REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA

AT NAIROBI (NAIROBI LAW COURTS)

Civil Appeal 31 of 2009

GLADYS WANGUI NGUNYI ……..…….. APPELLANT

versus

CHARLES MWANGI KARUOYA ……..……. RESPONDENT

RULING

This application arises from my ruling of 7/8/2009, in which I dismissed an application by **GLADYS WANGUI NGUNYI** ('Gladys') who had sought the custody of the minor son of **CHARLES MWANGI KARUOYA** ('Charles').

Gladys who I shall also refer to as 'the applicant' is back to court, and she seeks the following orders against Charles ('the respondent'):

- **€€€€€€€ THAT this court, do review the said order of dismissal.**

- **€€€€€€€ THAT this court do order a third independent child welfare report from a Children's Officer appointed by the Court.**

- **€€€€€€€ THAT this court do order that the minor herein, be educated, accommodated and taken care of by the applicant pending the hearing and determination of the Children's Case, which she filed against this respondent.**

She also prays for costs.

The respondent reiterates the fact that he is the biological father of the subject minor; that the applicant is his late wife's maternal aunt and is in the circumstances not his immediate relative, does not have overriding rights of custody. He therefore also opposes the application on the grounds that it contains falsehoods; that he is able to provide for his son who is in good health and that Children's Officer's report on record reflects the true position. All in all, the respondent is of the view that the application lacks in merits, and he urges this court to dismiss it with costs.

I have considered this application, the pleadings herein as well as the submission by both counsel and I would at this juncture refer to Order XLIV rule 1 of the Civil Procedure Rules which the applicant pleads as well as rule 2

thereof which provide that:

> "(1) *Any person considering himself aggrieved.*
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> *(a) by decree to order from which an appeal is allowed but from which no appeal has been preferred,*
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> *or*
>
> *(b) by all a decree or order from which no appeal is hereby allowed*
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> *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 an 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 or judgment to the court which passed the decree or made the order without unreasonable delay".*
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> *"(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 on which he applies for the review."*
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> *"2. 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".*
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> *"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 opinion that 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 or 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".*

In its recent decision, in **Rose Kaiza v Angelo Mpanju Kaiza [2009] eKLR**, the Court of Appeal held that:

- ***€€€€€€€ 'An application for review under Order 44 r 1 of the Civil Procedure Rules had to be clear and specific on the basis upon which it was made. Even though the motion before the superior court was based on the discovery of new facts, it was not every new fact that would qualify for interference with the judgment or decree sought to be reviewed. Discovery of new and important matter or evidence must be one 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'.***

- ***€€€€€€€ 'Applications on the ground of discovery of new facts had to be treated with great caution and as required by Rule 4(2) (b). The court had to be satisfied that the materials placed***

before it in accordance with the formalities of the law proved the existence of the facts alleged. Before a review could be allowed on the ground of discovery of new evidence, it had to be established that

a)The applicant had acted with due diligence

b)The existence of the evidence was not within his knowledge'.

- ***€€€€€€€ 'Where review was sought on the ground of discovery of new evidence but it was found that the petitioner had not acted with due diligence, it was not open to the Court to admit evidence on the ground of sufficient cause. It was not only the discovery of new and important evidence that entitled a party to apply for a review, but also the discovery of any new and important matter, which was not within the knowledge of the party when the decree was made'.***

Based on the above, it is obviously trite that Gladys must therefore demonstrate that she has, since the subject decree was passed discovered new and important matter or evidence which, after the exercise of due diligence, was not within her knowledge, or could not be produced by her at the time when the decree was passed or the order made. She would otherwise have to demonstrate that she has *'any other sufficient reason'*.

While her earlier application which I dismissed and which is the subject of this application for review, was based mainly on the ground that '*the respondent, the minor's father, is a perpetual drunkard with no fixed income and has never at any time exercised any parental responsibility over the minor',* this application is based on the grounds that not only has she discovered new and important matters and evidence which, after the exercise of due diligence, was not within her knowledge or could not be produced at the time when the order of 7th August, 2009 was issued, but that she has other sufficient reasons to move this court in reviewing its aforesaid order and further that the minor is suffering greatly for the respondent has failed to meet the his paramount needs, which she says is depriving the minor of his right to good education, health and accommodation; that the minor has since been subjected to stress, neglect, poor nutrition and this has greatly affected his health and education. It is also her ground that there are two contrasting Children Officers' reports which were relied upon by the trial Court and that contributed to the ruling by the learned trial Magistrate, which ruling is the subject of her appeal to this court.

I have perused the pleadings herein and I find that the applicant has pleaded facts similar to those pleaded in the application which I dismissed last year. Indeed, her main ground is that the respondent is not able to maintain the minor, which issue I dealt with and reached my decision. Needless to say she readily concedes that the two Children Officers' reports which she claims are contradictory were considered by the trial Magistrate, whose decision she has appealed against.

In my humble opinion, her cause lies in appeal for she has failed to demonstrate that she has discovered new and important matter or evidence, and that being the case then, she has failed to demonstrate that she falls within the ambit of the above legal provisions, and I find there are no sufficient ground for a review, or even for ordering that a third report be availed, and I do dismiss this application with costs.

I would however advice the parties to ensure that the pending appeal is listed for hearing within the shortest time possible so that this mater can be brought to an end once and for all.

Dated and delivered at Nairobi this 14th day of May 2010.

JEANNE GACHECHE

Judge

Delivered in the presence of:

For the applicant – Mr. Kariuki

For the respondent – Mr. Wanjohi