**REPUBLIC OF KENYA**

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

**(*Coram: Hon.. K. Kemei J.*)**

**CIVIL APPEAL NO. 66 OF 2020**

**JONAH NKAPIANI KISIOH..................................................................APPELLANT**

***VERSUS***

**BENITA SHARON WANGARI NJOROGE.......................................RESPONDENT**

**(An appeal from the Ruling and Order of the Honourable Benard Kasavuli Principal Magistrate at the Chief Magistrate's Court at Mavoko delivered on the 7th day of December, 2020)**

***BETWEEN***

**BENITA SHARON WANGARI NJOROGE.................................................PLAINTIFF**

***VERSUS***

**JONAH NKAPIANI KISIOH.....................................................................DEFENDANT**

**JUDGEMENT**

1. The appeal is against the ruling and order of the Hon. Principal Magistrate Bernard Kasavuli delivered on 7.12.2020 in respect of the Appellant's Notice of Motion dated 19.8.2020 and filed on the same day under certificate of urgency. The Appellant had sought to stay and review the trial court ruling and orders of 17.8.2020 which emanated from the Amended Notice of Motion dated 8.7. 2020. The trial court had ordered inter alia that the Appellant access the minor virtually. As regards maintenance of the child, the Appellant and Respondent were directed to each pay Kshs. 38,500/- monthly.

2. On 7.12.2020, the trial magistrate held that on the ground that the court was influenced by Covid -19 to deny the Appellant physical access to the minor, the ground did not fall under any of the set out grounds for review under Order 45 Rule 1 of the Civil Procedure Rules, 2010 but a moot ground of appeal. On the subject of review of monthly maintenance, the court held that the pay slips exhibited by the Appellant in his application seeking review were in his possession long before the orders of 17.8.2020 and was thus not a matter that could not be discovered even with exercise of due diligence.

3. According to the trial magistrate, the Appellant could not introduce new evidence at this stage which would amount to re-litigating the Amended Notice of Motion dated 8.7.2020 filed by the Appellant. The trial magistrate proceeded to dismiss the Appellant's Notice of Motion dated 19.8.2020.

4. Aggrieved by the Ruling and order of the trial court, the Appellant has lodged the present appeal citing the following grounds:-

> ***(1) THE learned magistrate erred in law and in fact in finding that the Appellant had not demonstrated grounds of review of the orders issued on 17.8.2020.***
>
> ***(2) THE learned magistrate erred in law and misdirected himself in failing to find that the Appellant was entitled to physical access of the minor as opposed to virtual access.***
>
> ***(3) The*** **learned magistrate erred in law and fact in** ***finding that the Appellant had not established grounds of review of the orders issued on 7.8.2020, as he did not consider that the Appellant was entitled to physical access of the minor and review of maintenance from Kshs. 38,500/- to Kshs.20,000/-.***

*(4) __THE__ learned magistrate erred in law and misdirected himself by finding that the pay slips produced by the Appellant were new evidence.*

*(5) __THE__ learned magistrate erred in law and in fact by refusing or failing to consider the pleadings filed and the evidence on record thereby arrived at an erroneous and/or wrong decision that the Appellant had not demonstrated grounds for the review of the orders issued on 17.8.2020.*

*(6) __THE__ learned magistrate erred in law and misdirected himself in dismissing the Appellant's application dated 19.8.2020*

5. The Appellant seeks the following reliefs:-

***(a) The appeal be allowed.***

***(b) The Ruling delivered on 7.12.2020 be set aside in entirety.***

***(c) The orders issued on 17.8.2020 be reviewed as follows:***

***i) That the Appellant to have physical access of the minor every weekend; and***

***ii) The Appellant do pay Kshs. 20,000/- every month towards the minor's upkeep.***

***(d) The costs of the appeal be awarded to the Appellant.***

6. It is submitted by counsel for the Appellant that the trial magistrate ignored that the minor was barely one and half years old and had not developed proper elementary speech. According to the Appellant, that cannot be achieved through video call. Further that the trial magistrate ignored the Appellant's financial capability. According to the Appellant, he could only be able to contribute Kshs. 20,000/- instead of Kshs. 38,500/-. Counsel submitted that the Appellant had through his testimony in court pointed out that he was initially contributing Kshs. 10,000/- and would only be able to add further Kshs. 10,000/- to contribute Kshs. 20,000/- per month. According to the Appellant, the court did not ask for an affidavit of means from the Appellant and thus the evidence adduced by the Appellant was sufficient for review of its orders. On what is error apparent of the face of record, reliance was placed on the case of ***Chandrakhant Joshibhai Patel vs R (2004) TLR.***

7. According to the Appellant, it is an error apparent on the face of the record when the trial magistrate assumed that it is only the father that could transmit Covid- 19 to the minor and not the Respondent. Reliance was placed on the case of ***Muyodi vs Industrial & Commercial Development Corporation & Another [2006] 1 EA***. According to the Appellant, the purpose of the pay slips was to aid the court in correcting the error apparent and not for re-litigating as found by the trial magistrate. It is further submitted that the Appellant had a right to access the minor pursuant to Article 53(1) (e) of Constitution, Section 6(1) of the Children's Act No.8 of 2001 and Article 9(3) of the Convention on the Rights of Children. It is in the best interest of the minor to experience both parental care and protection from both parents. Reliance was placed on the cases of ***N vs K (2008) KLR*** and ***SNS vs FCT (2017) eKLR.***

8. As regards contribution of Kshs. 38,500/- by the Appellant, it is submitted that the amount is based on unascertained expenses pleaded by the Respondent. The pay slips attached to the application seeking review demonstrate the extent of the Appellant's financial capability based on his income. The ordered contributions by the trial magistrate cannot exist in a vacuum as the same would be derived from the Appellant's income hence an error apparent on the face of record in failing to consider his capability based on the pay slips. The trial magistrate erred both in law and in fact in failing to consider that the Appellant had pleaded that he would only be capable of contributing Kshs. 20,000/- per month. The findings by the trial magistrate were based on misapprehension of evidence. Reliance was placed on the case of ***JM vs JM (2012) eKLR***.

9. Counsel for the Respondent submitted that the trial magistrate correctly made a finding that the Appellant did not demonstrate the threshold for a stay of execution pending review. According to the Respondent, Order 45 Rule 1 of the 2010 Rules requires the Applicant to convince the court of the existence of new and important matter or evidence which after the exercise of due diligence was not within the Applicant's knowledge or could not be produced at the time when the decree or the order was made. Reliance was placed on the cases of James ***M. Kingeru & 17 Others vs J.M Kangari & Muhu Holdings Ltd & 2 Others (2005) eKLR and Rose Kaiza vs Angelo Mpanju Kaiza (2009) eKLR***.

10. According to the Respondent, one cannot use a review application as basis for supplementing evidence or introducing new evidence but rather the new evidence must be one which, after exercise of due diligence, was either; *not within his knowledge or could not be produced by him at the time when the decree was passed or the order made or that the knowledge of the existence of the evidence sought to be introduced or he had been deprived of the evidence at the time of the trial.*

11. It is submitted that the issues on the face of the application seeking review were dealt with by the trial magistrate before the order that was sought to be reviewed by court was made by court. The pay slips dated 29.2.2020 attached to the Application seeking review was not new evidence since the application which led to the ruling and/or order that the Appellant requested court to review was first heard on 22.6.2020 hence the pay slip was within the knowledge of the Appellant. According to the Respondent, the grounds raised in the application that sought review are grounds for appeal not review. It is submitted that the Record of Appeal and supplementary appeal is incompetent for lack of certified copies of the order sought to be reviewed as required under Order 42 Rule 2 and 13(4) of the 2010 Rules. Reliance was placed on the cases of ***Salama Beach Hotel Ltd & 4 Others vs Kenyariri & Associates Advocates & 4 Others (2016) eKLR*** and ***Nyeri Civil Appeal/Application No.51 of 2013, Ndegwa Kamau t/a Side View vs Fredrick Isika Kalumbo***. The Respondent has urged the court to dismiss the Record of appeal for being incompetent and defective with costs.

**Determination**

12. I have considered the submissions filed in this appeal.

13. This being the first appellate court, it's role is to re-evaluate and subject the evidence to afresh analysis so as to reach an independent conclusion as to whether or not to uphold the decision of the trial court. The court also takes note of the fact that it did not have the benefit of seeing or hearing the witnesses testify and therefore has to make an allowance for the same. It was held in the case of ***Selle –vs- Associated Motor Boat Co [1986] EA 123*** as follows:-

> "***The appellate court is not bound necessarily to accept the findings of fact by the court below. An appeal from the trial court by the high court is by way of a retrial and the principles upon which the Court of Appeal acts are that the court must reconsider the evidence, evaluate it itself and draw its own conclusions through it should always bear in mind that it has neither seen nor heard the witnesses and should make due allowance in this respect in particular the court is not bound necessarily to follow the trial judge's findings of fact if it appears either that he has clearly failed on some point to take account of particular circumstances or probabilities materially to estimate the evidence or if the impression based on the demeanour of a witness is inconsistent with the evidence in the case generally."***

14. In ***Peters vs Sunday Post Ltd [1958] EA 424***, the Court held that:-

> ***"Whilst an appellate court has jurisdiction to review the evidence to determine whether the conclusions of the trial judge should stand, this jurisdiction is exercised with caution; if there is no evidence to support a particular conclusion, or if it is shown that the trial judge has failed to appreciate the weight or bearing of circumstances admitted or proved, or had plainly gone wrong, the appellate court will not hesitate so to decide"***

15. The Appellant's application dated 19.8.2020 was premised on Order 45 Rule 1 of 2010 Rules which provides that:-

> ***(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 <u>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</u>, or <u>on account of some mistake or error apparent on the face of the record</u>, or <u>for any other sufficient reason</u>, 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.***

16. The substantive provision is found under section 80 of the Civil Procedure Act which provides as follows:-

> ***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 judgement to the court, which passed the decree or made the order, and the court may make such order thereon as it thinks fit.***

17. Based on the above provisions of law, the Appellant's application was pegged on the condition of *error apparent on the face of the trial court's ruling delivered on 7.12.2020*.

18. The Court of Appeal in ***Muyodi vs. Industrial and Commercial Development Corporation & Another (2006) 1 EA 243***, considered what constitutes a mistake or error apparent on the face of the record, and stated as follows:

> ***"In Nyamogo & Nyamogo vs Kogo (2001) EA 174 this Court 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 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 substantial 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 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 a possible one, it cannot be an error or wrong view is certainly no ground for a review although it may be for an appeal."***

19. ***Mativo J***. in the case of ***Republic v Advocates Disciplinary Tribunal Ex parte Apollo Mboya [2019]eKLR*** at paragraph 30 of his ruling stated that the principles which can be culled out from the above noted authorities (expounding on the grounds for review) are:-

***"i. A court can review its decision on either of the grounds enumerated in Order 45 Rule 1 and not otherwise.***

***ii. The expression "any other sufficient reason" appearing in Order 45 Rule 1 has to be interpreted in the light of other specified grounds.***

***iii. An error which is not self-evident and which can be discovered by a long process of reasoning cannot be treated as an error apparent on the face of record justifying exercise of power under Section 80.***

***iv. An erroneous order/decision cannot be corrected in the guise of exercise of power of review.***

***v. A decision/order cannot be reviewed under Section 80 on the basis of subsequent decision/judgment of a coordinate or larger Bench of the tribunal or of a superior court.***

***vi. While considering an application for review, the court must confine its adjudication with reference to material, which was available at the time of initial decision. The happening of some subsequent event or development cannot be taken note of for declaring the initial order/decision as vitiated by an error apparent.***

***vii. Mere discovery of new or important matter or evidence is not sufficient ground for review. The party seeking review has also to show that such matter or evidence was not within its knowledge and even after the exercise of due diligence, the same could not be produced before the court/tribunal earlier.***

***viii. A mistake or an error apparent on the face of the record means a mistake or an error, which is prima-facie visible and does not require any detail examination….."***

20. The issue that falls for determination is whether the application dated 19.8.2020 for review is merited.

21. The Appellant asserts that the trial court did not take into consideration that the minor was barely 1 ½ years old and could not talk. The Appellant contends that the trial court assumed that it is only the Appellant who can transmit Covid -19 to the minor hence an error apparent on the face of the court's ruling.

22. In his judgement, the trial magistrate noted the allegation of assaults put across by the Respondent against the Appellant. It was the trial magistrate's observation that the grounds relied on by the Appellant to demonstrate that the Respondent's misrepresentation and non-disclosure were superfluous.

23. Further the Appellant contends that his financial capability was not taken into account as he could only contribute Kshs. 20,000/- and not Kshs. 38,500/-. The trial magistrate held that the pay slips attached to the application dated 19.8.2020 were in the Appellant's possession before the orders of 17.8.2020 were issued by court. I agree with the trial magistrate that the evidence of pay slips was not new evidence sought to be introduced by the Appellant and hence the orders sought would not fall within the ambit of Order 45 Rule 1 but on an appeal. In any event, the said pay slips had been in the appellant's possession long before the trial court made the orders and hence the appellant's request for review on that ground was properly rejected by the trial court. As the main suit is yet to be heard, the appellant will be bound to pay the amounts ordered and that during the hearing he is at liberty to present the evidence on his means of income and hence the trial court will have the discretion to decide the appropriate amounts as maintenance for the minor. A perusal of the record of appeal reveals that the issues in contention were adequately dealt with by the trial court regarding the appellant's grievances on the payment of maintenance of the child as well as the direction that he could access the minor virtually due to the effects of covid-19. The learned trial magistrate noted that the minor was aged about one and half years old and due to the challenges on the environment directed that the appellant conducts his access to the minor virtually. It also transpired that the appellant had been communicating virtually with the minor and the respondent previously and hence I find that it is in the best interest of the minor to be accessed by the appellant virtually. The appellant has claimed that he is being discriminated against by being denied physical access to the minor as if he is the one likely to have Covid-19. I think the appellant has stretched the direction by the trial court a bit too far since it is also in his interest that the minor is kept away from harm and that once the Covid-19 pandemic goes down the trial court could still issue further directions regarding the issue of access to the minor even during the hearing of the main suit. The parties herein should now proceed to set down the main suit before the lower court for hearing and determination.

24. In light of the foregoing observations, it is my finding that the appellant's appeal lacks merit. The same is dismissed with no order as to costs.

It is so ordered.

**DATED AND DELIVERED AT MACHAKOS THIS 27TH DAY OF JULY, 2021.**

**D. K. KEMEI**

**JUDGE**