REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA

AT MOMBSA

FAMILY APPEAL NO. 29 OF 2019

NAWAL KHALIFAN...APPELLANT

VERSUS

AHMED LADHA..RESPONDENT

RULING

1. On 26th November,2020 this court delivered a ruling in respect of the Appellant's /Applicant's notice of motion dated 11th August, 2020 seeking stay of execution of the judgment dated 10th July, 2020 pending hearing and determination of the intended appeal. Having considered the application, the court dismissed the same on grounds that if granted, it would translate to the subjects of these proceedings cease their studies at Aga khan Academy which the appellant claims is very expensive and therefore not able to pay for lack of a clear source of income.

2. Upon delivery of the ruling, Mr. Siminyu counsel for the appellant noted and actually drew to the attention of the court that some parts of the ruling made reference to some facts which were not raised or canvassed in this case. Consequently, the Appellant /applicant filed a notice of motion dated 9th December, 2020 seeking to have the court review, vary or set aside the orders dated 26th November 2020.

3. The application is predicated upon grounds stated on the face of it and an affidavit sworn on 9th December, 2020 by the applicant. Subsequently, the applicant made reference to paragraph 30 of the ruling dated 26th November, 2020 stating that the reference made to the effect that the applicant has another family did not arise in the proceedings. Further, that the applicant did refer to and produced through his further affidavit a letter of termination of employment from his former employer Petrol city. He further 8averred that the court's reference at paragraphs 43,44 and 45 that the applicant is endowed with resources by virtue of owning a five-storey building in town was erroneous as the issue was not canvassed during the proceedings and that the applicant does not own such property.

4. The applicant further stated that at no time did the lower court and high court direct that the subjects herein do continue with studies at Aga khan Academy. In his view, the erroneous referral to facts not connected with this case is prejudicial to the applicant hence should be reviewed after reconsidering the correct materials placed before it.

5. In response, the respondent filed a replying affidavit sworn on 16th December,2020 conceding that paragraph 30 of the subject ruling in so far as it relates to another family was not correct and that paragraphs 45 and 46 connecting the applicant to ownership of a five storey building was also incorrect.

6. She urged the court to delete from the ruling the specified paragraphs and leave the order dismissing the application intact. That the order sought to be reviewed is in the best interest of the child.

7. She further stated that, when the application for stay of execution was made, there was no document attached to show that the appellant had lost his job. Further, that during the hearing before the lower court, there was not mention of the applicant having lost his job. She further claimed that the applicant was a beneficiary of kshs11million share out of Succession cause 20/15

8. In his rejoinder, the applicant filed a further affidavit sworn on 21st January,2021. He stated that, it was hypocritical for the respondent to question his letter of termination of employment in court. He contended that he was jointly operating various bank accounts with the respondent who is fully aware that they do not have funds.

9. He further averred that he had consulted the respondent about transferring the children to a cheaper school contrary to the respondent's denial.

10. He expressed disgust to the respondent's reference to a figure of Ksh 404,000 as his monthly salary which figure was applicable the

year 2011 when he was engaged in consultancy with Petrol Oil a contract that expired long time age. He challenged the respondent to produce evidence to show that he had some source of income either from business or employment. He contended that he had no source of income to continue paying such amount of school fees for the children at Aga khan academy.

11. During the hearing, Mr. Siminyu counsel for the appellant literally reiterated the averments contained in the affidavit in support of the application and a further affidavit in response to the replying affidavit. Counsel urged the court to delete the stated paragraphs in the ruling dated 26th November, 2020 in so far they made reference to facts that did not feature in the proceedings or have any bearing with this case.

12. Mr. Siminyu urged that if the impugned paragraphs were deleted, the court would have a reason to reconsider its position and review the orders by granting stay of execution pending the outcome of the intended appeal. That the appellant /applicant cannot be forced to pay school fees for the children when he had no legitimate source of income nor was any evidence submitted to prove any such income.

13. Learned counsel dismissed the claim by the respondent that the appellant had gotten a share of Kshs11million out of his grandfather's estate in a succession cause. He contended that there is an appeal in respect of the said succession cause. Lastly, counsel urged the court to apply sections 91, 98 and 99 of the Children Act to make orders it deems fit. He beseeched the court to apply its inherent powers to make ends of justice meet.

14. On her part, M/s Osino for the respondent who adopted the averments contained in the affidavit in reply urged the court to delete the impugned paragraphs which are referring to facts not related to this case and still retain the final verdict.

15. Counsel questioned the claim that the appellant lost his job 2018 yet no letter was produced before the trial court. Ms Osino submitted that from the appellant's bank statements up to 2016, he was earning good salary and that after divorcing things changed.

16. According to learned counsel, the appellant was withholding crucial information from the court. Ms Osino submitted that the appellant was a beneficiary of some Kshs 11 million from his grandfather's estate in succession cause No 20/15. Regarding the orders made by J. Thande and P.J Otieno, counsel submitted that, both courts directed that children to continue schooling in Agakhan Academy. Ms Osino opined that this court was being asked to sit as an appellate court on its own decision.

17. In his rejoinder to the submissions, Mr. Siminyu urged the court to summon the purported employer to the appellant to appear and confirm if the appellant was and still is an employee to that organization. That the bank statements relied on as proof of the applicant's sources of income are old records which are not a true reflection of the current situation.

<u>Determination</u>

18. I have considered the application herein which was filed within reasonable time, responses thereto and oral submissions by both counsel. The only issue that arise for determination is whether the application has met the threshold for grant of review orders.

19. Under Order 45 rule1, 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**
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> **(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".**

20. It is trite that, to grant or not grant review orders is at the discretion of the court. In the case of **<u>National Bank of Kenya Ltd v Ndungu Njau (1996) KLR 469 (CAK) at page 38,</u>** the court stated 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. The error or omission must be self-evidence and should not require an elaborate argument to be established. It will not be sufficient ground for review that another Judge could have taken a different view of the matter nor could it be a ground for review that the court proceeded on an incorrect expansion of the law".**

21. However, review application shall not be used as a back door to substitute an appeal. The application must meet the threshold provided under Order 45 Rule 1 which includes proof of an apparent error or mistake on the face of the record or discovery of new matter or evidence which was not within the knowledge of the appellant after due diligence. An error on the face of the record was succinctly addressed in the case of **<u>Nyamogo and Nyamogo Vs Kogo (2001) E A 174</u>** where the court held 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 very nature, and it must be left to be determined judicially on the facts of each case. There is real distinction between a mere erroneous decision and an error apparent on the face of the record. Where an error on a substantive point of law stares one in the face, and there could reasonably be no two opinions, a clear case of error apparent on the face of the record would be made out. An error which has to be established by long drawn process of reasoning or on points where there may conceivably be two options, can hardly be said to be an error apparent on the face of the record. Again, if a review adopted by the court in the original record is a possible one, it cannot be an error or, wrong record is certainly no ground for a review although it may be for an appeal".**

22. To echo the point that an application for review should not be crafted in a way so as to indirectly sneak in disguised appeal, the court of appeal had this to say in the case of **Pancras T.Swai Vs Kenya Breweries Limited (2014) e KLR**

> **"It seems clear to us that the appellant, in basing his review application on the failure by the court to apply the law correctly faulted the decision on a point of law. That was a good ground for appeal but not a ground for an application for review. If parties were allowed to seek review of decisions on grounds that the decisions are erroneous in law; either because a judge has failed to apply the law correctly or at all, a dangerous precedent would be set in which court decisions that ought to be examined on appeal would be exposed to attacks in the courts in which they were made under the guise of review when such courts are functus officio and have no appellate jurisdiction".**

23. In the instant case, the main grounds cited for review are; that the court made reference to certain matters of fact which were not urged in court or pleaded in the pleadings. Among the affected paragraphs in my ruling of 26th November,2020 is paragraph 30 in which the court made reference to the effect that the appellant has another family. Equally, at paragraph 44 and 45, the court referred to the appellant as a person of means owing to his ownership of a five storey building and that there was not proof of having lost his job. As correctly stated and conceded by the respondent and her lawyer Ms Osino, it true that those facts have no connection with the facts of this case.

24. After carefully perusing the pleadings and proceedings before me in relation to the application giving rise to the impugned ruling, the basis for this court's incorrect inclusion of the impugned content in those paragraphs can be traced to a mix up of files and in particular file number 124of 97 which was pending ruling at the same time. While writing the ruling of 26th November, 2020 in this file, I was at the same time preparing a ruling in file No 124/97 in the estate of Salim Karama Awadh(Deceased) then due for ruling on 3rd December, 2020 where an application challenging committal to civil jail was the subject of the ruling. It was in that file that the issue of the appellant challenging committal to civil jail for failing to pay an outstanding debt from 2011 arose hence the claim that, he was a person of means who owned a fiver storey building with another person within Mombasa hence refusing to pay the decretal sum arose. It is in that same file that the issue of the appellant having another family came up at paragraph 30 of the ruling.

25. On account of that mix up when writing the two rulings, some of the facts in file No 124/97 found their way into this file through paragraph 30,44, 45 and 46. This is indeed an error and mistake apparent on the face of the record which should be corrected. It was not intended to prejudice anybody as it was a genuine mistake. This court has inherent powers and pursuant to the slip rule under Section 99 of the Civil Procedure Act to correct error committed by deleting paragraphs 30,44,45 and 46 of the ruling.

26. Regarding paragraph 44 that the appellant did not tender evidence that he had lost a job, the court relied on the lower court proceedings where such evidence was not introduced nor before Judge Thande who heard the appeal. In any event, the court that heard the appeal did not consider that fact as no evidence was laid before it regarding loss of a job. However, if there is a job in place, the respondent shall be at liberty to apply for attachment of salary and if not, then the onus will be upon her to further prove that source of income during execution. For those reasons, I do not agree that the court made an improper finding under that paragraph.

27. Touching on paragraph 48 regarding whether the two courts directed that the children do continue schooling at the Aga Khan academy, the orders of P.J Otieno were clear on maintaining status quo. what does that mean? This fact is also admitted by the applicant. Maintaining status quo implies that the children continue studying at the school they were then which is Agakhan Academy. I do not see any error or mistake committed under that paragraph.

28. The court has been asked to reconsider the appellant's financial inability. In my view it will amount to reopening the trial on issues canvassed before the trial court, appealed against and dismissed. I cannot purport to re-open the appeal.

29. As to the issues raised in the respondent's replying affidavit that the appellant is a beneficiary of Kshs11 million given in some succession cause, this is a new matter which will generate issues that were not the subject of the application giving rise to the ruling in question. The court has already become functus officio. It cannot start adjudicating on new issues. The respondent can reserve those arguments for the application for execution of the decree so as to prove the existence of such monies.

30. Without re-engaging on issues already determined, the deletion of the paragraphs already stated does not affect the final order or finding. The association of the applicant with a five storey building was not the only ground considered in dismissing the stay of execution application.

31. The correction of the stated errors notwithstanding, I have no ground to discharge my orders for so to do, i would have delved on the merits of the intended appeal. However, I wish to urge the parties that, as parents, they should be fair to their children by engaging in a serious conversation with the best interest of the children at heart. They can as well consider a suitable or alternative but cheaper school offering same system of education to avoid children wasting more time by unnecessary interruptions due to non-payment of school fees. My advice to the Parents is that they should always set aside their supremacy fights against each other for the benefit of their children.

32. Having deleted the incorrect portions of the ruling i.e. paragraphs 30,44,45 and 46, the final finding made on 26thNovember 2020 shall remain in force. Order accordingly.

Dated, signed and delivered this 16th day of February2021

J. N. ONYIEGO

JUDGE