ANN v LNN (Civil Appeal E057 of 2024)
[2025] KEHC 8818 (KLR) (Family) (9 June 2025) (Judgment)

Neutral citation: [2025] KEHC 8818 (KLR)

REPUBLIC OF KENYA

IN THE HIGH COURT AT NAIROBI (MILIMANI LAW COURTS)

FAMILY

CIVIL APPEAL E057 OF 2024

CJ KENDAGOR, J

JUNE 9, 2025

BETWEEN

ANN ..... APPELLANT

AND

LNN ..... RESPONDENT

JUDGMENT

1. The Appellant and the Respondent are the biological parents of 4 minors, namely, AMN, DKN, JMN, and AWN. Their relationship broke down and the Respondent sued the Appellant at the Children's Court in Nairobi, seeking child maintenance and custody of the four minors.

2. The Court delivered a Judgment on 8th September, 2023 in which it apportioned parental responsibilities between the Appellant and the Respondent. The Appellant was to cater for school fees and school-related expenses as well as pay Kshs.20,000/= monthly towards the minor's upkeep.

3. The Appellant filed an application dated 12th February, 2024 seeking review of the judgment. He wanted the court to remove the monthly maintenance of Kshs.20,000/= as well as order the Respondent to provide half of the school fees for the minors.

4. At the same time, the Appellant failed to discharge his parental responsibilities as directed in the Judgment and had outstanding arrears of Kshs.94,000/=as of March, 2024. The Respondent brought a Notice to Show Cause (NTSC) dated 22nd March, 2024, requiring the Appellant to show cause why he had not cleared the said arrears.

5. The Court heard the two applications and delivered its ruling on 24th May, 2024. It dismissed the Appellant's application for review of the judgment and held that the Appellant had not established any basis to warrant the Court to disturb the terms of the Judgment. On the other hand, it allowed

the Respondent's Notice to Show Cause. It found that the reasons advanced by the Appellant for not complying with the Order on monthly upkeep flies on the face of the Court's judgment. It directed the Appellant to pay a sum of Kshs.94,000/= to the Respondent within 7 days of the ruling; failure to do so would result in a warrant of arrest being issued against him without further reference to the Court.

6. The Appellant was dissatisfied with the said Ruling and appealed to this Court vide a Memorandum of Appeal dated 3rd June, 2024. He listed the following Grounds of Appeal;

    1. That the Learned Magistrate erred in law and in fact by dismissing the Appellant's Application dated 12th February, 2024.

    2. That the Learned Magistrate erred in law and in fact by allowing the Respondent's Notice to Show Cause Application dated 22nd March, 2024.

    3. The Learned Magistrate erred in law and in fact by not considering the Appellant's evidence with regard to his change of the circumstances of his earning post judgment.

    4. The Learned Magistrate erred in law and in fact by finding that the utilizing money towards the completion of the construction of the family house was for the Appellant's benefit and not the minors.

    5. The Learned Magistrate erred in law and in fact by making findings which were a total misdirection and total deviations from the legal provisions of the law.

    6. The Learned Magistrate erred in law and fact by allowing his opinion to override the provisions of the law and legal precedence.

7. He requested this court to allow the appeal and set aside the entire ruling of Honourable F. Terer delivered on 24th May, 2024.

8. The Appeal was canvassed through written submissions.

Issues for Determination

9. Having considered the Grounds of Appeal and all the materials placed before me, I find that there are two issues for determination;

    a. Whether the Appellant's Application dated 12th February, 2024 seeking review of the judgment was merited.

    b. Whether the Respondent's Notice to Show Cause Application dated 22nd March, 2024 was merited.

The Duty of the Court

10. It is trite law that the duty of the first appellate court is to re-evaluate the evidence in the subordinate court, both on points of law and facts, and come up with its findings and conclusions. As the court re-evaluates the evidence, it must bear in mind that it has neither seen nor heard the witnesses. This principle was set out in Selle and another v Associated Motor Boat Company Ltd and others [1968] 1 EA 123:

    > "...this court must reconsider the evidence, evaluate it itself and draw its own conclusions though it should always bear in mind that it has neither seen nor heard the witnesses and should make due allowance in this respect. In particular this court is not bound necessarily to follow the trial judge's findings of fact if it appears either that he has clearly failed on some

point to take account of particular circumstances or probabilities materially to estimate the evidence ..."

Whether the Appellant's Application dated 12th February, 2024 seeking review of the judgment was merited

11. As a recap, the lower Court delivered a judgment in favour of the Respondent and against the Appellant on 8th September, 2023. In the Judgment, the Court ordered the Appellant to pay Kshs.20,000/= monthly towards the child maintenance of the minors. It also ordered him to exclusively cater for the minor's education and education-related expenses. The Appellant was dissatisfied with the judgment and brought the Application dated 12th February, 2024 before the lower Court where he sought a review of the Judgment. In the review application, he requested that the Court reconsider its orders and remove the monthly upkeep of 20,000/= that it had imposed on him. It also wanted the Court to review its orders on education and education-related expenses so that that the obligation is shared equally between them.

12. The grounds of his application were outlined on its face and supported by an affidavit sworn by him and dated 12th February, 2024. He averred that there was a substantive change in his earning capacity and was thus not in a position to continue sending Kshs.20,000/= to the Respondent as per the judgment. He also stated that he was not in a position to continue paying the full school fees for the minors single-handedly as the Court had ordered it. He stated that, before the judgment was delivered, his earnings had reduced from a net of Kshs.73,304/= to Kshs.22,824/= due to an advance he had taken from his employer and due to the sale of his Kayole property.

13. He stated that he applied for the advance of Kshs.1,100,000/= on 24th February, 2023 and the same was approved on 2nd March 2023, which was way before the judgment was delivered in September, 2023. He also stated that he sold his property in Kayole on 27th July, 2023 for Kshs.700,000/=. He stated that he utilized the funds to complete the family home so that the minors would have a conducive shelter. He averred that he has since extinguished the proceeds of the advance and the sale of the Kayole property, and hence, he is unable to comply with the orders. He stated that the Respondent has declined his request to have the minors transferred to cheaper schools.

14. The Respondent filed a Replying Affidavit sworn by her and dated 7th March, 2024 in which she opposed the Appellant's request for judgment review. She stated that she was not sure about the alleged loan, and in any case, the children's welfare takes priority. She stated that the Appellant was merely trying to run away from his parental responsibilities. She averred that the Appellant should put his priorities right because food is more important to the children than a decorated house. She argued that the review of the judgment should be done in the interest of the children involved. She asked the Court to decline the review, as it would compromise the rights of the minors.

15. This Court is being invited to determine whether the Appellant's Application for review was merited. Before this Court makes a determination on this issue, it is prudent to outline the principles that guide review applications. I shall first restate the principle that should guide a Court in determining whether to allow or dismiss an application seeking to review a judgment.

16. The power of review is anchored in the *Civil Procedure Act*, Cap. 21 of the Laws of Kenya and the Civil Procedure Rules, 2010. Section 80 of the *Civil Procedure Act* provides as follows: -

    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.

17. Order 45 Rule 1 of the Civil Procedure Rules, 2010 further provides for review in the following manner: -

Any person considering himself aggrieved—

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

(b) 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.

18. The Court in Republic v Advocates Disciplinary Tribunal Ex parte Apollo Mboya [2019] eKLR crystallized the principles for consideration in reviewing its own decisions as follows:

i. A court can review its decision on either of the grounds enumerated in Order 45 Rule 1 and not otherwise.

ii. The expression "any other sufficient reason" appearing in Order 45 Rule 1 has to be interpreted in the light of other specified grounds.

iii. An error which is not self-evident and which can be discovered by a long process of reasoning cannot be treated as an error apparent on the face of record justifying exercise of power under Section 80.

iv. An erroneous order/decision cannot be corrected in the guise of exercise of power of review.

v. A decision/order cannot be reviewed under Section 80 on the basis of subsequent decision/judgment of a coordinate or larger Bench of the tribunal or of a superior court.

vi. While considering an application for review, the court must confine its adjudication with reference to material, which was available at the time of initial decision. The happening of some subsequent event or development cannot be taken note of for declaring the initial order/decision as vitiated by an error apparent.

vii. Mere discovery of new or important matter or evidence is not sufficient ground for review. The party seeking review has also to show that such matter or evidence was not within its knowledge and even after the exercise of due diligence, the same could not be produced before the court/tribunal earlier.

viii. A mistake or an error apparent on the face of the record means a mistake or an error, which is prima-facie visible and does not require any detail examination. In the present case the petitioner has not been able to point out any error apparent on the face of the record.

ix. Section 80 of the Civil Procedure Code provides for a substantive power of review by a civil court and consequently by the appellate courts. The words occurring in Section 80

mean subject to such conditions and limitations as may be prescribed thereof and for the said purpose, the procedural conditions contained in Order 45 Rule 1 must be taken into consideration. Section 80 of the Civil Procedure Code does not prescribe any limitation on the power of the court, but such limitations have been provided for in Order 45 Rule 1.

x. The power of a civil court to review its judgment/decision is traceable in Section 80 CPC. The grounds on which review can be sought are enumerated in Order 45 Rule 1.

19. Similarly, the Court in Josiah *v Nyaga (Civil Appeal 34 of 2021*) [2023] KEHC 2054 (KLR) (16 March 2023) (Ruling) held as follows;

> " Courts have the discretion to allow review on three grounds; where there is discovery of new and important matter of evidence, where there is an apparent error on the face of the record and where there is sufficient reason to do so. The application for review must be made without undue delay."

20. The Court of Appeal in Pancras T. Swai –vs- Kenya Breweries Limited (2014) eKLR also reiterated the conditions set by Order 45. It held that for an applicant to succeed in an application for review, he must establish to the satisfaction of the Court any one of the following three main grounds: -

a. That there is discovery of new and important evidence which was not available to the Applicant when the Judgment or order was passed despite having exercised due diligence; or

b. That there was a mistake or error apparent on the face of the record; or

c. That sufficient reasons exist to warrant the review sought.

d. In addition to proving the existence of the above grounds, the Applicant must also demonstrate that the application was filed without unreasonable delay.

21. Courts have also elaborated what constitutes 'any other sufficient reason' as a ground for seeking review. In Paul Mwaniki v National Hospital Insurance Fund Board of Management [2020] eKLR, the Court held as follows;

> " Additionally, a court can review a judgment for any other sufficient reason. In the case of Sadar Mohamed vs Charan Signh and Another[15] it was held that any other sufficient reason for the purposes of review refers to grounds analogous to the other two (for example error on the face of the record and discovery of new matter. Mulla in the Code of Civil Procedure [16] (writing on Order 47 Rule 1 of the Civil Procedure Code of India), (the equivalent of our Order 45 Rule 1), states that the expression 'any other sufficient reason'...means a reason sufficiently analogous to those specified in the rule. Any other attempt, except an attempt to correct an apparent error or an attempt not based on any ground set out..., would amount to an abuse of the liberty given to the tribunal under the Act to review its judgment. [17]

22. Lastly, the Court in Tokesi Mambili and others vs Simion Litsanga [2004] eKLR held as follows:-

> " i. In order to obtain a review an applicant has to show to the satisfaction of the court that there has been discovery of new and important matter or evidence which was not within his knowledge or could not be produced at the time when the order to be reviewed was made. An applicant may have to show that there was a mistake or error apparent on the face of the record or for any other sufficient reason.

ii. Where the application is based on sufficient reason it is for the Court to exercise its discretion."

23. I shall apply the above authorities to the facts of this case to determine whether the Appellant's application for review met the outlined criteria. Primarily, for the Appellant's application to succeed, it must have been based on at least one of the three conditions outlined in Pancras T. Swai (Supra). I have read through the subject application dated 12th February, 2024. I have also read his written submissions dated 8th May, 2024 that he filed at the lower Court. In both pleadings, the Appellant did not argue that he had discovered new and important evidence which was not within his knowledge when the judgment was made. He also did not argue that there was a mistake or error apparent on the face of the record.

24. In my view, the Appellant based his application for review on the last ground, that is, any other sufficient reason. I understood him to be saying that the judgment should be reviewed because there is a substantive change in his earning capacity, which has compromised his ability to satisfy the court order. He stated that his earnings had reduced from a net of Kshs.73,304/= to Kshs.22,824/= due to an advance he had taken from his employer. He stated that he utilized the funds to complete the family home so that the minors would have conducive shelter. He also attributed this to the sale of his Kayole property. The question before this court is to determine whether these are sufficient reasons to grant the review.

25. I am guided by the case of Paul Mwaniki (Supra) where the Court held that any other sufficient reason for the purposes of review refers to grounds analogous to the other two (error on the face of the record and discovery of new matter). The Court observed that the expression 'any other sufficient reason'...means a reason sufficiently analogous to those specified in the rule. Lastly, the court in Paul Mwaniki (Supra) cautioned courts from entertaining review for all manner of reasons. It held that any other attempt, except an attempt to correct an apparent error or an attempt not based on any ground set out..., would amount to an abuse of the liberty given to the tribunal under the Act to review its judgment.

26. Having stated as much, the duty of this court at this stage is to relook at the evidence and determine whether the reasons given by the Appellant were analogous to the discovery of new matter (evidence) or error on the face of the record. I have re-examined the said judgment, and in my view, there was no error on the face of the record that could be corrected by review.

27. The only issue remaining is to assess whether the Appellant's alleged change in his earning capacity can be said to be analogous to the discovery of new matter (evidence). As pointed out by the Court of Appeal in Pancras T. Swai (Supra), an Applicant has to show that he has discovered important evidence which was not available to him when the Judgment or order was passed despite having exercised due diligence. Similarly, the Court in Republic v Advocates Disciplinary Tribunal (Supra) stated that an Applicant for review must show that the matter or evidence was not within their knowledge and, even after exercising due diligence, could not have been produced before the Court or tribunal earlier.

28. The Appellant stated that his earnings had reduced from a net of Kshs.73,304/= to Kshs. 22,824/= due to an advance he had taken from his employer and due to the sale of his Kayole property. He stated that he applied for the advance of Kshs.1,100,000/= on 24th February, 2023, and the same was approved on 2nd March, 2023. This means that the Appellant received the advance more than five months before the delivery of the judgment, as it was delivered in September 2023.

29. He also stated that he sold his property in Kayole on 27th July, 2023 for Kshs.700,000/=. This means that he disposed off the said property more than one month before the judgment was delivered.

30. Clearly, it can be concluded that the Appellant knew his earning ability had reduced drastically by the time the judgment was delivered. He received the advance 5 months before the judgment was delivered. It was obvious to him that the advance would impact his earning capacity, because it would claim substantial monthly deductions by his employer. This is information that was within his knowledge, at least 5 months before the judgment was delivered. He could have produced the same information to the Court before the delivery of the judgment. He chose not to. He sat on the information and watched the Court make the determination without the advantage of the said information.

31. In my view, the review was not merited. The drastic change in the Appellant's earning capacity cannot be said to be analogous to the discovery of new matter (evidence), for the simple reason that he knew about these facts way before the judgment was delivered and chose not to bring the said information to the knowledge of the Court. For the above-stated reasons, I do find that the Appellant's Application dated 12th February, 2024, seeking review of the judgment was not merited. I thus uphold the lower court's finding on the same.

Whether the Respondent's Notice to Show Cause Application dated 22nd March, 2024 was merited

32. I have seen the Respondent's Notice to Show Cause dated 22nd March, 2024. The notice is for Kshs.128,300/=. The Appellant opposed the NTSC in his replying affidavit sworn on 17th April, 2024. He averred that he is unable to satisfy his parental responsibilities as per the Court order because his net salary has reduced significantly from Kshs.73,304/= to Kshs.22,824/= due to an advance loan of Kshs.1,100,000/= he took to finalize construction of the family house. He stated that he took the advance before the judgment was delivered and that he did not anticipate that most of the financial burden towards all the four minors would befall on him.

33. The first question that begs is whether he is in arrears to the tune of Kshs.128,300/= as set out in the NTSC. According to the Court order, the Appellant was directed to pay Kshs.20,000/= monthly towards the maintenance of the minors. The Appellant averred in his replying affidavit that he had only paid Kshs.15,000/= since January to April. He produced statements from the Bank indicating that he transferred Kshs.10,000/= to the Respondent on 21st December, 2023 and Kshs.5,000/= on 27th December, 2023. He seemed to argue that these monies (Kshs.15,000/=) went towards settling (in advance) his monthly obligation for the coming January, 2024.

34. I have also seen other receipts indicating that he transferred Kshs.20,000/= to the Respondent on 8th December, 2023. Having found that the Appellant had already settled his obligation for December, 2023 earlier that month, I agree with him that the Kshs.15,000/= he transferred to the Respondent towards the end of December went towards settling (in advance) his monthly obligation for the coming January, 2024.

35. The Appellant admitted that he did not make any other payments towards his monthly obligations for the months of February, March, and April, 2024. I therefore find that as at April, 17th 2024, his arrears concerning the payment of the monthly maintenance were Kshs.5,000/= for January, and Kshs.60,000/= for the months of February, March, and April- totaling to Kshs.65,000/=.

36. The next issue is to determine his arrears concerning AWN's schooling. I looked at the evidence adduced on this issue and I find that the Appellant was yet to pay/or clear Kshs.29,000/= towards the schooling of the said minor. n the end, I find that his total outstanding arrears as at the date of the NTSC was Kshs.94,000/=. I thus agree and concur with the lower Court's finding on this issue of the extent of arrears.

37. The last question for determination is whether the Appellant had shown cause why he had not cleared the said arrears. Execution of decree procedure is governed by Section 38 of the *Civil Procedure Act* which provides that:

> Subject to such conditions and limitations as may be prescribed, the court may, on the application of the decree-holder, order execution of the decree—
>
> (a) by delivery of any property specifically decreed;
>
> (b) by attachment and sale, or by sale without attachment, of any property;
>
> (c) by attachment of debts;
>
> (d) by arrest and detention in prison of any person;
>
> (e) by appointing a receiver; or
>
> (f) in such other manner as the nature of the relief granted may require:
>
> Provided that where the decree is for the payment of money, execution by detention in prison shall not be ordered unless, after giving the judgment-debtor an opportunity of showing cause why he should not be committed to prison, the court, for reasons to be recorded in writing, is satisfied—
>
> (a) that the judgment-debtor, with the object or effect of obstructing or delaying the execution of the decree-
>
> (i) is likely to abscond or leave the local limits of the jurisdiction of the court; or
>
> (ii) has after the institution of the suit in which the decree was passed, dishonestly transferred, concealed or removed any part of his property, or committed any other act of bad faith in relation to his property; or

38. The above provision was interpreted recently in Auma v Khaduli (Civil Appeal E061 of 2024) [2024] KEHC 11934 (KLR), where the Court held as follows;

> " 24. What emerges clearly from the foregoing is that a person who fails to satisfy a monetary decree may, if the conditions stipulated in section 38 of the *Civil Procedure Act* are satisfied, be committed to jail. Committal to civil jail in such circumstances is exceptional in the sense that a person's liberty is curtailed not at the instance of the State but at the instance of a private individual though the person detained, in our circumstances, is placed in the custody of the state."

39. The Court in Solomon Muriithi Gitandu & Another vs. Jared Maingi Mburu [2017] eKLR, interpreted the above provision in the following terms;

> " A person is not liable to be committed to civil jail for inability to pay a debt but a dishonest and fraudulent debtor is liable to be punished by way of arrest and committal ... "Section 38 of the *Civil Procedure Act* however, provides a limitation of the courts' power to order

> execution of a decree by way of detention in prison. The section prohibits the court from making an order of execution of any decree for the payment of money unless the judgment-debtor has first been given an opportunity of showing cause why he should not be committed to prison and even where the judgment debtor has been given such notice to show cause, the court must itself be satisfied and give reasons in writing for that."

40. I have read the Appellant's reasons why he is unable or has been unable to clear the arrears. I have already outlined, in previous paragraphs, that the Appellant acquired the Advance Loan and disposed off the property in Kayole before the judgment was delivered. I have also held that the Appellant knew, as a result of these two transactions, that his earning capacity had diminished by the time the Court delivered its judgment. Lastly, I have already commented in the previous paragraphs that the Appellant kept this information and did not bring it to the attention of the lower Court.

41. To my mind, I find that the Appellant acted in bad faith in the manner in which he took the Advance loan and disposed the property in Kayole. I read bad faith particularly on the fact that he kept that information to himself and did not disclose this to the lower Court. Instead, he watched the lower Court go ahead and make orders on maintenance, when he already knew that he had done several actions whose impact was to diminish his ability to meet subsequent financial obligations. In my view and against this background, I find that the reasons given by the Appellant for not clearing the arrears are not sufficient. I therefore uphold the lower Court's finding on this issue.

Disposition

42. In the end, the Appeal fails.

43. This being a family matter, I make no order as to costs.

44. It is so ordered.

DATED, DELIVERED AND SIGNED AT NAIROBI THROUGH THE MICROSOFT TEAMS ONLINE PLATFORM ON THIS 9TH DAY OF JUNE, 2025.

.....

C. KENDAGOR

JUDGE

In the presence of:

Court Assistant: Beryl

Ms. Muthii, Advocate for the Appellant

No attendance for the Respondent