



REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT EMBU

CIVIL APPEAL NO. 24 OF 2017

M N N.....APPELLANT/APPLICANT

V E R S U S

E W M.....RESPONDENT

R U L I N G

1. This is an application dated 6/04/2018 seeking for review, vary and/or set aside the orders issued on 22/03 2018, to the extent that the applicant is to clear the amount owed to the respondent within two (2) months and the order that the applicant is to pay Kshs. 150,000/= before 12/04/2018.
2. The grounds in support of the application are that the applicant is sickly which was proved before the lower court but was disregarded. The order is causing great hardship to the applicant for he risks being committed to civil jail in case of default the time of 2 months given to comply with the order is limited and not fair to the applicant.
3. That substantial loss is likely to occur should this court deny the applicant the orders sought. The grounds are contained in the affidavit of the applicant and on the face of the application.
4. The application is opposed by the respondent on grounds that the orders complained of were made by consent of the parties dated 22/03/2018. The applicant is in arrears of Kshs.338,550/= being the maintenance of the minor one S M N.
5. The same medical documents annexed to this application are the same ones presented before the magistrate.
6. The respondent states that when she pursued execution of the decree, the applicant gave proposals which led to the recording of a consent by the parties on 22/03/2018. One of the clauses in he said consent was that the respondent withdraws this appeal. The respondent did not comply with this clause but instead filed this application.
7. The applicable law guiding courts in applications for review or varying orders issued by a court is Order 45 Rule 1 of the Civil Procedure Rules. It provides:-

45(1)

1. (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 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.

(2) A party who is not appealing from a decree or order may apply for a review of judgment notwithstanding the pendency of an appeal by some other party except where the ground of such appeal is common to the applicant and the appellant, or when, being respondent, he can present to the appellate court the case on which he applies for the review.

8. The orders for which review is sought were issued on 22/03/2018 by consent as follows:-

i. That the defendant shall pay Kshs.13,000/= per month to the plaintiff with effect from 10/07/2017 payable before 10th of every month as maintenance for S M N – minor.

ii. That the defendant shall with effect from 7/1/2017 pay an additional Kshs.11,875/= per month on top of the monthly maintenance every 10th of every month until the maintenance arrears of Kshs.285,000/= are cleared.

iii. That the defendant shall withdrawal Civil Appeal No. 24 of 2017 pending before the Embu High Court forthwith.

iv. That the parties herein shall record a further consent when the minor S M N reaches school going age.

v. That the plaintiff shall have full custody of the minor S M N while the defendant shall have visitation rights once a week and the visitation shall be done in consultation with the plaintiff as to the place and time of visitation.

vi. That if the defendant defaults in making any payment above stipulated execution to issue.

9. The issues which arise in this application are as follows:-

(a) Whether the application is competent.

(b) If the application is found to be competent, whether it is merited.

10. The provision stipulates in very clear and vivid terms that a party has a choice to either prefer an appeal or apply for review. The applicant has already filed this appeal which he has refused to withdraw despite the consent clause 3.

11. The applicant having filed an appeal and refused to withdraw it after signing the consent adopted as a court order is not covered by the provisions of Order 45 Rule 1 to apply for review. An application for review can only be brought before the court which granted the orders sought to be reviewed. The applicant is represented by a counsel who is well versed with the relevant law and procedure.

12. Having entered into a consent order, the applicant cannot approach this appeal court for review of the order issued by the subordinate court.

13. The failure/refusal to withdraw the appeal is a demonstration of bad faith on part of the applicant. It leaves no doubt that the applicant is not serious and is only buying time to defeat execution.

14. This is a case involving a minor who is entitled to enjoy her rights after the court issued orders in her favour.

15. I find the application incompetent and I hereby strike it out with costs.

DELIVERED, DATED AND SIGNED AT EMBU THIS 31ST DAY OF JULY, 2018.

F. MUCHEMI

JUDGE

In the presence of:-

Ms. Kiai for Mugendi for Appellant/Applicant

Ms. Muthoni for Respondent