REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT MOMBASA

FAMILY MISCELLENOUS CASE NO. 31 OF 2019

LYDIA IZA MWAMBURI.....APPLICANT/RESPODNENT

VERSUS

PATRICK NJOKA NDWIGA.....RESPONDENT/APPLICANT

RULING

1. Through her application dated 18th August, 2020, Lydia Iza Mwamburi the applicant/respondent herein sought orders committing the applicant/ respondent to civil jail for 6 months for disobeying court orders made on 25th February, 2020. After canvassing the application, Hon Justice Thande through her ruling dated 29th April, 2021 and delivered by myself on 18th May, 2021 found Patrick Njoka the respondent /applicant liable and directed as follows;

> **(1) The respondent is hereby committed to civil jail for a period of 90 days.**
>
> **(2) Warrant of arrest is hereby issued against the respondent**
>
> **(3) During the said period of 90 days, the applicant and the children shall attend canselling every Saturday with a view to re-establishing a health mother/child relationship.**
>
> **(4) During this period, the applicant shall have access to the children every weekend from 9.00 am on Saturdays to 5.00 pm on Sunday.**
>
> **(5) This being a matter concerning the party's children there shall be no orders as to costs.**

2. The respondent/applicant remained at large till 16th September, 2021 when he was arrested and arraigned before the court. Upon pronouncing the sentence, the respondent /applicant was committed to civil jail as directed which he started serving immediately.

3. Aggrieved by the ruling and sentence ordered by the court, the respondent filed a notice of motion dated 21st September, 2021 under certificate of urgency seeking; review of committal orders made on 16th September, 2021; the court to grant stay of execution of the proceedings pending further interpartes hearing and determination of the application; custody of the children do vest to the respondent/applicant and, that the applicant /respondent be given structured access to the children.

4. The application is based on grounds set out on the face of it and further amplified by the averments contained in the affidavit in support sworn by the respondent/applicant on 21st September, 2021 stating that; the act of contempt was purged hence the sentence imposed can be reversed; the applicant has a pre-existing medical condition which requires constant and frequent medical attention;. the health condition of the children is not good since they were taken by the applicant/respondent ; it is in the interest of the children that the orders be set aside; if the orders are not reversed, the children will be traumatized hence suffer loss and prejudice.

5. In response, the applicant/respondent filed grounds of opposition stating that; the application is incompetent, vexatious, hopeless and fit for dismissal; the respondent/applicant is not deserving the orders as he has been disobeying court orders persistently; application is an abuse of the court process; application is malafides, devoid of any merit, grossly defective as it seeks the court to act in vain and that the Interest of justice demands that it be dismissed.

6. During the hearing, Mr Obonyo appearing for the respondent/applicant basically reiterated the averments contained in the affidavit in

support. Counsel submitted that the act of contempt has been purged and that further detention of the respondent /applicant in custody will amount to further impediment of execution of the court order.

7. On their part, Ms Musyoki appearing for the applicant /respondent also adopted their grounds of opposition. Counsel submitted that the act of contempt complained of has not been purged as the children are with their uncle a brother to the contemnor pursuant to his instructions thus curtailing access of the children by the mother (applicant /respondent).

8. I have considered the application herein, affidavit in support and grounds of opposition. Issues that emerge for determination are;

(1) Whether the respondent/applicant has met the criteria for review of the impugned orders.

(2) Whether the respondent/applicant has met the threshold for stay of execution orders.

9. The prayer for review of the orders of 16th September, 2020 is anchored under Order 45 of the Civil Procedure Rules. Under this provision, it is incumbent upon the respondent/applicant to prove discovery of new and important matter or evidence after the exercise of due diligence which was within his knowledge or could not be produced by him at the time the order or decree was passed; proof of mistake or error apparent on the face of the record or for any other sufficient cause.

10. See **Nyamogo and Nyamogo Vs Kogo (2001) E A 174** where the court held;

> **"An error apparent on the face of 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 the substantive point of law stares one in the face, and there could reasonably be two opinions, a clear case of error apparent on the face of the record could be made out. An error which has to be established by long drawn process of reasoning or on points there may conceivably be two options, can hardly be said to be an error 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.**

11. In the instant case, there is no proof of any discovery of any new matter or evidence that was not within the knowledge of the respondent/ applicant. Equally, there is no proof of any error apparent or mistake on the face of the record.

12. If the applicant is aggrieved with the conviction and sentence, then, the appropriate remedy should have been an appeal and not review.

13. It is trite law that review is not a substitute to an appeal. See **Pancras T. Swai Vs Kenya Breweries Limited (2014) e KLR where the court held;**

> **"it seems clear to us that the applicant 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 determined 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 competent jurisdiction".**

14. Having found the respondent /applicant guilty of disobedience of a court order and sentenced him to 90 days, the court is deemed to have become functus officio. For me to vary or set aside the sentence already passed by a court of concurrent jurisdiction, will amount to sitting as an appellate court determining my colleague's orders. To that extent, the application of review cannot apply. In any event, the review application has been belatedly filed considering that the ruling finding him guilty was delivered on 18th May, 2021. Be that as it may, I do not have jurisdiction to review the impugned orders.

15. Regarding stay of execution, the court has no jurisdiction as it has already become functus officio. Accordingly, I do not find merit in the application sought hence the same is dismissed with no order as to costs.

DATED, SIGNED AND DELIVERED VIRTUALLY AT MOMBASA THIS 22ND DAY OF OCTOBER 2021.

J N ONYIEGO

JUDGE