



REPUBLIC OF KENYA
IN THE HIGH COURT OF KENYA AT NAIROBI
FAMILY DIVISION
MATRIMONIAL CAUSE 73 OF 2014

P S.....APPLICANT/RESPONDENT

VERSUS

R N N ALIAS R N S.....PETITIONER/RESPONDENT

RULING

The Applicant filed an application Notice of Motion on 6th September 2012 brought under Certificate of Urgency. The Application was brought under **Article 27 of the Constitution, Section 3 of the Civil Procedure Act, Order 51 Rule 1 and Order 45 Rule 6 (1) of the Civil Procedure Rules, 2010**. The Applicant sought orders inter-alia:

- I. There be a stay of execution of the Decree issued by this Hon. Court on 7th March 2016 pending the hearing and determination of the Application.**
- II. This Hon. Court be pleased to review and vary its Decree issued on 7th March 2016.**
- III. The Applicant even though desirous cannot afford to satisfy the terms of the judgment.**
- IV. The Applicant will suffer grave injustice unless this application is heard and determined with urgency as the Applicant is apprehensive that the Petitioner will proceed with execution or contempt of Court proceedings**
- V. Costs of this Application be borne by the Petitioner.**

Grounds in support of the Applicant were that:

- I. The Petitioner/Respondent herein filed a Petition for maintenance by the Spouse on 25th November 2015.**
- II. The Hon. Court issued a Decree on 7th March 2016 in which the Respondent was ordered to pay for inter-alia the following:**
 - a) Ksh. 97,385.55 as electricity arrears for the joint property Edenville on L.R No. [particulars withheld] Kiambu in the month of March 2016.**
 - b) Ksh. 107,752 as service charge payment for the joint property Edenville on L.R No.**

[particulars withheld] Kiambu in the month of April 2016.

c) Thereafter, monthly payments of Ksh. 60,000/- per month to the Petitioner as maintenance for utilities and transport and Ksh. 40,000 for the children as per the Court order on 25th February 2015.

III. The Respondent/Applicant herein has been paying the service charge for the said apartment and no amount is due.

IV. The Respondent/Applicant herein is desirous of fulfilling the Court order, he is unable to do so as he has no financial ability to cater for the same.

V. The Respondents/Applicant's only income comes from his rented apartment where he derives a net of Ksh. 83,000/- per month.

VI. The Respondent/Applicant herein also started a gym business in November 2013 but the same is not flourishing as can be proved by the audited accounts adduced before the Court.

VII. On mutual agreement of the parties, the Respondent/Applicant herein has been having care and control of the 2 children since June 2014 and he has also been catering for all their expenses including housing, food, school fees and related expenses, medical expenses, groceries, grooming, entertainment, transport to school among other day to day needs and I am thus strained beyond my means.

VIII. In addition to the above, the Respondent/Applicant herein also provides the Petitioner Ksh. 40,000/- being maintenance for the children as ordered by Court on 25th February 2015 even though I have physical custody of the children.

IX. The Petitioner is in good mental and physical health and thus capable of earning a living

X. The Respondent/Applicant herein is left with a huge burden as he has to shoulder all the needs of the children single handedly.

XI. In light of the above, it is in the interest of justice that this Hon. Court varies/reviews its Decree given on 7th March 2016 as the Respondent/Applicant herein has no means to fulfill the same.

In the Affidavit in Support of his Application, the Respondent/Applicant herein deposed that he purchased Villa No. [particulars withheld] Edenville within L.R No. [particulars withheld] Kiambu Municipality which is jointly owned by both of them and occupied by the Petitioner, L.R No. [particulars withheld] Apartment [particulars withheld] Block [particulars withheld] Ashton Court where he resides with the Children and Apartment No. Block [particulars withheld] in Ashton Court L.R No. [particulars withheld] Nairobi which he has rented for Ksh. 90,000/- and Ksh. 7,000/- of the said amount goes towards payment of service charge. He further stated that the [particulars withheld] Apartment in Kiambu though jointly owned is not matrimonial property as it was bought after the breakdown of their relationship and it should thus be used, sold and let out for the benefit of both parties.

The Petitioner/Respondent replied to the Application by filing a Replying Affidavit on 25th October 2016. She deposed that the Applicant was in defiance with the Court order dated 7th March 2016 that was served upon him on 9th June 2016. She further stated that it was her belief that there was no new evidence discovered so as to warrant a review of the said Court Order. She prayed that the Application be struck out because it is fatally defective and incompetent for the reasons stated in paragraph 8 of the Affidavit. She also prayed that the Applicant be ordered to obey the subsisting Court order without fail.

APPLICANT/RESPONDENT'S SUBMISSIONS

The Applicant filed his submissions dated 8th December 2016 wherein he submitted on the issue of whether he had adduced sufficient grounds to warrant a review of the maintenance order and decree and whether he had the financial ability to fulfill the decree of this Honorable Court. On the first issue, he submitted that his case is premised on **Order 45, Rule 1 (1) CPR 2010** which allows one to apply for review where there is a mistake on the face of the record and where there is any other sufficient reason. He relied on **Article 27** and **Article 45 of the Constitution, 2010** which Advocates for equality of parties to a marriage.

In relying on the case of *WN v PB [2013] eKLR* quoted in *JOO v MBO [2015] eKLR*, he submitted that the Petitioner has the capability of engaging in an income.

In *SMR vs PHS DIVORCE CAUSE NO5 OF 2012* it was held;

In light of Article 45(3), the criterion in determining the rights of spouses in a marriage must treat the husband and wife as equals and neither has a greater or lesser obligation than the other in relation to maintenance.

RESPONDENT/PETITIONER'S SUBMISSIONS

The Respondent filed her written submissions on 28th November 2016.

She submitted that the present Application should be struck out as it is fatally defective, incompetent and should thus be struck out with costs to her due to the following reasons, that it purports to be brought under **Article 27 of the Constitution, 2010** and yet the pleadings do not show specific civil rights that have been violated by the Court order, that the Application is brought under **Order 42 Rule 6(1) of the Civil Procedure Rules, 2010** and yet there is no Appeal or intended Appeal and that **Order 51 and Section 3 of the Civil Procedure Act** does not apply to the prayers sought in the Application and should thus be struck out.

ANALYSIS AND DETERMINATION

From the prayers sought in the present Application, it appears that the Applicant being aggrieved by the orders given by this Court on 7th March 2017 seeks a review thereof and the Issue for determination is whether the Applicant has made a case to warrant a Review of the said Orders.

A review is a creation of statute pursuant to **Order 45 Rule 1 of the Civil Procedure Rules, 2010** and the same is limited to specific grounds unlike an appeal which is on can be on both facts and law depending on whether it is first or second Appeal.

Order 45, Rule 1 provides:

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.

In *Mwihoko Housing Company Limited Vs Equity Building Society [2007] 2 KLR 171*, It was held, inter alia: -

***“A review could have been granted whenever the Court considered that it was necessary to correct an error or omission on its part. The error or omission must have been self-evident and should not have required an elaborate argument to be established. It would neither have been sufficient ground of review that another Court could have taken a different view of the matter nor could it have been a ground that the Court proceeded on an incorrect exposition of the law and reached an erroneous conclusion of law. Misconstruing a statute or another provision of law could not have been a ground for review. There was no discovery of a new and important matter or evidence which after due diligence was not within the knowledge of the appellant at the time the judgment and decree was passed. There was no error apparent on the face of the record or any other sufficient reason to justify review.*”**

Likewise, In the Court of Appeal decision of **Rose Kaiza Vs Angelo Mpanju Kaiza 2009**, the Court was categorical that;

“An application for review under order 44 Rules 1 of the Civil Procedure Rules must be clear and specific on the basis upon which it is made...”

On the third ground of Review which is ‘for any sufficient reason,’ the court in **Pancras T. Swai v Kenya Breweries Ltd, [2014] eKLR** had this to say:

“...the words ‘for any sufficient reason,’ must be viewed in the context of firstly; section 80 of the Civil Procedure Act, Cap 21, which confers an unfettered right to apply for review and secondly, on the current jurisprudential thinking that the words need not be analogous with the other grounds specified in the order.”

From the above, it is clear that grounds for Review are limited and should be strictly confined to what is provided for under the Rules. From the grounds in support of the application and those adduced in the affidavit in support of the application as reiterated above, the applicant has failed to show how his grounds for seeking a review of the Court orders are in tandem with **Order 45 of the Civil Procedure Rules, 2010**. He did not raise any new and important matter or evidence which was not within his knowledge or could not be produced by him at the time when the decree was passed or the order made and neither are his grounds alluding to an error apparent on the face of record.

However, the Court's judgment delivered on 7th March 2016 at page 10 reads;

In the circumstances, the court finds she is entitled to maintenance. In the absence of confirmed figures of the Respondent's financial position; the Court shall grant a conservative figure to be adjusted once the affidavit of means are filed by the parties.

The above requirement falls under the ground for review **‘for any sufficient ground** as envisaged under for review under **Order 45 of CPR 2010**. The Affidavits of means consist of each party's income, earning capacity and other financial resources which each party has. Secondly, the affidavits include the financial needs, obligations and responsibilities each party has. The content of the affidavits aid the Court in determination of alimony or maintenance payable from one spouse to the other based on informed decision and not seemingly oppressive measures from one spouse to the other. I find that the Respondent /applicant complied and outlined the expenses at paragraph (f) of the submissions totaling Ksh 246,000/- .Financial resources were disclosed as 3 apartments; one where the Petitioner resides, the other the Respondent /Applicant resides and the third one is rented out and he receives rent receivable net Ksh 83,000/- he runs a Gym business that is not financially stable as per audited accounts filed.

The Applicant outlined the expenses that he shoulders; the responsibility of their 2 children's schoolfees and expenses, medical care, transport, subsistence, utility bills, entertainment and holidays clothing etc. He also confirmed that he paid service charge payments for [particulars withheld] Edenville where the Petitioner resides and there are no arrears. He pays Ksh 40,000/- to the Petitioner /Respondent for upkeep of their children and disclosed that by mutual agreement since June 2014 he has physical custody of the children.

The Applicant took issue with the fact that the Respondent claimed ill health but enjoyed good health but declined to take up any employment or finance generating activity. Therefore, the Applicant is saddled with all expenses without contribution from the Petitioner for upkeep of the children.

The Respondent stated in the application filed on 25th November 2014 that she had legal and physical custody of both children and they resided at the matrimonial home [particulars withheld] Edenville on LRNo [particulars withheld] Kiambu Municipality. In the present application, the children are with the Respondent since 2014. This Court is unable to vouch the truth as it is one's word against the other. However, be that as it may; this Court at Pg 9 of its Judgment stated;

The Petitioner is now sickly and unemployed and has physical custody of the 2 children. She is financially destitute and has incurred electricity arrears and service charge payments. She is entitled to maintenance to pay utility bills, transport to ferry the children and herself and their subsistence.

At Pg 10 this Court went on to state;

The Court observed that, the Respondent shoulders the burden of maintaining the children so the figure of Ksh 200,000/- as maintenance is exorbitant. The Petitioner is expected later upon recovery to undertake revenue generating activity

This Court was cognisant of **Article 27 & 45(3) COK 2010** as shown above. There is no new evidence adduced to the contrary. The only setback is that the Petitioner/Respondent did not controvert the allegation that she has not been sick, that service charge for the home is paid and no arrears are due, that the children are with the Respondent/applicant and finally that she has no genuine reason for not undertaking employment and/or revenue generating activity. More importantly, she did not file her affidavit of means.

Therefore, since the Applicant's application is uncontroverted as the Petitioner/Respondent dwelt on technicalities of appropriately filing the application; This Court reviews the Orders of 7th March 2016 as follows;

DISPOSITION

1. [particulars withheld] EDENVILLE on L.R. No [particulars withheld] Kiambu Municipality remains jointly owned by the Petitioner/respondent and Respondent/Applicant and held for themselves and 2 children of the presumed marriage.

2. The Respondent /Applicant shall pay;

a) Ksh 107,752 service charge for [particulars withheld] Edenville and subsequent payments thereafter;

b) Maintenance of Ksh 20,000/- to the Respondent/Petitioner monthly;

c) Ksh 40,000/- for children upkeep as per Court order of 25th February 2015 (If Respondent has physical custody of the children as earlier deposed to this Court);

3. The Respondent /Petitioner shall pay her utility bills for the home [particulars withheld] Edenville;

4. The Respondent /Petitioner to reside in [particulars withheld] Edenville with the 2 children on visitation or physical custody;

5. The Application filed on 6th September 2016 is upheld to the extent of the orders above;

6. No orders as to costs; each party to bear own costs;

DATED, SIGNED AND DELIVERED IN OPEN COURT AT NAIROBI THIS 22ND DAY OF SEPTEMBER, 2017.

M. W. MUIGAI

JUDGE

IN THE PRESENCE OF;

MRS. WACHIRA HOLDING BREIF FOR MR. GITAU FOR THE RESPONDENT

MRS. MUSIMI FOR THE APPLICANT/ABSENT