. This being a first appeal, this court is under a duty to re-evaluate and assess the evidence and make its own conclusions. It must, however, keep at the back of its mind that a trial court, unlike the appellate court, had the advantage of observing the demeanour of the witnesses and hearing their evidence first hand.

27. In the case of *Mbogo and Another v. Shah* [1968] EA 93 the Court stated:

> "...that this Court will not interfere with the exercise of judicial discretion by an inferior court unless it is satisfied that its decision is clearly wrong, because it has misdirected itself or because it has acted on matters on which is should not have acted or because it failed to

take into consideration matters which it should have taken into consideration and in doing so arrived at a wrong conclusion."

28. The duty of the first appellate Court was settled by Clement De Lestang, VP, Duffus and Law JJA, in the locus classicus case of *Selle & another v Associated Motor Boat Company and Others* [1968]EA 123, where they stated as follows:-

> " .. this court is not bound necessarily to accept the findings of fact by the court below. An appeal to this court ... is by way of re-trial and the Court of Appeal is not bound to follow the trial Court's finding of fact if it appears either that he failed to take account of particular circumstances or probabilities or if the impression of demeanour of a witness is inconsistent with the evidence generally."

29. The Court is to bear in in mind that it had neither seen nor heard the witnesses. It is the trial court that has observed the demeanor and truthfulness of those witnesses. However, documents still speak for themselves. The observation of documents is the same as the lower court as parties cannot read into those documents matters extrinsic to them.

30. Further, in the case of *Peters v Sunday Post Limited* [1958] EA 424, court therein rendered itself as follows:-

> " It is a strong thing for an appellate court to differ from the findings on a question of fact, of the judge who had the advantage of seeing and hearing the witnesses...But the jurisdiction to review the evidence should be exercised with caution: it is not enough that the appellate court might have come to a different conclusion..."

31. The issue that fall for this Court's determination is whether the Trial Court erred in law and fact in reviewing the Judgement dated 27th May 2020 as per the Order dated 3rd November 2021.

32. In determining the Appeal, this court has also to take into consideration the welfare and best interest of the 2 affected minors. I understand Article 53(1) of the *Constitution* of Kenya provides that a child's best interests are of paramount importance in every matter concerning the child. The constitutional provision is reiterated by Section 8 of the *Children Act* 2022 Act No 29 of 2022 which provides as follows:

(1) In all actions concerning children, whether undertaken by public or private social welfare institutions, courts of law, administrative authorities or legislative bodies—

(a) the best interests of the child shall be the primary consideration;

(b) the best interests of the child shall include, but shall not be limited to the considerations set out in the First Schedule. 19 No. 29 of 2022 Children.

2. All judicial and administrative institutions, and all persons acting in the name of such institutions, when exercising any powers conferred under this Act or any other written law, shall treat the interests of the child as the first and paramount consideration to the extent that this is consistent with adopting a course of action calculated to—

(a) safeguard and promote the rights and welfare of the child;

(b) conserve and promote the welfare of the child; and

(c) secure for the child such guidance and correction as is necessary for the welfare of the child, and in the public interest.

(3) In any matters affecting a child, the child shall be accorded an opportunity to express their opinion, and that opinion shall be taken into account in appropriate cases, having regard to the child's age and degree of maturity.

33. The aforesaid principles are well anchored in the *Convention on the Rights of the Child* to which Kenya is a party. *The Convention on the Rights of the Child* (CRC) that Kenya ratified on 30 July 1990, Article 3 provides that:

1. In all actions concerning children, whether undertaken by public or private social welfare institutions, courts of law, administrative authorities or legislative bodies, the best interests of the child shall be a primary consideration.

2. States Parties undertake to ensure the child such protection and care as is necessary for his or her well-being, taking into account the rights and duties of his or her parents, legal guardians, or other individuals legally responsible for him or her, and, to this end, shall take all appropriate legislative and administrative measures.

34. I therefore have no doubt that there are enough safeguards to guide this court in arriving at a finding founded on the welfare and best interest of the children in this case. This includes the inclination to find whether the decision of the trial court took into consideration the welfare and best interest of the affected minors.

35. However, in assuring the welfare and best interest of the children, I have to refer to the Judgement dated 27th May 2020 and the subsequent review dated 3rd November 2021 to discern whether the review met the legal threshold.

36. In the case of *National Bank of Kenya v Ndungu Njau* (1997)e KLR the court stated as follows:

> 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. The error or omission must be self-evident and should not require an elaborate argument to be established. It will not be a sufficient ground for review that another Judge could have taken a different view of the matter. Nor can it be a ground for review that the court proceeded on an incorrect exposition of the law and reached an erroneous conclusion of law. Misconstruing a statute or other provision of law cannot be a ground for review.

37. The jurisdiction to review is underpinned in Section 80 of the *Civil Procedure Act* which states thus:

" Any person who considers himself aggrieved—

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

(b) by a decree or order from which no appeal is allowed by this Act, may apply for a review of judgment to the court which passed the decree or made the order, and the court may make such order thereon as it thinks fit".

Section 63 (e) of the *Civil Procedure Act* states that:

> "In order to prevent the ends of justice from being defeated, the court may, if it is so prescribed make such other interlocutory orders as may appear to the court to be just and convenient

38. Order 45 of the *Civil Procedure Rules* provides for Review and it states 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 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.
>
> (2) A party who is not appealing from a decree or order may apply for a review of judgment 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 the review"

39. I also associate myself with the reasoning of Kuloba J (as he then was) in *Lakesteel Supplies v. Dr. Badia and Anor Kisumu* HCCC No. 191 of 1994 where he opined that:

> " The exercise of review entails a judicial re-examination, that is to say, a reconsideration, and a second view or examination, and a consideration for purposes of correction of a decree or order on a former occasion. And one procures such examination and correction, alteration or reversal of a former position for any of the reasons set out above. The court of review has only a limited jurisdiction circumscribed by the definitive limits fixed by the language used in Order 44 rule 1, of the *Civil Procedure Rules*. A review is by no means an appeal in disguise whereby an erroneous decision is reheard and corrected, but lies only for patent error. It can only lie if one of the grounds is shown, one cannot elaborately go into evidence again and then reverse the decree or order as that would be acting without jurisdiction, and to be sitting in appeal. The object is not to enable a judge to rewrite a second judgement or ruling because the first one is wrong...On an application for review, the court is to see whether any evident error or omission needs correction or is otherwise a requisite for ends of justice. The power, which inheres in every court of plenary jurisdiction, is exercised to prevent miscarriage of justice or to correct grave and palpable errors. It is a discretionary power. In the present application it has not been said or even suggested that after the passing of the order sought to be reviewed, there is a discovery of new and important matter of evidence which, after the exercise of due diligence, was not within the applicant's knowledge or could not be produced by him at the time when the ruling was made."

40. Flowing from the authorities, the Jurisdiction to review is limited. It is founded on the discovery of new and important matter or evidence which, after the exercise of due diligence, was not within a party's 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.

41. From the face of the Judgement, there was nothing to review in the manner stated in the Application dated 5th July 2021 and the consequential Order dated 3rd November 2021. I say so because there was no mistake or error apparent on the face of the record demonstrated just as there was no new evidence unavailable during trial or sufficient cause. The Application though christened as a review was not an Application for Review in the eyes of the law.

42. The Court of Appeal in *Mahinda v. Kenya Power & Lighting Co. Ltd* [2005] 2 KLR 418 expressed itself as follows:

> "The Court has however, always refused invitations to review, vary or rescind its own decisions except so as to give effect to its intention at the time the decision was made for to depart from this would be a most dangerous course in that it would open the doors to all and sundry to challenge the correctness of the decisions of the Court on the basis of arguments thought of long after the judgement or decision was delivered or made."

43. Consequently, I agree with counsel for the Appellant that the Respondent would better be placed in law to challenge the Judgement dated 27th May 2020 by way of an appeal as opposed to review. The jurisdiction of this Court to review its orders is limited under Section 80 of the *Civil Procedure Act* and Order 45 of the *Civil Procedure Rules*. The Application did not fall within the stated provisions of the law.

44. In the case of *Dock Workers Union & 2 others v Attorney General & another Kenya Ports Authority & 4 others (Interested Party)* [2019] eKLR it was therefore held that: -

> "In this regard, for a Court to review its own orders, it must be demonstrated that there is discovery of new and important matter or evidence. It must also be shown that the new evidence was not within the knowledge of the party seeking review or could not be produced at the time the orders were made. Such party must also satisfy the Court that this was the case even after exercise of due diligence. A Court will also review its orders if it is demonstrated that there is some mistake or error apparent on the face of the record, or for any other sufficient reason. The error must be evident on the face of the record and should not require much labour in explanation. An application for review must also be made without unreasonable delay."

45. The *Code of Civil Procedure*, Volume III Pages 3652-3653 by Sir Dinshaw Fardunji Mulla states:

> "The power of review can be exercised for correction of a mistake and not to substitute a view. Such powers should be exercised within the limits of the statute dealing with the exercise of power. The review cannot be treated as an appeal in disguise. The mere possibility of two views on the subject is not ground for review. The review proceedings are not by way of an appeal and have to be strictly confined to the scope and ambit of Order 47, rule 1, *Code of Civil Procedure*...The review court cannot sit as an Appellate Court. Mere possibility of two views is not a ground of review. Thus, re-assessing evidence and pointing out defects in the order of the court is not proper."

46. It is also clear to this court that as the children are of tender age, no sufficient evidence was led that would justify displacing the presumption that custody of the children with tender years to be left with the mother. Like I have stated above the welfare and best interest of the children must be the foremost consideration when making a decision that affect children. The learned trial magistrate consequently

erred and in the absence of evidence warranting review resorted to sitting on an appeal against her own decision. To that extend, I interfere with the decision of the trial court.

47. The Court of Appeal in the case of *J O versus SAO* [2016] eKLR stated as follows in paragraph 13: -

> " There is plethora of decisions by this court as well as the High Court that in determining matters of the custody of the children, especially of tender age, except where exceptional circumstance exist, the custody of such children should be awarded to the mother, because mothers are best suited to exercise and control of the children. Exceptional circumstances include the mother being unsettled, where the mother has taken a new husband; where she is living in quarters that are in disgraceful or immoral. See *Sospeter Ojuamong versus Lynnette Amondo Otieno* Civil Appeal No. 175 of 2006; *Karanu versus Karanu* [1975] EA 18 and *Githunguri versus Githunguri* [1979]eKLR".

48. Therefore, the exercise of unfettered discretion has to be premised within the bounds of the law. Otherwise, it will be capricious and whimsical and defeat the very purpose of serving justice that the law is set to achieve.

49. I have said enough to demonstrate that the Appeal is merited.

Determination

50. In view of the foregoing I make the following Orders:

    a. The Appeal is allowed;

    b. The Decision of the Trial Court dated 3rd November 2021 is set aside;

    c. The Judgement dated 27th May 2020, subject to the Consent Order dated 19th April 2021, is reinstated; and

    d. Each party shall bear own costs of the Appeal.

DATED AND SIGNED AT MOMBASA THIS 22ND DAY OF NOVEMBER 2023.

GREGORY MUTAI

JUDGE

In the presence of: -

Mr. Gikandi for the Appellant;

Mr. Mohamed Liyakat Mohamed, the Respondent (pro se litigant);

Arthur – Court Assistant