



**NKG v SGB (Family Appeal E035 of 2022)
[2024] KEHC 12259 (KLR) (11 October 2024) (Ruling)**

Neutral citation: [2024] KEHC 12259 (KLR)

**REPUBLIC OF KENYA
IN THE HIGH COURT AT MOMBASA
FAMILY APPEAL E035 OF 2022**

G MUTAI, J

OCTOBER 11, 2024

BETWEEN

NKG APPELLANT

AND

SGB RESPONDENT

RULING

1. This Court delivered a judgment on 22nd March 2024 vide which it held in paragraphs 35 and 36 as follows:-

“35. The upshot of the foregoing is that the appeal has merit. The same is allowed. The ruling of the trial Court dated 19th October 2022 permitting the Respondent to transfer the child to MM Shah & MV Shah Academy and for the child to study under the CBC program is set aside. The child shall continue studying at Mombasa Academy pending the conclusion of the hearing of this matter. The costs of such education will be borne by the Respondent. The Appellant will, however, make up the difference between what is payable at MM Shah & MV Shah Academy and what is due at Mombasa Academy.

36. With a view to bringing this protracted matter to a close, I order that the suit be heard and determined by the Children's Court within 90 days of the date hereof.”

2. The judgment was delivered virtually in the presence of Mr Muthuri for the Appellant and Ms Odhiambo, holding brief for Mr Masake for the Respondent. The Respondent did not appeal against the decision of this Court. The matter thus proceeded before the Court below for a time until the application dated 7th August 2024 was filed before this court.



3. Vide the Notice of Motion dated 7th August 2024 the Respondent sought the following orders:-
 1. Spent;
 2. Spent;
 3. Spent;
 4. That this honourable Court be pleased to review the judgment delivered on 22nd March 2024 and the Court orders issued on 6th August 2024;
 5. That the order issued on 6th August 2024, together with the judgment of 22nd March 2024, be reviewed to allow the Respondent to pay school fees equivalent to MM Shah & MV Shah Academy under the CBC Program;
 6. That this honourable Court be pleased to issue any other order that the Court may deem just and appropriate; and
 7. The costs of this application be provided for.
4. The Respondent contended that the judgment ordered him to pay school fees under the international curriculum, contrary to the partial mediation agreement between the Appellant and the Respondent. It was urged that the Respondent has eight other children studying under the CBC program and that enforcement of this Court's judgment would throw him into financial oblivion.
5. The application was opposed. The Appellant filed a Replying Affidavit sworn on 19th September 2024. In her said affidavit she accused the applicant of frustrating the hearing of the suit before the trial court by filing myriads of applications among which was one to prevent MM Shah & MV Shah Academy from presenting their fee structure for the international curriculum. She deposed that it had not been explained why the Respondent waited for 5 months to apply for the review of the judgment. She stated that there were no averments in the application that would justify the review of the judgment of this Court. Noreen averred that her son had not been in school since May and had missed 2 terms while the Respondent's other children continued to study. She further averred that while she was willing to take the child to a cheaper school she couldn't do so without a school leaving certificate and that to obtain the certificate she would need to clear the school fees arrears. Although the Respondent paid Kes.35,000.00 to the school the said amount was insufficient as the arrears had to be cleared in full. She contended that the Respondent, in addition to not paying fees in full, had not paid for school-related expenses.
6. The Appellant attached to her Replying Affidavit the Notice of Motion filed before the Court below and the ruling of the trial magistrate.
7. The Respondent/Applicant filed a Further Affidavit he swore on 23rd September 2024 in which he reiterated the contents of his affidavit in support of the Motion before the Court. He deposed that being ordered to pay school fees under the international curriculum by this Court was an error apparent on the face of the record as it was contrary to the partial Medication Agreement dated 9th June 2022. He denied that the child had missed school for two terms and accused the Appellant/Respondent of lying. He reiterated that he wishes to pay school fees equivalent to what is charged at MM Shah & MV Shah Academy under the CBC program.
8. As earlier stated, the application dated 7th August 2024 was filed on 8th August 2024. On 9th August 2024 this Court listed the said application for hearing on 16th August 2024. The Respondent was ordered to serve the applicant. On 12th August 2024 Mr Kevin Ngoli Shisanya, a licenced process, filed



an affidavit of service vide which he claimed to have affected service on the Appellant's counsels Kinyua Muyaa & Co. Advocates through their email address info@kinyuamuyaa.com pursuant to Rule 13 of the Electronic Cause Management Practice Directions, 2020 and Order 5 Rule 22(b) (1) (2) (3) and (4) of the Civil Procedure Amendment Rules 2020.

9. I have had to set out the foregoing as the counsel for the Appellant stated during the hearing of the application that she was not aware of the proceedings that took place on 16th August 2024 and the orders that were issued on that date.
10. When the matter came for hearing on 16th August 2024, there was no representation on the part of the Appellant. Ms. Hope Amugune, learned counsel for the Respondent, prayed for temporary orders in terms of prayers 2 and 3 of the Motion. On that basis, this Court issued an order to stay proceedings until the application presently under consideration is determined. To give the Appellant/Respondent a further opportunity to be present for the hearing, I gave directions regarding the filing of submissions. I ordered that the application be heard on 19th September 2024.
11. The Respondent's counsel filed written submissions dated 9th September 2024. The Appellant's counsel didn't, contending that there was not enough time to do so due to the urgent need to conclude the proceedings pending before the Children's Court. On 30th September 2024, the application was argued to be interpartes.
12. It was urged on behalf of the Respondent/Applicant that the effect of this Court's judgment was that he was made to carry an onerous burden which he cannot bear due to the financial obligations he currently has. It was submitted that the Respondent/Applicant has eight other children whose education he pays for at a cost of Kes.336,000.00 per term.
13. Ms Amugune, learned counsel for the Respondent, urged that MM Shah & MV Shah Academy has two curricula, unlike Mombasa Academy, which has the International curriculum only. She submitted that the Court made an error apparent on the face of the record in that it failed to identify which curriculum at MM Shah & MV Shah Academy was to be considered while determining what amount the Appellant had to contribute. Counsel denied that her client had ever defaulted in paying school fees.
14. Counsel relied on the case of Tokesi Mambili & Others v Simion Litsanga Sabwa (Civil Appeal 90 of 2001 – Kisumu). In the said case the Court of Appeal said as follows:-

“Hence 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. In the application before the superior court the appellants failed to prove discovery of new and important matter or mistake on the face of the record.”
15. It was urged that the application was filed diligently, without unreasonable delay and that no prejudice would be occasioned to the Applicant if the orders sought were granted.
16. Ms Muyaa, learned counsel for the Appellant, submitted that a party aggrieved by a decision of the Court had the option of appealing but that he couldn't choose whether to obey Court orders or not. Counsel submitted that since the Respondent had chosen to have many children, he should bear his burden gracefully. She urged that the judgment of this Court could not be reviewed as I addressed the



- issue in the judgment. She saw in the actions of the Respondent a scheme to defeat justice by delaying the completion of the trial before the children’s Court by making application after application.
17. Counsel urged that there was no basis for review as there was no error apparent on the face record, nor were there new facts that had just been discovered. She stated that if the Respondent/Applicant was unhappy, he had the option of filing an appeal, but he hadn’t filed one. It was urged that he hadn’t taken into account the best interest of the child as school fees had not been paid.
 18. Ms Muyaa submitted that there was no merit in the application and that it should be dismissed with costs. She also prayed for an order compelling the Respondent to obey Court orders.
 19. The review jurisdiction of this Court is set out in section 80 of the *Civil Procedure Act* and Order 45 Rule 1 of the Civil Procedure Rules. I will set this out in the succeeding paragraphs of this decision.
 20. Section 80 of the *Civil Procedure Act* states 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.”
 21. Order 45 Rule 1 of the Civil Procedure Rules states as follows:-
 - “(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.
 22. What is evident from the provisions of statutes is that a party who desires to have a decision with which he is aggrieved reviewed must show that:-
 1. He had discovered new and important matter or evidence which, after the exercise of due diligence, was not within his knowledge or couldn’t be produced by him at the time when the decree was passed or order made;
 2. There was a mistake or error apparent on the face of the record; and
 3. There is otherwise sufficient reason to review the judgment or ruling.
 23. Mativo, J (as he then was) considered the import of section 80 of the *Civil Procedure Act* and Order 45 of the Civil Procedure Rules in Republic vs Advocates Disciplinary Tribunal Exparte Apollo



Mboya [2019]eKLR. The learned judge distilled the principles used by courts when considering the applications for review as being:-

- 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. 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 grounds on which review can be sought are enumerated in Order 45 Rule 1."

24. It is evident from the submissions that the Respondent/Applicant's sole ground is that there is an error apparent on the face of the record.

25. What amounts to an error apparent on the face of the record was described in *Muyodi v Industrial and Commercial Development Corporation & another* [2006] 1 EA 243 as:-

"...In *Nyamogo & Nyamogo v Kogo* [2001] EA 174 this Court said that 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 real distinction between a mere erroneous decision and an error apparent on the face of 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 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 or wrong view is certainly no ground for a review although it may be for an appeal. This laid down principle of law is indeed applicable in the matter before us.”

26. The court of appeal in *National Bank of Kenya Ltd vs Ndungu Njau* [1997]eKLR stated as follows

“A review may be granted whenever the Court considers that it is necessary to correct an apparent error or omission on the part of the Court. The error or omissions must be self-evident and should not require an elaborate argument to be established.”

27. Did I make an error that is clear and obvious and requires no elucidation or elaborate argumentation? Perusal of my decision shows that at paragraph 26 I made reference to the partial mediation agreement dated 9th June 2022.

28. It is evident that the child, as agreed by the parties, was to continue undertaking a curriculum that was being taken in his then-current school. In paragraph 31, I noted that “changing the curriculum that the child was studying would have a deleterious effect on the minor.” What flows from this is that the relevant fee structure upon which to consider the amount to be paid by the Appellant had to be MM Shah & MV Shah International Curriculum. I am, therefore, unable to see an error apparent on the face of the record that would justify a review of my judgment.

29. It is clear that what is claimed to be an error apparent on the face of the record requires elaborate arguments.

30. The Respondent averred that he has eight children whose fees he pays. With respect, I must agree with the counsel for the Appellant that having chosen to be so fecund, the Respondent must carry his burdens gracefully. This Court's concern is the child's welfare, not the inconvenience that the Respondent will suffer in fending for an ever-growing family. In any case, since he was blessed with another child recently, it must be presumed that the Respondent, being prudent, took into consideration his means and actual and contingent liabilities and concluded that he could meet them.

31. The number of his children and the obligation placed on the Respondent by their welfare isn't new to this Court, for it was mentioned during the hearing of the appeal.

32. I note that the Respondent has done everything possible to prevent the conclusion of the trial in the court below. Given his conduct, it is my opinion that this Court should depart from the usual practice of the Family Court of not issuing orders as to costs, by condemning him to pay costs.

33. Based on the foregoing, the orders that commend themselves to me are:-

1. I dismiss the application for review;
2. I condemn the Respondent to pay the costs of the Appellant in respect of this application;



3. I order Respondent to pay school fees arrears at Mombasa Academy within seven days of the date hereof; and
 4. There will be a mention to confirm compliance by the Respondent of Order 3 above and for further directions on 18th October 2024.
34. It is evident that there must be stability in how the minor is brought up. Delay in the conclusion of the matter before the Children's Court is harmful to him. In the circumstances, and in exercise of my supervisory jurisdiction under Article 165 (6) & (7) of *the Constitution* I order the trial magistrate to hear the cause before him and deliver his decision within 45 days of the date hereof.

Orders accordingly.

DATED AND SIGNED AT MOMBASA THIS 11TH DAY OF OCTOBER 2024. DELIVERED VIRTUALLY VIA MICROSOFT TEAMS

GREGORY MUTAI

JUDGE

In the presence of: -

Ms Amugune, for the Respondent;

Ms Muyaa, for the Appellant;

Arthur - Court Assistant.

