REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT NAKURU

Civil Appeal 117 of 2005

Z M K ……..………...APPELLANT

VERSUS

C W K.…….......................................……..RESPONDENT

JUDGMENT

The appeal herein arose from a ruling delivered by the trial Court in the Senior Principal Magistrate's Court at Naivasha, **Separation and Maintenance Cause No. 4 of 2001** where the respondent herein was the petitioner and the appellant was the respondent.

The background to this appeal as I understand it is that on 22nd October, 2001, the appellant filed an application under Order XLIV seeking inter-alia review of the decree issued on 23rd July, 2001 so that one quarter of his salary could be attached and not a quarter of his total earnings. The Court allowed the application and ordered that a sum of Kshs.7,500 would be deducted on a monthly basis for maintenance of two minor children of the parties namely **K M** and **M M** . The ruling was delivered on 5th December, 2001 and the order was extracted on 6th December, 2001.

On 23rd September, 2004 the petitioner filed an application for review of the orders issued on 6th December, 2001. The said application was made by way of a chamber summons pursuant to the provisions of **Order XLIV Rule 1** of the Civil Procedure Rules. The Court was asked to review the maintenance sum upwards because the children's financial needs had increased over the years.

In a ruling on the said review application that was delivered on 18th March, 2005, the Court reviewed its earlier orders and ordered attachment of one third of the appellant's salary. The appellant was aggrieved by the said ruling and preferred this appeal. The appellant raised the following grounds of appeal:

1. That the learned trial magistrate erred both in law and fact in finding that the applicant (now respondent) was entitled to 1/3 of the appellant's basic salary without proper basis in law or fact.

2. That the learned magistrate failed to give satisfactory, rational or discerning reasons for her finding that the appellant is liable to pay the same to the respondent.

3. That the learned magistrate erred in law and fact in not factoring in the economic ability, status and liabilities of the respondent and the applicant respectively.

4. That the learned trial magistrate erred in law and fact in failing to militate reasons in opposition to the application in her ruling.

5. That the learned magistrate erred in law and fact in issuing review orders while there existed other review orders contrary to Order XLIV Rule 7 of the Civil Procedure Rules.

Mr. Ogola for the appellant chose to first argue the last ground of appeal which I believe is the central one. He submitted that a Court could not entertain an application for review emanating from orders made on review and sought to rely on the provisions of **Order XLIV Rule 7**. The same states as follows:

"No application to review an order made on an application for a review of a decree or order passed on a review shall be entertained."

Mr. Machage for the respondent agreed that there was a procedural error in the making of the respondent's application since it was seeking a review of orders made pursuant to another review application. However, he submitted that the orders made were justified in the circumstances of the case since the financial requirements of the children who were being maintained had gone up considerably and in fact one of the children had developed a heart condition that required medical attention whose cost was rather high.

The provisions of **Order XLIV Rule 7** are clear beyond peradventure. The rule is couched in mandatory terms and no matter how justified the resultant orders were, the trial court simply had no discretion in the matter and had no business in entertaining the application in the first place. Where express provisions of the law prohibit filing of certain applications in a given situation, if a court contravenes such express and mandatory provisions it acts without jurisdiction and any order that it may issue as a result thereof cannot stand. This is sufficient to dispose of the entire appeal and it would be superfluous for me to consider the other grounds of appeal.

I may observe that there is justification in seeking additional maintenance sum by the respondent in view of increasing financial needs of the said children but such a move must be made within appropriate legal framework and not otherwise.

I therefore allow the appeal and set aside the ruling and orders issued by the trial court on 18th March, 2005.

The appellant will have costs of the appeal.

DATED, **SIGNED** and **DELIVERED** at Nakuru this 31st day of March, 2006.

D. MUSINGA

JUDGE

31/3/2006

Judgment delivered in open court in the presence of Mr. Gekonga holding brief for Mr. Mugambi for the appellant and N/A for the respondent.

D. MUSINGA

JUDGE

31/3/2006