



REPUBLIC OF KENYA



AMW v HAW (Civil Appeal 2 of 2023) [2025] KEHC 1658 (KLR) (6 February 2025) (Ruling)

Neutral citation: [2025] KEHC 1658 (KLR)

**REPUBLIC OF KENYA
IN THE HIGH COURT AT MARSABIT
CIVIL APPEAL 2 OF 2023
FR OLEL, J
FEBRUARY 6, 2025**

BETWEEN

AMW APPELLANT

AND

HAW RESPONDENT

RULING

A. Introduction

1. The Application before this court is the Notice of motion application filed on 07.11.2024 brought pursuant to provisions of Section 1A, 1B, 22(A), & 23 of the Civil Procedure Act, Order 45 Rule 1(b), Order 51 Rule 15 of the Civil Procedure Rules, Article 50(1), 2(c) & (k) of the Constitution of Kenya 2010 and all other enabling provisions of law. The Applicant’s seek the following prayers, that;
 - a. Spent.
 - b. Spent
 - c. That this Honourable court be pleased to review its ruling delivered on 17th October 2024 by issuing an unconditional stay of execution of decree of the judgment of Hon Kadhi in Matrimonial suit No 003 of 2023 pending the hearing and determination of the Appeal.
 - d. That costs of this Application be in the cause.
2. The Application is supported by the grounds on the face of the said application and the supporting affidavit of the Applicant, AMW, who depones that during pendency of this Appeal, the respondent had abandoned her children at his residence in February 2024 and later after mediation they agreed that he would retain custody of five children, while the respondent would have custody of the youngest child.



3. On or about 31st October 2024, while he was away on a business trip, he was informed that the respondent had brought/abandoned the youngest child at his house and because of this new development, they had gone back to the Marsabit children office on 4th November 2024, where after mediation, it was agreed that the said child would be left in his custody, since the respondent was proceeding for studies outside Marsabit. Since he now had full custody of all the children, it would be impractical to continue paying maintenance to the respondent, hence need to have the previous orders issued reviewed.
4. The application had been filed timeously, was merited and he urged the court to grant the same.
5. The application was opposed by the respondent, through her preliminary objection dated 18th November 2024. she stated that the said application was defective as it had been filed premised on the wrong provision of law and further that the applicant had also failed to formally extract and annex the decree or order sought to be reviewed as mandatorily required. It was also her contention that there was no error evident on the face of the record the basis upon which review orders could lie.
6. Further, the respondent denied having travelled away or abandoning her children. To the contrary, it was the applicant who had chased her away from her matrimonial home and denied her access to her children. To that extent the applicant had come to court with unclean hands in equity, his application was riddled with falsehood and bad faith, thus most underserving of the orders sought.
7. The respondent urged the court to find that the Application was underserving in law and equity and proceed to dismiss the same with costs.

B. Analysis & Determination

8. I have carefully considered the Application, its supporting affidavit and the response filed thereto. The only issue which arise for determination is whether proper grounds have been advanced to allow for review of the earlier orders issued on 17th October 2024.
9. Section 80 of the *Civil Procedure Act* and Order 45 Rule 1 of the Civil Procedure summarize the circumstances/conditions under which orders for review may be issued and they include where the applicant shows:
 - a. discovery of new and important matter or evidence which after the exercise of due diligence, was not within the knowledge of the applicant or could not be produced by him at the time when the decree was passed or the order made or;
 - b. on account of some mistake or error apparent on the face of the record,
 - c. 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.
10. The applicant seeks review of the orders issued on 17th October 2024, based on discovery of new evidence and sufficient reason that the “status quo” has since changed, due to the fact that the respondent abandoned the youngest child, with him after delivery of the said ruling. He currently has custody of all their children, and thus there was no need to continue paying Kshs. 18,000/= as monthly maintenance to the applicant pending determination of the Appeal filed.
11. The respondent denied the averments made by the applicant and at paragraph 10 of her response averred that it was the applicant who had chased her away from the matrimonial home and denied her access to her children. She further denied travelling out of Marsabit county to go for further studies.



12. It is my finding, that the applicant did not place any evidence before court to show that they indeed had a meeting before the children's officer on 4th November 2024, where it was agreed by consent, that he would have custody of their youngest child, AA. The respondent too denied such arrangement and further orally emphasised in court that she had been denied access to her children.
13. The Applicant has therefore failed to prove his averments and has not shown discovery of any new and important matter or evidence to enable the court exercise its discretion in his favour.

Disposition

14. The Application dated 7th November 2024, therefore lacks merit and the same is dismissed with costs to the Respondent.
15. It is so ordered.

RULING READ, DATED AND SIGNED AT MARSABIT THIS 6TH DAY OF FEBRUARY, 2025.

FRANCIS RAYOLA OLEL

JUDGE

DELIVERED ON THE VIRTUAL PLATFORM, TEAMS THIS 6TH DAY OF FEBRUARY, 2025.

In the presence of;

Mr. Behailu for Appellant

Present in person for Respondent

Mr. Jarso Court Assistant

