IN THE HIGH COURT OF KENYA

AT NAIROBI

DIVORCE CAUSE NO. 8 OF 2008

O .O. A..PETITIONER/RESPONDENT

Versus

H. O. O...RESPONDENT/APPLICANT

RULING

Upon the Petitioner's application dated 26th May 2009 this court (Lady Justice Gacheche) issued an order on 6th August 2009 restraining the Respondent from going to their matrimonial home or in any way harassing or threatening the Petitioner until this cause is heard and determined. In the same order the judge granted temporary custody of the children to the Petitioner with the Respondent having access to them on Sundays between 10.00 and 18.00 hours. The court directed that the Respondent should, with prior notice, be picking the children from [PARTICULARS WITHHELD] and be dropping them at the matrimonial home.

The Respondent has by his Notice of Motion dated 30th March 2010 sought a review of that order so that he is able to visit the children at the matrimonial home and not to be restricted to the hours stated above. He avers in his affidavit in support of the application that he resides and works in Malawi and comes to Kenya only when he is on leave or when on transit to other destinations. In the circumstances to have access to the children only on Sundays between 10.00 and 18.00 hours is restrictive and does not give him enough time to bond with them. Besides, there are times when he makes stopovers in the country on days other than Sundays. He complained that between 18th March and 18th April 2010 when he was, with the knowledge of the Petitioner, on leave in the country the Petitioner went with the children to Uganda and he was unable to see them. Earlier on 29th December 2009 the Petitioner, referring to the hours of visit, had made a fuss when he went with the children to his rural home in Bondo. He would therefore wish the order to be reviewed to the effect that he can have unrestricted access to the children and that they should be visiting him out of the country during the school holidays or alternatively that both parents should have custody of the children on alternative holiday vacations.

The Petitioner cannot hear of the Respondent's application. She claims that there is no ground warranting the review of the court order. If the Respondent was dissatisfied, he should have appealed against it. She avers in her replying affidavit that the Respondent has flouted the order by going to the matrimonial home and at times taking the children beyond the visiting hours. She said, for instance, that one time at the request of the Respondent, she allowed him to take the children to Mombasa but instead he took them to his rural home in Bondo. She is not willing to have the Respondent go to the matrimonial home and avers that the Respondent can always bond with the children anywhere else.

In their submissions counsel for the Respondent argued that this application is based on all the grounds contained in **Order 44 Rule 1(1)(b)** of the **Civil Procedure Rules.** On the first ground of discovery of new and important matter or evidence they argued that the Petitioner's taking of the children to Uganda between 28th March 2010 and 9th April 2010 was something the Respondent had not anticipated and is therefore new evidence forming a good ground to review the order. On mistake or apparent error on the face of the record they argued that despite the judge knowing that the Respondent lives and works in Malawi, she went ahead to restrict his access to children to only Sundays between 10.00 and 18.00 hours. On sufficient grounds counsel submitted that it is impracticable for the Respondent to have the children whenever he comes back to Kenya only on Sundays when he is supposed to be flying to Malawi where he works. They also argued that the Respondent was not required to avail in court his flight schedules.

For the Petitioner it was argued that this application is defective and bad in law as it is brought under the **Civil Procedure Rules** and yet the matter is covered by **Matrimonial Causes Act** Cap 152 of the Laws of Kenya. On its merits counsel submitted that there is no new evidence, error on the face of record or sufficient reason to warrant a review of the order.

I have considered these rival submissions and read the averments in the parties' affidavits. The decision sought to be reviewed was made by Lady Justice Gacheche. Ordinarily this application should have been heard by her but as she has since been transferred to another division and since the application is premised on discovery of new and important matter and an error apparent on the face of the record as well as sufficient grounds, **Order 45 Rule 2(1)** of the **Civil Procedure Rules** authorises me to hear it.

A court has no inherent jurisdiction to review its decision duly pronounced. The power to review is a creature of statute and can only be exercised within the limits of the statute giving that power. In Kenya the power to review is donated by **Section 80** of the **Civil Procedure Act** and **Order 45** of the **Civil Procedure Rules**. **Section 80** provides:-

"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 or order 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."

Order 45 Rule 1(1) provides in more detail the instances under which an application for review can be made. It states:-

"Any person considering himself aggrieved –

i) by a decree or order from which an appeal is allowed, but from which no appeal has been preferred; or

ii) 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."

As I have already pointed out, this application is based on the ground of discovery of new and important matter or evidence and that there is an error apparent on the face of the Hon. Justice Gacheche's ruling.

The first ground of discovery of new and important matter or evidence can be disposed of easily. What **Order 45 Rule 1(1)** envisages by new matter or evidence is new matter or evidence that was in existence at the time of hearing or reaching the decision sought to be reviewed and not subsequent events. In this case the alleged new matter or evidence is the Petitioner's taking of the children to Uganda between 28th March 2010 and 9th April 2010 when the Respondent was in Kenya which is a new development long after the ruling sought to be reviewed. That cannot avail the Respondent. That ground is therefore dismissed.

As I have previously stated[1] from its very nature, the phrase "an error apparent on the face of the record" has an inherent element of indefinitiveness and cannot be defined precisely or exhaustively. It has to be determined by the court on the facts of each case. The criterion in each case, however, is that the error contemplated under the rule means an error on both points of law and fact which must be obvious and self evident from the record and does not require to be searched and fished out by a re-appraisal of the evidence on record, or by an elaborate argument or a process of reasoning.

Having carefully considered the matter I am satisfied that the totality of the Respondent's application is an appeal disguised as a review application. As I have said that the Respondent complains that despite knowing that he lives and works in Malawi the learned judge restricted his access to the children to Sundays between 10.00 and 18.00 hours. That is not a mistake or error apparent on the face of the record but a criticism of the judge's decision. It is an argument to be advanced in an appeal and not in a review application. In the circumstances I find no mistake or error on the face of the record. To purport to find any error in the learned Judge's ruling would amount to sitting on appeal on her ruling which I have no jurisdiction to do.
There is also no sufficient ground shown to warranty a review. Consequently I dismiss this application with costs.

DATED and delivered this 29th day of July, 2011.

D.K. MARAGA
JUDGE

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[1] **Peter Wanjama Thuo Vs Midicha Traders Ltd, Nakuru HCCCA No. 77 of 2005.** See also **National Bank of Kenya Limited Vs Njau, Civil Appeal No. 211 of 1996 (CA)**