



**REPUBLIC OF KENYA**

**IN THE HIGH OF KENYA AT NYERI**

**CIVIL APPEAL NO.38 OF 2006**

**JG..... APPLICANT**

**MCW & GOW**

**(Children suing through their mother guardian) JNW..... RESPONDENT**

**RULING**

**INTRODUCTION**

1. The Notice of Motion was brought under a Certificate of Urgency and under the provisions of Section 3A and 63 of the Civil Procedure Act, Orders 22 Rule 22(1), 45(1) and 55(1) of the Civil Procedure Rules and Sections 73 and 99 of The Children's Act of 2001, Rules 1 and 7 of the General Rules & Regulations and Articles 36 and 37 of the Constitution of Kenya.
2. The application is dated the 27<sup>th</sup> day of February, 2015 and is made by the Respondent (hereinafter referred to as the applicant) who is the father of the minors and is seeking the following orders;
  - i. Spent
  - ii. That the maintenance order made by this court against the applicant in the ruling of 21<sup>st</sup> February, 2014 be reviewed, varied and set aside and instead this Honorable Court do apportion parental responsibilities for the two minors as between the applicant and the mother of the minors and an order be made that the applicant herein do continue paying the school fees of the two minors in their respective schools and the applicant do cater for the medical expenses of the minors until further orders of this Honorable Court and that the mother of the minors be ordered to meet and provide for the needs of the minors during the three months school holidays every calendar year.
  - iii. That pending the hearing and determination of this application an order be issued staying the Notice to Show Cause issued against the applicant in the Nyeri Childrens Case No. 14 of 2005.
  - iv. That the costs of this application be provided for.

**FACTS**

3. A brief overview of the facts; the applicant and respondent were married and filed for divorce vide Divorce Cause No.4 of 2003; the subject matter of the appeals and application for review are the maintenance orders for the issues of the said marriage.
4. On the 3/05/2006 the trial court had awarded monthly maintenance in the sum Kes11,700/- and the applicant filed an appeal thereto; thereafter on the 28/2/2012 the parties signed recorded a consent whose effect was to substitute the maintenance amount to Kes.8,000/- until the minors

- became of age.
5. The mother of the minors sought for a variation on the 25/06/2012 on the grounds that the cost of living had gone up; the court relied on Section 100 of the Children's Act which allows for variation of a consent order and the same was varied to an amount of Kes.21,230/-.
  6. The applicant appealed to the Court of Appeal against the order in CA.Case No. 25 of 2014; the appeal was dismissed on the 1/10/2014 and the decision of the High Court was upheld as being in the best interest of the children.
  7. The applicant has now filed this instant application seeking review of the orders issued by Serگون J.

### **APPLICANTS SUBMISSIONS**

8. The applicant relies on the grounds stated on the face of the application and on the Supporting Affidavit made on the 27/02/2015.
9. The applicant avers that he has discovered new and important evidence which after due diligence was not available or within his knowledge and could not be produced at the initial hearing; that the respondent made a false affidavit which she used to convince the court to enhance the maintenance orders.
10. That the applicant states that he was informed by the proprietor of the school that the receipt number 6843 annexed to the respondents' application of 26.06.2012 which guided the court to enhance the order for maintenance was forged.
11. That the maintenance amounts were beyond the minors actual needs; that he has been forced to borrow moneys from shylocks to comply with orders; that the respondent is a woman of means and is using the orders to enrich herself; that the general principle of maintenance of the children is that of shared responsibility.
12. The applicant prayed that the court do review, vary or set aside the existing maintenance orders and apportion parental responsibility with the applicant paying school fees and provide medical cover; and that the respondent meet all the minors' upkeep and maintenance during school holidays.

### **RESPONDENTS SUBMISSIONS**

13. The application was opposed and the respondent relied on her replying affidavit made on the 14.05.2015 and the written submissions filed on 9.07.2015; that the application to set aside the order; was filed after 14 months and is meant to avoid compliance of court orders; that the orders sought are not in the best interest of the children.
14. That the arguments raised have been the subject to an appeal; the application is an abuse of the court process because an appeal on the orders was dismissed by the Court of Appeal; that this court is factus officio and cannot review the order which would amount to overruling the Court of Appeal; the respondent relied on the case of **Pancras T. Swai vs Kenya Breweries Ltd (2014) eKLR.**
15. That the matter has always been handled by the firm of Wahome Gikonyo and Company advocates; that the Notice of Appointment of Additional Advocates filed was not in compliance with Order 9 Rule 9 of the Civil Procedure Rules 2010; that the new firm of advocates was therefore not properly on record.
16. The respondent prays that the application be dismissed.

### **ISSUES FOR DETERMINATION**

17. After hearing and considering the submissions of Counsel for both parties this court has framed two issues for determination which are;
  - i. Whether this court has appellate jurisdiction
  - ii. Whether the application for review of the ruling dated 27/02/2015 is properly before this court.

### **ANALYSIS**

18. This court finds it not necessary to belabor itself on the merits of the application but will only address the issue as to whether the application is properly before this court.
19. It is not in dispute that the Order sought to be reviewed was issued by a court of coordinate jurisdiction; that the applicant thereafter filed an appeal against the decision to the Court of Appeal in Case No. 25 of 2014 which appeal was dismissed.
20. The applicant after losing the appeal now seeks revision of the order that had been initially issued by the High Court; it is my considered view that the application for review should be read in the context of Section 80(a) of the Civil Procedure Act which reads as follows;

**“80. 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 from which no appeal is allowed by this Act,**

**may apply for a review of judgment to the court which passed the decree or made the order, and the court may make such order thereon as it thinks fit.**

21. What then is the position of an applicant who has already exercised his option of appeal, has been unsuccessful and has filed an application under the guise of a review on the grounds that he has discovered new and important material that was not available to him even after exercising due diligence? The answer lies in Section 80 (a) and (b) hereinabove cited.
22. The applicant herein chose to prefer an appeal against the order of the High Court to the Court of Appeal; the sub-section (a) uses the words **“but from which no appeal has been preferred”** and sub-section (b) states **“...from which no appeal is allowed”**
23. It therefore follows that once an option to appeal is exercised then review may not be readily available; it would also be a dangerous precedent to allow an applicant to appeal, as is in this instant case, then allow him to revert back to the lower court and seek to review an order that has been subjected to a determination by a superior court.
24. By dint of the same provision of law, if the applicant was still aggrieved or dissatisfied with the order of the Court of Appeal the applicant was at liberty to seek review of the decision of the Court of Appeal but at the Court of Appeal and not in the High Court.
25. This court finds that it does not have appellate jurisdiction to examine decisions emanating from the Court of Appeal.

### **FINDINGS AND DETERMINATION**

26. For the foregoing reasons this court finds that it does not have the jurisdiction to review, vary or set aside an order rendered by the Court of Appeal.
27. The application for review is found to be incompetent and is hereby struck out.
28. This being a family matter each party shall bear their own costs.

Orders accordingly.

Dated, Signed and Delivered at Nyeri this 28th day of April 2016.

**A.MSHILA**

**JUDGE**