REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA

AT GARSEN

MISC. APPLICATION NO E001 OF 2020

AMW……..…….…….…. PLAINTIFF

VERSUS

ZA…….... DEFENDANT

RULING

R. Nyakundi, Judge

Zeynab Abdalla Ismail for defendant

Soita Wafula & Advocates

This is not an appeal but a notice of motion filed under Order 45 Rules (1) and (2) under Order 51 of the Civil Procedure Rules and Section 1(A), 1(B) and 3(A) of the Civil Procedure Act and Article 50 of the Constitution seeking the following orders:

> **(a) That the Honorable court be pleased to stay the orders issued on 27.2.2020 and 19.8.2020 by Hon. Swaleh Mohammed SRK in Lamu. Divorce cause no 8 of 2015 and have it subsequently reviewed. In support of the application is an affidavit by Learned Counsel Mr Socra Victor Wafula on behalf of the applicant.**

In reply, the respondent ZA Ismail opposed the application in the replying affidavit filed in court on 22.11.2020

Determination

The Notice of Motion directly falls within the scope of Section 80 of the Civil Procedure Act and order 45 Rule (1) of the civil procedure rules on the power of review.

Traditionally, the jurisdiction on review is exclusively to the court or Judge who passed the decree or order. The material before court in an application for review of a decree or order of court for it to succeed must satisfy the following criteria:

> **(a) Discovery of the need and importance matter or evidence as is referred to Rule (1) of Order 45, or the existence of a clerical or arithmetic or mistake or error apparent on the face of the record or for due sufficient reasons.**

I agree with this statutory provisions on the power of review as is stated in **Nyamogo & Nyamogo v Kogo (2001) EA 174** the court of appeal said that:

> **"an error apparent on the face of the record cannot be defined, precisely or exhaustively. There being an element of indefiniteness, inherent in its nature and it must be left to be determined judiciary on the facts of the case.**
>
> **There is a real distinction between a mere erroneous decision and the error apparent on the face of the record. Where an error on a substantial point of the Law stares one in the face and there could reasonably, be no two opinions, a clear case of error would be made out.**
>
> **On the face of the record will be made over. An error which has to be long drawn process by long drawn process of reasoning at an parties where there may conceivably. The two opinions can hardly be said to be an error apparent on the face of the record**

Again, if a view adopted by the court in the original record is possible one, it cannot be an error or wrong view is certainly no grounds for a reviewed although it may be for an appeal"

The question that has been referred to this court is whether the orders issued on 27.2.2020 on attachment of salary of the applicant pursuant to the decree on Divorce Cause No. 8 of 2015 is reviewable under order 45 Rules (ii) of the Civil Procedure Rules.

The fact of the matter is that even the provisions under Section 1 (A)and 1 (B) of the Civil Procedure Act are simply not enabling the applicant in his quest to further an objection to the execution on attachment of salary. The said provisions are intended to determine greater fundamental issues and hence ensure proper administration of justice. In the case of **Purdy v Cambran CCRT1 1999/0847/B1**, the court addressed incidentals on overriding objective in so clear circumstances as follows:

"The Civil Procedure Rules are a new procedural code with an overriding objective enabling the court to deal with cases in accordance with considerations which include those to be found in rule 1.1 (2) One element expressly included in rule 1.1 (2) as guiding the court towards dealing with cases justly is that cases are dealt with expeditiously and fairly…The court has to seek to give effect to the overriding objective when it exercises any powers given to it by the rules. This applies to applications to struck out a claim. When the court is considering, in a case to be decided under Civil Procedure Rules, whether or not it is just in accordance with the overriding objective to struck out a claim, it is not necessary or appropriate to analyze that question by reference to the rigid and overloaded structure which large body of a decision under the former rules had constructed"

Although these principles, are enunciated specially under the comparative jurisprudence it is quite instructive they appear to be in conformity with our Section 1 (A) the Civil Procedure Act on overriding objective.

Having considered the Notice of motion and the commencement of the proceeding premised under Section 80 of the Act and order 45 Rule (1) of the CPR it goes against the backdrop of the letter and spirit of the provisions. It is not in this court's place to second guess that a party aggrieved from a decree or order passed by a court has the first opportunity to approach that court which issued the impugned order or ruling to consider the application. It is worthy to note that the in reality the decree or order of the subordinate court could not be impeached by way of a motion for review unless specific orders on certiorari or prohibition under order 53 of the Civil Procedure Rules are invoked.

With reference to this application, it must be observed that no new and important evidence that has been availed by the applicant which was within the knowledge or on due diligence, he was not able to provide it when the impugned decree was passed. Further applying the test under the power of review there is no error apparent on the face of the record or any other sufficient evidence to permit the court to exercise discretion in favor of the applicant. The court is at pains to understand why the applicant failed to safely seek the review orders before the Kadhi's court. The applicant has a duty to appreciate that there is a long established fundamental distinction between an appeal and review.

It follows therefore that a remedy for review of the decree or order of the trial court is entirely misconceived and if the court entertains it, then it has totally exceeded its jurisdiction in allowing the review merely because the applicant is totally unhappy with attachment of his salary. Consequently, the notice of motion dated 22.10.2020 lacks merit and its dismissed with costs.

DATED, SIGNED AND DELIVERED AT MALINDI THIS 22ND DAY OF JANUARY 202I

R. NYAKUNDI

JUDGE

This Ruling has been dispatched electronically to the respective emails of the advocates in the matter.

(soitaadvocates@gmail.com and mabruk-computer@gmail.com)