



N.C.K..... PETITIONER/RESPONDENT

VERSUS

G.V.K..... RESPONDENT/APPLICANT

R U L I N G

This matter relates to the custody of a minor. On 12th July, 2011, the Hon. Lady Justice Nambuye (as she then was) delivered a ruling granting/awarding custody of the child to the Petitioner in this Divorce Cause. Dissatisfied with that award, the Respondent filed this application by a Notice of Motion dated 20th July, 2011 and taken out under **Article 53(2), 159(2) (d) of the Constitution of Kenya; Section 1B, Section 3 and Section 80 of the Civil Procedure Act; Order 45 Rules 1, 2, and 3 of the Civil Procedure Rules (Cap. 21); Sections 4(4), 76(1), 83(1) (d) and 76(3) of the Children Act.**

The application seeks the following orders –

1. *...(Spent).*
2. *That upon hearing this application, this Honourable Court be and hereby pleased to review and/or set aside its orders granted by Lady Justice Nambuye, dated 15th July, 2011 following from her ruling dated 12th July, 2011.*
3. *That upon hearing this application, this Honourable Court be pleased to stay all and/or any execution of the order dated 15th July, 2011 and/or other orders pursuant to the ruling by Lady Justice Nambuye dated 12th July, 2011, pending the hearing and determination of this application or until further orders of this Honourable Court.*
4. *That costs of this application be provided for.*

The application is supported by the annexed affidavit of G.V.K sworn on 20th July, 2011 and is based on the grounds that –

- (i) *The Honourable Judge ought to have taken into account the known and ascertainable wishes and interests of the minor herein N.G in making orders as to his care and control which know, ascertainable, wishes and desires as expressed continually over the past year and reinforced by his own actions and verbalization were to be in the care and control of the Respondent/Applicant herein.*
- (ii) *The Honourable Judge erred by granting care and control to the Petitioner/Respondent of the minor N.G on the ground that the Petitioner/Respondent had not been shown to fit in the category of one who had shown exceptional circumstance vis-à-vis immorality and bad company each of which were shown.*
- (iii) *The said minor having shown, by both conduct and his verbal expression, not to have a good relationship with the mother cannot by Court orders be led to mend fences with the Petitioner/Respondent.*

- (iv) The minor herein is in the ruling described as being of tender years, yet clearly this did not militate against his being invited on more than one occasion by the Honourable Judge in Chambers to ascertain his wishes and what would be in his best interest.**
- (v) The said minor before the Honourable Court expressed under no duress, coercion and/or threat, his ascertainable wishes which quite belie the notion that he was merely of tender age and incapable of expressing his own wish by his volition and which wishes have been ignored and/or deliberately not taken into account.**
- (vi) The minor turns ten (10) years old on 1st August, 2011 and this was not taken into account but was disregarded.**
- (vii) The minor herein is attached to his brother – M.G originally one of the named children in this custody suit, who now has turned 18. The two have been, and now more so, close and have over the period of the dispute been living together in the same home with the Respondent/Applicant. The ruling and execution for the orders herein envisage a scenario that will disrupt the status quo, bring confusion and at best traumatize the minor rendering nugatory the desire to act in the best interest of the child as envisioned by the outlined provisions of the law and enshrined in the Constitution.**
- (viii) The provision at No.13 in the order to execute the ruling rely on, at best, means by which cannot be countenanced as they are extraneous and extra-judicial, failing to look towards the best interests of the child by relying on the overseeing of the process of the hand-over of the child with assistance of the O.C.P.D. This being a civil matter, the introduction of police officers cannot be seen to be anything less than an attempt to traumatize the child further by an act of force rather than assistance and/or acknowledgement of acting in the best interest of the child and/or in seeking to act within his ascertainable wishes which are deemed to be paramount importance in every matter covering the child.**
- (ix) The orders sought herein are vital for giving credence to the principle of seeking to uphold the best interest of the child.**
- (x) With regard to the conduct of the Petitioner/Respondent there are new facts that have come to light that were not the subject of the previous proceedings and which are set out in the supporting affidavit.**

In her response, the Respondent filed a replying affidavit sworn on

26th July, 2011. In that affidavit, she deposes, in a nutshell, that all the issues raised in the Applicant's application have already been canvassed and determined upon previously as he had raised the same in his previous affidavit sworn on 28th July, 2010 and the Court in delivering its ruling on 12th July, 2011, considered all the issues he has raised.

At the oral canvassing of the application Mr. Gatuguta appeared for the Applicant while Ms. Thongori appeared for the Respondent. Although this application was listed for hearing along with another application by Chamber Summons dated 1st November, 2011, Counsel confined themselves to the application by Notice of Motion dated 20th July, 2011. They did not directly address the application by Chamber Summons dated 1st November, 2011. However, whatever decision this Court reaches on the application dated 20th July, 2011 will have a direct bearing on the other application.

Mr. Gatuguta for the Applicant argued that Honourable Lady Justice Nambuye found that there was need for the child to mend fences with the Petitioner but did not record her interview with the child, and that in the report filed by the Children Welfare Society on orders of the Court, the child expressed a desire to be taken care of by the father. He also submitted that the orders granted were faulty as police were involved in attempts to transfer the child from one custody to another. The learned Judge erred by transferring the child to the custody of the Petitioner while the child would not have voluntarily agreed to be so

transferred.

On her part, Ms. Thongori submitted that there were no sufficient grounds for review and that what had been argued were grounds for appeal. The Judge discussed the issue of infidelity extensively and Counsel therefore submitted that the findings of the Judge should be allowed to stand. Police involvement was intended to ensure that Court orders were obeyed and dissatisfaction with that order would be a good ground for appeal.

In a short reply, Mr. Gatuguta submitted that the report from the Children Service Department should be accepted and allowed.

It is important to state from the outset that this is not an appeal. It is an application for review. The rules guiding the Court in a review are clearly set out in **Order 45 (1)** of the **Civil Procedure Rules**. It states that –

“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.”

It is clear from this provision that there are only 3 grounds upon which an application for review can be based. These are discovery of new and important matter or evidence which was not within the Applicant’s knowledge or could not be produced by him when the decree was passed or the order made; some mistake or error apparent on the face of the record; and any other sufficient reason. Regarding the first ground, it is instructive that the applications which were the subject matter of the Ruling by the Hon. Lady Justice Nambuye (as she then was) were dated 16th July, 2010 and 21st October, 2010 and they were filed in Court on 20th July, 2010 and 21st October, 2010 respectively. In his affidavit sworn on 20th July, 2011, the deponent, one P.V.M, deposes that the Petitioner herein was first known to him in or about June, 2009, and that the liaison between her and one A.N.O continued unabated from June, 2009 and February, 2010. No evidence along that line was adduced before the Hon. Lady Justice Nambuye and yet, by the affidavit sworn on 20th July, 2010, the Respondent deposed at paragraph 7 that his **“... investigations revealed that that she (the Petitioner) was having an adulterous relationship with one A.K a.ka. A.N.O”** and at paragraph 13 that he **“had recently been informed that on several occasions when he (Respondent) would be out of the country on business, the Petitioner/Respondent would bring the said Alex Kober to the matrimonial bedroom, all this in the presence of the domestic workers and children, including the child and would operate to the detriment of the children.”**

These depositions led Judge Nambuye to remark in her ruling as follows –

“This Court has considered the said rival arguments on issues of an immoral character and in this court’s opinion, the following is a correct assessment of the same.

(a) Vide paragraphs 7, 8, 9 and 10 of the Respondents’ replying affidavit, without proof or evidence of what the Petitioner actually did outside then what the court has is mere suspicion on the part of the respondent that immorality was being committed by the petitioner.

(b) Vide paragraphs 11, 12 and 13, the nature, extend (sic) and who carried out investigation (sic) are not disclosed. Also, the particular lodgings where the adultery was committed, have not been given. The photographs exhibited display images of moving human beings with no prima facie

immorality being displayed.

Paragraph 15 can only be confirmed by a deponement from the Sunday school that the position is not as put by the petitioner.

Issues of admission of adultery is the Respondent's word against that of the Applicant. The details of the house where the adultery was committed and the friends who had knowledge of it have not been disclosed in paragraph 22. The source of information in paragraph 23 is also not disclosed.

The net result of the aforesaid assessment on immorality is that it has not withstood the test of the required standard on a balance of probability. These remain mere allegations and by reason of them being mere allegations they do not qualify to be termed exceptional circumstances in terms of the standard set by the Court of Appeal in the cited case law."

These are some of the gaps and loopholes identified by Hon. Lady Justice Nambuye as militating against the grant of the orders sought. They are the same ones which the Respondent now seeks to plug belatedly by introducing particulars which should and ought to have been placed before the learned Judge at the time of hearing the application before her. It is instructive that the affidavit now relied upon by G.V.K was sworn on 20th July, 2011. That date was only one week after the delivery of Judge Nambuye's ruling on 12th July, 2011. With the application following that ruling so closely, it is implicit that the Applicant had that information all along, but did not table it before Judge Nambuye. Consequently, it does not fall within the ambit of "... new and important matter ..." as envisaged in **Order 45 Rule 1 (1)**. Indeed, nowhere does the Respondent state the said information was a new discovery because that information was always within his knowledge. I find that the 1st condition as to the discovery of new and important matter or evidence has not been satisfied for purposes of reviewing the orders made by Hon. Lady Justice Nambuye.

As for the 2nd condition, there is no allegation that there is any mistake apparent on the face of the record, and therefore that condition does not arise to be satisfied.

Finally, no sufficient reason has been pleaded, and Judge Nambuye considered all the matters which were placed before her. In the circumstances, I find that this application does not satisfy the conditions for review and it is bound to fail. I agree with Ms. Thongori that the grounds pleaded by the Respondent/Applicant endear themselves more to an appeal than a review. That is the avenue which he ought to pursue. Otherwise, this Court has no jurisdiction to sit on appeal against a judgment of another Court of co-ordinate jurisdiction.

This application accordingly fails and it is hereby dismissed with costs to the Petitioner/Respondent. The orders granted by Judge Lenaola in this matter stand unabated and should be enforced.

It is so ordered.

DATED and DELIVERED at NAIROBI this 3rd day of May, 2012.

L. NJAGI
JUDGE