A.O……..…….....……..……..……..
……..APPELLANT

VERSUS

N.O.B……..…….....…….……..…1ST
RESPONDENT

CELESTINE OKUTA……...…….....……2ND
RESPONDENT

R U L I N G

1. On 12th July 2011, Nambuye J. delivered a lengthy judgment on the present Appeal and in conclusion, granted the following Orders;

"1) The custody of the minor subject of these proceedings namely R.A.A. be and is hereby granted to the mother, A.A.O and the father N.O.B the 1st Respondent.

2) The care and control of the said subject child R.A.A. be and is hereby granted to the mother A.A.O

3) The said A.A.O be and is hereby ordered and directed to look for a school of equal standard as the one currently being attended by the minor for the minor to attend if the one currently being attended by the minor is not within easy reach from her residence. If within reach of her residence then the child will continue attending the same school.

4) In the event of any relocation to a new school, both parties to agree mutually with the assistance of their counsels to the school to be chosen.

5) Both parents to meet the school expenses as well as school transportation expenses inclusive of costs of learning material and school trips equally.

6) Costs of the food, clothing for the minor to be met on equal basis. The mother who is going to have care and control of the child to provide a budget for the same to be shared out equally mutually failing which the amount of the fathers contribution to be fixed by the Court.

7) The father who is the 1st Respondent will have access to the child on all weekends during the school days. The child will be picked by the father on each Friday after school and be returned to the mother's house on Sunday afternoon by 5.00 p.m. in order to be prepared for school the next day.

8) Access to the father to the child during school holidays to be three (3) weeks to him and one (1) week to the mother. The three weeks to start [at the beginning] of the holiday and to end one week to the opening of the school.

9) Both parents are enjoined not to engage the child into negative talk about each other. But to do all that is within their reach to [maintain] the child's strong bonds with both of them.

10. The access given to the father in number 7 above to be exercised only if the father is not travelling outside the jurisdiction.

11. The handing over of the child to the Appellant from the 1st Respondent to be supervised by the OCPD of the police station having jurisdiction in the area where the child currently resides witnessed by counsels of both sides of their authorized agents and the children's officer as well as any social worker having jurisdiction in the area where the child resides.

12. Further to number 11 above before the child is handed over to the Appellant, the parties with the assistance of their counsels, children's officer, social worker or church ministers on both sides do hold three joint sessions to prepare the child for transition from living with the father to now moving to go and start living with the mother. The dates on which the sessions are to be held are to be agreed upon mutually.

13. The said sessions to be conducted within thirty (30) days from the date of the reading of this judgment after which the child to transit to the mother"

2. The matter should have come to an end but it did not because on 1st August 2011, the Respondent/Applicant invoked **Section 3, 3A** and **63(e)** of the **Civil Procedure Act, Section 76** of the **Children Act** and **Rule 4** of the **Children Practice Rules** as well as **Order 45** of the **Civil Procedure Rules 2010** and filed a Notice of Motion seeking substantially orders that ***"the judgment herein be reviewed, set aside and reversed".***

3. I have read the grounds in support as well as the Affidavit sworn on 28th July 2011 by the Respondent/Applicant and his case can be summarized thus;

i) that by the time the judgment was delivered, the Applicant and Respondent had resumed co-habitation as husband and wife and so the orders issued by Nambuye J. had no meaning at all, in the circumstances,

ii) that the Respondent inspite of (i) above , upon obtaining a favourable judgment, fled the matrimonial home, removed the minor issue from (particulars withheld) and;

iii) that the judgment was patently illegal and specifically unconstitutional as it failed to take into account the fact that the child had been living with the Applicant for five years and would be traumatized by separation with his father,

iv) that the Respondent is incapable of raising the child and has no ability to take care of him and the child's interests would be negated in the circumstances,

v) that on 24th July 2011, the Respondent was found in a compromising situation with a certain man at Eureka Lodging House in Nairobi and her conduct made her unfit to have custody of the child.

vi) that any orders granting custody to the Respondent would have the effect of emotionally affecting the child and cause him stunted personal development.

4. In her Replying Affidavit sworn on 17th August 2011, the Respondent's case is that the judgment delivered by Nambuye J. was sound in Law as it placed both parents on an equal footing as regards custody of the child.

5. As regards the child's schooling, the Respondent has stated that Nambuye J's judgment allowed her the opportunity to look for a school near her residence and she was merely complying with those orders when she removed him from *(particulars withheld)*. She was also entitled to do so as she was to contribute to the fees and had to choose a school whose fees were within her means.

6. I should also summarise other issues raised by the Respondent as follows;

i) that all the issues raised in the Application were canvassed before Nambuye J. and cannot be re-opened at this stage.

ii) that allegations of adultery on the part of both herself and the Applicant were considered both by the Lower Court and this Court and it was ordered that the same be addressed in the pending divorce proceedings. She denied any infidelity on her part and denied the existence of the incident at the Eureka Lodging House in Nairobi. She admitted however that the Applicant found her at an unnamed hotel in Nairobi with one Martin Maina and that the Applicant caused a scene at the hotel before calling the media to witness the spectacle.

iii) that the best interests of the child would be served if the orders are maintained and the Application dismissed.

7. I have taken into account the submissions by Advocates for the parties and the first issue to address is the Law regarding review and setting aside of a judgment obtained after exhaustive argument by parties.

8.**Order 45** of the **Civil Procedure Rules 2010** provides as follows;

"(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 in which he applies for review.

(2) 1) An Application for review of a Decree or Order of a Court, upon some ground other than the discovery of such new and important matter or evidence as is referred to in Rule 1, or the existence of a clerical or arithmetical mistake or error apparent on the face of the Decree, shall be made only to the Judge who passed the Decree, or made the order sought to be reviewed.

2) If the Judge who passed the Decree or made the Order is no longer attached to the Court, the Application may be heard by any other Judge who is attached to the court at the time the Application comes for hearing.

3) If the Judge who passed the Decree or made the Order is still attached to the Court but is precluded by absence or other cause for a period of 3 months next after the Application for review is lodged, the application may be heard by such other Judge as the Chief Justice may designate.

(3) 1) Where it appears to the Court that there is not

sufficient ground for a review, it shall dismiss the Application.

2) Where the Court is of the opinion of the Application for review should be granted, it shall grant the same:

Provided that no such Application shall be granted on the ground of discovery of new matter of evidence which the Applicant alleges was not within his knowledge, or could not be adduced by him when the decree or order was passed or made without strict proof of such allegation.

(4) 1) When the Application for review is heard by more

than one Judge and the Court is equally divided the

Application shall be dismissed.

2) Where there is majority, the decision shall be according to the opinion of the majority.

(5) When an Application for review is granted, a note thereof shall be made in the register, and the Court may at once re-hear the case or make such order in regard to the re-hearing as it thinks fit.

(6) No Application to review an order made on an Application for a review of a Decree or Order passed or made on a review shall be entertained."

9. I chose to reproduce the whole Rule because it is clear that the only grounds upon which a review can be made are;

a) That the Applicant has discovered a new and important matter or evidence, which after due diligence was not within his knowledge or could not be produced by him at the time when the decree or order was made. The matters raised must be strictly proved, in any event.

b) That where there is a mistake or error apparent on the face of the record.

c) That for any other sufficient reason

10. In the Application before me, nowhere has the Applicant specifically relied on any of the above grounds as the basis for his application but reading between the lines, it seems to me that he is saying that there is sufficient reason to review the judgment because of the matters that I have elsewhere summarized above.

11. My view in the circumstances is as follows;

First, it matters not that the parties may have reconciled between the filing of the Appeal and the delivery of the judgment. This is a Court of record and as long as there is no record of withdrawal of the Appeal, the Court was obligated to determine the matters before it, on merits and Nambuye, J. did so.

12. Second, whether or not the Respondent committed adultery with Martin Maina a few days after the judgment and whether or not the Respondent also committed adultery prior to and subsequent to the judgment is a matter for the divorce Court and not this court sitting on Appeal in a matter arising from the Children's Court. Allegations of adultery would have become pertinent had there been evidence that they affected the best interests of the child. No such connection has been made and the issue, attractive as it may sound to both parties has no bearing to the matters under consideration and parties, are best advised to save the salacious details of the alleged adultery for their divorce case.

13. Third, Nambuye J. in her judgment went out of her way to address the issue of who was best suited to have the custody of the minor child. She set out in great detail each parties' arguments and in equal detail set out the law applicable to the subject. She quoted the following relevant authorities in reaching her decision;

§ *Sospeter Ojamong vs. Liner Amondi Otieno, H.C.C.C. No.31/2004 (Nbi)*
§ *S.O. vs. L.A.M. C.A. No.175/2006*
§ *Githunguri vs. Githunguri [1981] KLR 598*

§ *Mehrunissa vs. Parves [1981] KLR 547*

14. She then analysed **Article 53(1)** and **Article 2(5)** of the **Constitution** and invoked **Articles 4, 9, 12,** and **18** of the **African Charter** on the **Rights** and **Welfare** of the **Child** before applying those principles to the circumstances in the present case. In conclusion, she made the detailed orders set out elsewhere above which were all anchored on one principle; that the interests of the child should be best served at all times.

15. It is obvious to me that save for the single issue of the alleged sexual escapade by the Respondent on 24th July 2011, all of the relevant issues raised by the Applicant were canvassed before Nambuye J. and the learned Judge finally ruled on them. The issue of the Respondent taking the child away from school may well be distasteful to the Applicant but I accept the Respondent's argument that those actions flow directly from the judgment and may be excusable in the circumstances.

16. **Four, what part of the judgment is the Applicant uncomfortable with?** There is no advantage granted to the Respondent save that of daily care and control of the child. ***What part of that order impacts on the Welfare of the child when the learned Judge also made certain orders to ensure that the child adjusts to his new circumstances?*** In any event, each of the parties has equal access and I see no justifiable reason to change those orders.

17. Lastly, I came into this matter quite late in the day but I have taken time to read the entire file and all I can say is that Nambuye J.'s judgment, form where I sit, is solid in Law and fact and while I am not sitting on Appeal over it, I would have given the same orders had I heard the Appeal.

18. If any advise is needed, parties should not use the minor as a pawn to vent their frustrations over their vanquished love but should channel their joint affection towards making his upbringing as comfortable as possible.

19. In any event, I see no merit in the Notice of Motion dated 27th July 2011 and I will quickly dismiss it with costs to the Respondent who was the Appellant in the Appeal.

20. Orders accordingly.

DATED, DELIVERED AND SIGNED AT NAIROBI THIS 20TH DAY OF JANUARY, 2012.

20/1/2012
CORAM:
ISAAC LENAOLA – JUDGE
Miron – Court Clerk

Miss Ndombi hold brief for Mr. Ongaya for Appellant

No appearance for Respondent
ORDER

Ruling duly delivered on the main file. This skeleton file to be attached to that file.

ISAAC LENAOLA
JUDGE