



**REPUBLIC OF KENYA**

**IN THE HIGH COURT OF KENYA AT MOMBASA**

**FAMILY APPEAL CASE NO. E016 OF 2020**

**HMI.....APPLICANT**

**VERSUS**

**KBH.....RESPONDENT**

**RULING**

1. Before me is an extremely protracted and emotive issue over a dispute on custody of the minor herein between the biological parents. It all started in the children's court at Tononoka and ended up before the High court on appeal. The gist of the appeal herein is geared towards challenging a temporary custody order of a minor the subject of these proceedings aged 3 years made to the father. The said custody order was reversed by this court on 5<sup>th</sup> March, 2021 thus restoring custody of the minor to the mother and stay of proceedings before the Tononoka children court pending hearing and determination of appeal.
2. Aggrieved by the court's orders of 5<sup>th</sup> March 2021, the applicant filed an application dated 8<sup>th</sup> March, 2021 seeking to vary the said orders and or review under order 45 of the Civil Procedure Rules.
3. The application is premised upon grounds stated on the face of it and averments contained in the affidavit in support deposed by KBH the respondent/applicant herein.
4. It is the applicant's case that the orders of this court made on 5<sup>th</sup> March, 2021 temporarily handing over the minor to the applicant/respondent (mother) was arrived at erroneously. That the court's finding that the respondent/applicant's application giving rise to the orders of 5<sup>th</sup> March, 2021 was not contested was not correct as there was a replying affidavit in response to the application dated 29<sup>th</sup> December, 2020.
5. He further averred that the court has made a determination on a matter that is yet to be determined before the Children's court based on the conclusion that the application was not opposed. That in view of the fact that there was a response to the application giving rise to the impugned orders which was not considered, it amounts to an error to justify review of its orders. He further averred that the case herein touches on a child who is traumatized by his mother's behavior as evidenced by averments contained in the replying affidavit sworn on 21<sup>st</sup> January, 2021.
6. In reply to the application, the respondent HMI filed her replying affidavit sworn on 11<sup>th</sup> March, 2021 opposing the application. She denied allegations that she was deliberately delaying the matter by making multiple applications. She stated that this court exercised its supervisory jurisdiction over the children court by restoring the child to her custody.
7. She further averred that the applicant has not demonstrated or proved any exceptional circumstances to warrant taking physical custody of the minor. She stated that the grounds cited for review and stay of execution does not raise a prima facie case to warrant issuance of such orders.
8. It was further deposed that the child has suffered while in the applicant's custody and that the minor is of tender age thus ought to stay with the mother. She contended that the orders are not applicable as the court has already pronounced itself and that the applicant had not established the principles in *Giella Vs Cassman Brown*.
9. In his rejoinder, the applicant filed a lengthy supplementary affidavit sworn also on 11<sup>th</sup> March, 2021 stating that the minor is in good shape while in his custody. To prove this fact, he attached a letter from a doctor marked KBH-1 which confirms the child is in good health. He averred that the respondent had threatened to kill him using a knife during court session. He further stated that the respondent is not mentally stable as reflected in her conduct using abusive language in court against the trial magistrate.
10. In support of the averment that his counsel's absence was not of any consequence as long as his response was in the court file, he attached an authority in respect of the case of **Israel Otieno Agina Vs Attorney General (2002) e KLR** and **Esther Okenyuri Anyieni Vs**

**Mokumi Edmond Anthony & 3 others (2018) e KLR.**

11. He further stated that the respondent is likely to escape to Uganda or Nigeria with the baby as she had attempted to do so before thus necessitating an order from the court to restrain her. He filed several abusive text messages from the respondent in CD format and Whatsapp messages.

12. During the hearing, both counsel reiterated averments contained in their respective affidavits in support of their respective positions. In reply to the application, Mr Obonyo for the applicant submitted that an application is deemed to be contested when a response is filed pursuant to Order 50 Rule 4 of the Civil Procedure Rules which provides on how a party responds to an application. Counsel submitted that the respondent is not fit to have custody of the child. He further submitted that they had filed an O.B from Bamburi Police station showing how the mother had injured the baby.

13. Mr Masake for the respondent submitted that there was no error or new evidence to warrant review of the orders. Counsel submitted that although there was a replying affidavit, there was no attendance to oppose the application hence it proceeded ex parte and therefore the application was not opposed. He further submitted that annexure KBH4-5 being electronic evidence does not meet the requirements of section 106B of the Evidence Act as there was no certificate attached.

14. In his rejoinder, Mr Obonyo submitted that the error on the face of the record is that the court did not consider the response on record.

**Determination**

15. I have considered the application herein, response thereto and oral submissions by both counsel. The only issue that arise for determination is whether the applicant has met the threshold for review of the orders made on 5<sup>th</sup> March, 2021. The applicant has moved to this court challenging the orders of 5<sup>th</sup> March, 2021 on grounds that the pronouncement by the court that the application dated 29<sup>th</sup> December, 2020 giving rise to the implunged orders was not opposed was an error on the face of the record.

16. The law governing review is anchored under order 45 of the Civil procedure rules which provides that;

**1(1)-“Any person considering 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 an 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”**

17. It is incumbent upon the applicant to prove the existence of the above stated elements. See **Pancras T. Swai Vs Kenya Breweries Ltd (2014) e KLR.** However, to grant or not grant review orders is a matter of discretion by the court sized of the matter. It is however not meant to substitute an order or decree which would on the face of it attract a ground for appeal. See **John Kamau Ndungu Vs Kenya Reinsurance Company Civil Appeal No 208/2006** where the court held that;

**“it is important to bear in mind that order 44 rule 1 of the Civil procedure rules sets out the purview of the review jurisdiction. A point outside that purview is not a ground for review. A point which may be a good ground of appeal like erroneous view of law or evidence is also not a ground for review. That a court relied on erroneous conclusion because it proceeded on an incorrect exposition of the law or misconstrued a statute or other provision of law is not a ground of review. All these are grounds of appeal”**

18. Similar position was expressed in the case of **Joseph Kamenju Mwaura Vs Sammy Ngure Muthinji (2019) e KLR.**

19. In the instant case, the application dated 29<sup>th</sup> December, 2020 came up for hearing on 1<sup>st</sup> February 2021. In the morning of that day, Mr Obonyo for the respondent appeared virtually but Mr Gichana for the applicant was not as he and his client were waiting in open court. The court then gave time allocation for hearing in open court at 12.30 pm.

20. At 12.30 pm, Mr Obonyo was not present nor was his client. Mr Gichana then submitted that the application was not opposed and urged the court to allow the application as prayed and have the child returned back to the mother. The court proceeded with hearing ex parte and delivered its ruling on 5<sup>th</sup> March, 2021 thus staying proceedings in the lower court and on the interim restored the minor to the mother pending further directions.

21. In my ruling, I observed that the application was not opposed during its prosecution. By the court restoring the child to the mother temporarily, it was on the basis of Mr Gichana’s oral submission during the hearing seeking custody of the child to his client a fact that was not rebutted.

22. Has the applicant proved that there was an apparent error or mistake on the face of the record? I do not see any. Was the pronouncement of the court that the application was not opposed an apparent error to warrant review? In my opinion it is not. An erroneous conclusion in the interpretation of law such as the one relied on in this case is a ground of appeal not review.

23. Is there any other sufficient ground to warrant review of the order of 5<sup>th</sup> March, 2021? The applicant alleged that the mother to the baby (respondent) is mentally sick hence unfit to be given the baby. This was however not supported by any medical evidence. In the circumstances of this case, the applicant's fear is that the respondent will run away from the jurisdiction of the court. To guard against this, the court has powers to order the respondent to deposit in court all traveling documents including those of the child. To address the issue of suitability of the respondent, I will direct that the children officer does file a social inquiry report within 7 days in court to enable the court make further orders in future where necessary.

24. In a nut shell, the grounds cited for review do not fit within the parameters for review. If I were to determine in full the grounds cited for review with respect to the learned counsel, I would have sat on my own decision as an appellate court. As regards whether the application was filed within time, the record speaks for itself. The application was filed 3 days after delivery hence in time.

25. The upshot of it all is that, the application has not been proved to the required degree. Parties are directed to adhere to court orders and allow each other to access the baby. No parent has the monopoly of the child. The court will ensure that the appeal is expeditiously disposed. Accordingly, the application is dismissed but with additional orders in furtherance of the orders of 5<sup>th</sup> march 2021 as follows;

**(1) The respondent (mother) to the minor, shall deposit her passport and travelling documents together with those of the minor if any in her custody before taking custody of the child by 9.00AM of 19<sup>th</sup> April 2021**

**(2) The children officer Mvita Sub -County children office to urgently file an inquiry report within 7 days confirming the status of the child as well as the suitability of the mother (respondent) to continue holding the baby**

**(3) The rest of the orders issued on 5<sup>th</sup> March, 2021 shall remain in force.**

**(4) The Deputy Registrar to call for the original file from Tononoka children court urgently for purposes of hearing the appeal.**

**(5) The Applicant to hand over the baby to the mother by the 20<sup>th</sup> April 2021 at 9.00AM in the presence of Mvita Sub-County Children Officer within the children officer's office premises and thereafter further access to the child by either party as directed in the order of 5<sup>th</sup> March, 2021.**

**(6) For avoidance of doubt, the Appellant/Respondent (mother to the minor) will take custody of the minor on 20<sup>th</sup> April, 2021 only upon fulfillment of order No.1 herein above by depositing the documents referred thereto with the Deputy Registrar**

Dated signed and delivered virtually at Mombasa this 16<sup>th</sup> day of April 2021

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J.N. ONYIEGO

JUDGE