JLM v NI (Civil Appeal 13 of 2023) [2025] KEHC 13070 (KLR) (Family) (19 September 2025) (Ruling)

Neutral citation: [2025] KEHC 13070 (KLR)

REPUBLIC OF KENYA

IN THE HIGH COURT AT NAIROBI (MILIMANI LAW COURTS)

FAMILY

CIVIL APPEAL 13 OF 2023

PM NYAUNDI, J

SEPTEMBER 19, 2025

BETWEEN

JLM ..... APPELLANT

AND

NI ..... RESPONDENT

RULING

1. On the 19th September 2024, the file in Family Appeal No. 13 of 2023 was placed before me and I adopted mediation agreement dated 6th June 2024 as an order of the Court. The agreement was said to be a partial settlement. This provoked the filing of Notice of Motion dated 26th November 2024 seeking that-

    1. An Order be and is hereby made that the Mediation agreement having been commenced by and abandoned in the Children's Court in Children's case number 455 of 2020, this honourable Court is devoid of jurisdcition to adopt any consent arising from the mediation process.

    2. The Honourable Court be pleased to set aside its orders issued on 19th September 2024 and dated 20th September 2024.

    3. This Honourable Court be pleased to reprimand and admonish the Appellant for seeking to embarrass the honourable Court by knowingly and intentionally filing documents to this Honourable Court for adoption well knowing that this Honourable court is devoid of jurisdiction and the process was abandoned.

    4. The Costs of this Application be provided for.

2. The Appellant has taken issue with that Notice of Motion on the ground that the case Number was wrongly cited as E013 of 2024 which would be a different matter from the matter before court which is

HCFA 13 of 2023. I consider this is a clerical error that does not go to the substance of the Application. It is evident that the parties are cited as JLM v NI and the issue for determination is the validity of the orders that issued on the 19th September 2024.

3. The gravamen of the Applicant's challenge to the Orders that issued on 19th September 2024 is that this Court was devoid of jurisdiction. The Application is presented under Order 45 of the *Civil Procedure Rules* that allows this Court to review orders under the following circumstances-

   (1) 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.

4. It is submitted that there is an apparent error on the face of the record as this Court did not have jurisdiction to adopt the order as the matter of the mediation agreement was live before the subordinate Court.

5. An error apparent on the face of the record was defined in *Batuk K. Vyas v Surat Municipality* AIR (1953) Bom 133 thus:

> "No error can be said to be apparent on the face of the record if it is not manifest or self-evident and requires an examination or argument to establish it..."

6. In making an examination as to whether there is an error apparent on the face of the record, the court must be quick to draw a parallel between a decision that is merely erroneous in nature and an error that is self-evident on the face of it. A review application must confine itself to the scope and ambit of Order 45 rule 1 lest it mutates into an appeal.

7. In the case of *Nyamogo & Nyamogo Advocates v. Kago* [2001] 2 EA 173 the court defined an error apparent on the face record, thus:

> An error apparent on the face of the record cannot be defined precisely or exhaustively, there being an element of indefiniteness inherent in its very nature, and it must be left to be determined judicially on the facts of each case. There is a real distinction between a mere erroneous decision and an error apparent on the face of the record. Where an error on a substantial point of law stares one in the face, and there could reasonably be no two opinions, a clear case of error apparent on the face of the record would be made out. An error which has to be established by a long drawn process of reasoning or on points where there may conceivably be two opinions can hardly be said to be an error apparent on the face of the record. Again, if a view adopted by the court in the original record is a possible one, it cannot be an error apparent on the face of the record even though another view was also possible. Mere error or wrong view is certainly no ground for a review although it may be for an appeal.

8. It is submitted that the Court acted in error by adopting the mediation settlement agreement when the same was for consideration before the subordinate Court. In determining whether this Court erred, I have considered the mediation agreement that was presented for adoption and secondly the record of the proceedigs in the lower court.

9. The mediation agreement has the following citation:

> Mediation No: 358/2024
>
> Arising out of E455/2020
>
> Case Type: Children
>
> JLM....Plaintiff/ Applicant
>
> V
>
> NI....Defendant/ Respondent

10. The proceedings in the trial Court show that the parties were referred to Court Annexed Mediation on 17th April 2024. On 13th June 2024, the Registrar Mediation referred the matter to the trial Court for adoption of mediation agreement on 27th June 2024. The parties were not present on 27th June 2024 and the Court postponed the matter to 4th July 2024. On 4th July 2024, Counsel for the defendant applied to defer the adoption of the mediation agreement to allow the parties to file a proper consent. The Court directed that the matter would be mentioned on 17th July 2024. On that date it appears the parties had not agreed and the Court directed that the defendant file her defence and the matter to proceed for hearing on 9th September 2024. The record on 9th September 2024 indicates that the matter did not proceed to hearing as the Court gave time to the defendant/ respondent to file application challenging the jurisdiction of the Court, mention was set for 7th October 2024.

11. On 31st January 2024, the matter was mentioned before Hon. Justice H. Chemitei for direction on the Appeal herein. On that date the Counsel for the appellant indicated that the appeal had not been served and asked for more time. The Court therefore fixed the matter for mention on 27th March 2024 to allow for service. On 27th March 2024 the Court was not sitting and the matter fixed for mention on 27th June 2024. On 27th June 2024, the parties were absent and Hon Justice H. Chemitei fixed the matter for mention on 31st October 2024. On the 9th September 2024, the file was placed before me and I adopted the mediation settlement as an order of the Court.

12. From the record, the appeal herein relates to the trial court's ruling of 1st December 2023. The question therefore, is how the Mediation agreement was placed before me. At paragraph 12 of Supporting affidavit of the appellant I find the answer as the deponent states-

> (12) That the above trial court was unwilling to adopt the consent and so I moved the High Court which I know has supervisory jurisdiction of all subordinate Courts in such a case as this one.

13. What this indicates is that the Appellant being dissatisfied/ aggrieved by the decision of the Subordinate Court to not adopt the Consent, proceeded to place the mediation agreement in the High Court for adoption without reference to the respondent and within a subsisting and separate appeal. He did not disclose that in doing so he was inviting the Court to review the decision of the trial Court for if he done so, he would have been required to notify the other party herein. The orders that were issued could not issue ex parte

14. I am prepared to give the appellant benefit of doubt that as he was acting in person, he did not deliberately set out to mislead the Court. However for the reasons cited above, the orders issued on 19th

September 2024 and consequential orders arising therefrom specifically the Notice to Show Cause of 4th November 2024 cannot stand.

15. The Notice of Motion dated 26th November 2024 is allowed as follows-

    1. The Orders of 19th September 2024 along with all consequential orders are set aside
    2. The matter is referred back to the trial court for priority hearing.
    3. The Appeal herein will proceed to hearing and will be mentioned on 7th October 2025 to confirm that there is a Memorandum of Appeal filed and to take further directions.
    4. Each party will bear their own costs.
    5. Parties exercising their right to appeal will file appeal within 30 days.

    It is so ordered.

SIGNED, DATED AND DELIVERED VIRTUALLY AT NAIROBI THIS 19TH DAY OF SEPTEMBER 2025.

P. M NYAUNDI

JUDGE

In the presence of:

Fardosa Court Assistant

JLM Appellant/Respondent in person

Ms. Wamatu holding brief for Mr. Mola for Applicant