



REPUBLIC OF KENYA
IN THE HIGH COURT OF KENYA
AT NAKURU
CIVIL APPEAL 11 OF 2000

TERESIA NYAKAIRU.....APPELLANT

VERSUS

GEORGE OTIENO.....RESPONDENT

(An appeal from the Ruling in Naivasha S.R.M.DIV.C.NO.169 of 1998 by Hon. M. M. Muya, Senior Principal Magistrate,
Nakuru dated 22nd December, 1999)

JUDGMENT

This is an appeal arising from the decision of the court below (Muya, Senior Principal Magistrate as he then was) in which he reviewed the judgment of Miss Gitari, Senior Resident Magistrate (as she then was). On 12th November, 1999 Miss Gitari delivered a judgment in which she dissolved the marriage between the appellant and the respondent. She also ordered the respondent to surrender 1/3 of his monthly salary towards the maintenance of their minor children until they attain the age of eighteen (18) years. It is this last order that prompted the respondent to seek a review and stay of the judgment on the ground that 1/3 of his salary would leave him with only Kshs.4,300/= which would be insufficient even for his own maintenance. He annexed to his affidavit copies of the payslips.

In his ruling dated 22nd December, 1999, Mr. Muya found that at the time the order was made by Miss Gitari, the appellant's income and expenditure were not disclosed; that without those details the court was not in a position to ascertain the amount for maintenance. He then went ahead to reduce the sum ordered to Kshs.7000/= per month. The appellant was aggrieved hence this appeal.

The appellant challenges the review order on five (5) grounds which can be summarized as follows:

- 1) that the learned magistrate failed to apply the relevant law thereby arriving at a wrong conclusion
- 2) that the learned magistrate's exercise of the power of review amounted to an abuse of the court process

Arguing these grounds, learned counsel for the appellant submitted that the ruling, the subject of this appeal did not consider the grounds of review of a judgment as provided in **Order 44** of the **Civil Procedure Rules** and indeed amounted to a decision on appeal. In reply counsel for the respondent supported the decision of the learned magistrate on the ground that it complied with the law, namely **section 44(1)(8)** of the **Civil Procedure Rules** and **Sections 90** and **101 (5)(c)** of the **Children Act**.

I have considered the arguments advanced by both sides as well as the decision in **National Bank of Kenya Ltd. Vs. Ndungu Njau**, Civil Appeal No.211 of 1996. Any person aggrieved by a decree or order from which an appeal is allowed as of right but he has not filed an appeal or by a decree or order from which no appeal is allowed can instead apply for a review of judgment to the court that passed or made it on satisfying the following conditions;

- i) that he has discovered a new and important matter or evidence which was not within his knowledge or could not be produced at the time the order was made or decree passed and that he exercised due diligence
- ii) that there is a mistake or error apparent on the face of the record, or
- iii) for any other sufficient reason
- iv) the application for review must be made without unreasonable delay.

It is particularly necessary in an application for review to state clearly which of the first three grounds listed above is or are being relied upon. It is not clear which ground the respondent was relying on.

His argument was merely that maintenance order took a large chunk of his earnings. It is not therefore clear whether he was saying that there was a mistake or error apparent on the record or if he was seeking the discretion of the court to review the decision on the last ground of *"for any other sufficient reason."*

Clearly upon reading the judgment of Miss Gitari, I find no mistake or error which is apparent on the face of the record. Mr. Muya in exercising his discretion to review the order said:

"However, I find that there are good grounds for the review of the earlier orders."

Did he exercise his discretion properly by reviewing the order in question on the ground *"for any other sufficient reason?"* The evidence presented before Miss Gitari was that the respondent earned Kshs.35,000/= and that the couple lived in company house allocated to the appellant; that the appellant was paying school fees to the three children; that only one of the three children was the respondent's biological child; that the respondent confirmed to the court that he had the means to maintain the children.

It is therefore irregular that during the hearing of his application for review he led evidence of his earnings and liabilities, yet Miss Gitari based her judgment on the material that was before her. The Court in **National Bank of Kenya Limited** Vs. **Ndungu Njau** (Supra) observed that:

“It will not be a sufficient ground for review that another judge could have taken a different view of the matter. Nor can it be a ground for review that the court proceeded on an incorrect exposition of the law and reached an erroneous conclusion of law. Misconstruing a statute or other provision of law cannot be a ground for review.”

In this appeal, it appears to me that Mr. Muya believed that Miss Gitari did not consider the respondent’s financial commitments when the maintenance order was made. That could not be questioned through an application for review. If Miss Gitari reached a wrong conclusion, that could only be a ground for appeal.

For the reasons stated, I find merit in this appeal which I hereby allowed with the result that the judgment of Miss Gitari is upheld and restored, the orders of 22nd December, 1999 are hereby quashed and the respondent ordered to pay all the arrears taking into account the ages of the children. He will also meet the costs of this appeal and those in the court below.

Orders accordingly.

Dated, Signed and Delivered at Nakuru this 23rd day of April, 2010.

W. OUKO
JUDGE