



REPUBLIC OF KENYA



SAK v ZDNP (Family Appeal 27 of 2016) [2023] KEHC 17391 (KLR) (12 May 2023) (Ruling)

Neutral citation: [2023] KEHC 17391 (KLR)

**REPUBLIC OF KENYA
IN THE HIGH COURT AT MOMBASA**

FAMILY APPEAL 27 OF 2016

G MUTAI, J

MAY 12, 2023

BETWEEN

SAK APPELLANT

AND

ZDNP RESPONDENT

RULING

Introduction

1. The Respondent/Applicant and the Appellant/Respondent are the parents of EAK. The said child was born on 10th February 2012. The Respondent/Applicant filed a maintenance cause in the lower court seeking to have the Appellant/Applicant compelled to provide for the said child.
2. *vide* a judgment delivered on 31st May 2016 in Tononoka Children's Court Case No. 287 of 2015; ZDNP versus SAH the Hon B. Koesh, SRM made the following orders:-
 1. Actual physical custody of the child the subject of the appeal was granted to the Respondent/Applicant and the Appellant/Respondent was to have unlimited access at such times as may be agreed by the parties from time to time;
 2. The Appellant/Respondent was to pay school fees for the child while the Respondent/Applicant was to cater for school related expenses;
 3. The Appellant/Respondent was to take out an in/out patient medical cover for the child while the Respondent/Applicant was to cater for shelter and utility bills;
 4. Both parties were to provide the child with clothing at least twice a year;
 5. The Appellant/Respondent was to contribute a monthly maintenance sum of Kes.50,000.00 payable not later than the 5th day of each month.



3. The Appellant/Respondent was aggrieved by the said decision and appealed to this Court. This court (per M. Thande, J) in a judgment delivered on 18th January, 2019 partly allowed the appeal. In paragraph 18 of the said judgment the court said as follows:-

“Considering the circumstances of this case in totality therefore, the appeal partly succeeds. The order of the Learned Magistrate directing the Appellant to pay the Respondent a monthly maintenance for the child of Kes.50,000.00 is hereby set aside and substituted therefor with an order that the Appellant pays to the Respondent the sum of Kes.20,000.00 as monthly maintenance for the child before the 5th day of each month. For the avoidance of doubt all other orders of the learned Magistrate of 31st May 2016 are upheld and remain the same. This being a matter concerning a child each party shall bear own costs”.

4. The Respondent/Applicant did not appeal against the said decision. On 16th June, 2022 she filed an application for review expressed to be brought under sections 1A, 1B and 3A of the Civil Procedure Act, Section 4(2) (3) (b), 98 and 99 of the Children Act, Orders 45 Rule 1 and 51 of the Civil Procedure Rules and Article 53 (2) of the Constitution of Kenya, 2010. In the said application she sought to have the judgment of this court delivered on 18th January, 2018, and in particular the order requiring the Respondent to make a monthly payment of the sun of Kes.20,000.00 as maintenance for the child to the Respondent/Applicant, reviewed upwards to the sum of Kes.100,000.00. The court was also asked to give directions on costs.

5. The grounds of the application were as follows: -

1. The Appellant/Respondent had produced fake identity card number and pin number which misguided the court when assessing the monthly sum payable towards the maintenance of the child;
2. The Respondent produced fake payslips to prove his income which in turn misguided the court when assessing the monthly sum payable towards the maintenance for the child;
3. Drastic circumstantial changes had occurred over time to the minor, to wit growth, increased food intake, education items due to the change in school curriculum thus the necessity to have the monthly sum payable as child maintenance reviewed upwards by the Honourable Court;
4. The application is meritorious;
5. The application is made in good faith and that the applicant has the best interest of the minor at heart;
6. It is for the best interest of the child that the monthly payment of the sum of Kes.20,000.00 as maintenance to be reviewed upwards by the Honourable Court.

6. The application for review was opposed by the Appellant/Respondent *vide* Grounds of Opposition dated 23rd February 2023 and filed on 28th February, 2023. The Appellant/Respondent averred that:-

1. The application was misconceived, unmerited, vexatious, bad in law, fatally defective and amounts to gross abuse of the court process;
2. The honourable court is funds officio and has no jurisdiction to entertain the application as drawn;
3. The appeal is concluded and no or no further orders can issue on the same as sought by the Respondent/Applicant;



4. The issue of authenticity or otherwise of the Appellant/Respondent's identity card and pin were conclusively determined by the trial court and this Honourable Court and cannot be the basis for the application for review of the amounts of maintenance payable;
5. The Respondent has continued to religiously and timeously remit maintenance in accordance with the court order.

The court was thus urged to dismiss the Respondent/Applicant's application with costs.

7. The said application came before me on 16th March, 2023 for hearing. Upon considering the nature of the application I directed the parties to file written submissions and to appear before me on 25th April 2023 so that I could confirm if there would have been compliance with the said directions. As there was compliance by both parties when this cause was mentioned on 25th April 2023 I fixed the matter for ruling on 12th May, 2023.

The Applicable Law

8. The matter before me concerns the welfare of a child. Article 53(2) of the Constitution of Kenya, 2010 provides that: -

“a child's best interests are of paramount importance in every matter concerning the child”.

9. The Constitution of Kenya, 2010, in the above stated article provides in part that: -

1. Every child has the right to ...
 - e. to parental care and protection, which includes equal responsibility of the mother and father to provide for the child, whether they are married to each other or not”.

10. Section 8 of the Children Act, 2022 provides as follows: -

8.
 - (1) In all actions concerning children, whether undertaken by public or private social welfare institutions, courts of law, administrative authorities or legislative bodies
 - (a) best interests of the child shall be the primary consideration;
 - (b) the best interests of the child shall include, but shall not be limited to the considerations set out in the First Schedule.
 - (2) All judicial and administrative institutions, and all persons acting in the name of such institutions, when exercising any powers conferred under this Act or any other written law, shall treat the interests of the child as the first and paramount consideration to the extent that this is consistent with adopting a course of action calculated to
 - (a) safeguard and promote the rights and welfare of the child;
 - (b) conserve and promote the welfare of the child; and
 - (c) secure for the child such guidance and correction as is necessary for the welfare of the child, and in the public interest.
 - (3) In any matters affecting a child, the child shall be accorded an opportunity to express their opinion, and that opinion shall be taken into account in appropriate cases, having regard to the child's age and degree of maturity.



- (4) The Cabinet Secretary shall issue guidelines to give effect to this section.
11. The application before me is for review of the judgment of this court. Section 80 of the Civil Procedure Act provides that: -
- “ 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 review of the judgment to the court which passed the decree or made the order, and the court may make such order thereon as it thinks fit”.
12. Courts may review decrees or orders in any of the following instances:-
1. Firstly, 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
 2. secondly mistake or error apparent on the face of the record; or
 3. Thirdly for any other sufficient reason.
13. The question I must determine then is whether a case for review has been made herein that would justify review of the judgment made by her Ladyship. To do that I will discuss the submissions made by the parties herein.

Submissions of the Respondent/Applicant

14. The Respondent/Applicant submitted that she made grave allegations against the Appellant/Respondent in her affidavit in support of the application for review. It was urged that as the Appellant/Respondent never filed a Replying Affidavit the contents of the Supporting Affidavit were unrebutted. In support of this contention I was referred to the case of *Mohamed & another versus Haidara* [1972] EA 166.
15. The Respondent/Applicant identified 2 issues, which to her call, for my determination. These are: -
- a. Whether the honourable court is functus officio and lacks jurisdiction to entertain the application?
 - b. B) whether the honourable court should upwardly review maintenance for the child?
16. Regarding the first question I was referred to the decision of the court of appeal in *John Gitahi Kabui versus Mercy Catherine Wanjiku Gitahi & Olivia Wangu (suing through their Guardian Judith Nyakeru Wang'ombe)* [2014] eKLR for the proposition that the doctrine of functus officio does not apply to children matters in view of what Article 53(2) of the Constitution of Kenya 2010 and Section 4(2) of the Children Act, 2001 (repealed) provide. It was submitted that the application for review could not be made at the trial court as the judgment of the court below had been reviewed downwards. It was thus submitted that the lower court cannot review the judgment of the High Court as it is bound by the decisions of this court.
17. On the second question, I was referred to the unfettered inherent powers of the court under sections 1A, 1B and 3A of the Civil Procedure Act and Sections 98 and 99 of the Children Act. In support of



this contention, I was referred to *Shanzu Investment Ltd versus Auto Selection (k) Ltd & 2 others versus John Namasaka Famba* [2016] eKLR.

18. The Respondent/Applicant submitted that the cost of living had gone up. In support of this contention I was referred to the case *John Gitabi Kabui versus Mercy Catherine Wanjiku Gitabi* (*supra*) where the court held that the change in the cost of living justified a review of the previous orders of the court. It was also submitted that there had been the discovery of new and important evidence, whose contents had not been controverted.
19. The Respondent/Applicant therefore prayed for maintenance to be reviewed upwards to Kes. 70,000.00 per month.

Submissions of the Appellant/Respondent

20. The Appellant/Respondent submits that this court has no jurisdiction to hear and determine the matter as it is functus officio. He identified 2 issues to wit: -
 - i. Whether the honourable court has jurisdiction to entertain the application; and
 - ii. Whether the application is an abuse of the process of court.
21. On jurisdiction I was referred to the case of the *Owners of Motor Vehicle "Lilian S" versus Caltey Oil (Kenya) Ltd* (1989) eKLR for the proposition that where a court has no jurisdiction it should down its tools.
22. I was referred to sections 116 and 119 of the *Children Act*, 2022 which provide as follows: -
 - " 116. Duration of financial provisions.
 - (1) A maintenance order requiring financial provision to be made through periodic payments shall commence on the date of the application, or on such later date as the Court may direct.
 - (2) An order under subsection (1) shall remain in force until the child's eighteenth birthday subject to the provisions of section 111.
 - (3) The Court may review the order for periodic payment upon—
 - (a) the death of the person liable to make the periodic payment;
 - (b) significant change of circumstances of either parent or guardian, provided that the change is not detrimental to the best interest of the child"
 - and
 - "119. Power to impose conditions or to vary order.
In relation to an order made under section 116, the Court may—
 - (a) impose such conditions as the Court deems fit;
 - (b) vary, modify or discharge any order made under section 116 with respect to making of any financial provision, by altering the schedule of payments or by increasing or diminishing the amount payable;or



- (c) temporarily suspend the order as to the whole or any part of the money paid and subsequently revive it wholly or in part as the Court deems fit.”

23. The Appellant/Respondent relied on the cases of EAW versus WAN [2021] eKLR, *OGM versus FG & Another* [2016] eKLR and *Menginya Salim Murgani versus Kenya Revenue Authority* [2014] eKLR. In the last case, the court said: -

“it is a general principle of law that a court after passing judgment becomes functus officio and cannot revisit the judgment on merits or purport to exercise a judicial power over the same matter, save as provided by law”.

24. On whether the application was an abuse of the process of court I was referred to the case of *Richard Muthusi versus Patrick Gituma Ngomo & Another* [2017] eKLR. It was submitted that the Respondent/Applicant was abusing the court process by attempting to relitigate issues which had been previously determined by the court below and also by this court. I was thus asked to dismiss the application.

Issues for determination

25. I have considered the application carefully. To my mind the following are the issues that call for my determination: -

- i. Whether this court has jurisdiction to hear and determine the matter;
- ii. Whether a case for review of the judgment has been made; and
- iii. Whether the application is an abuse of the process of court.

I shall look at each of the issues I have identified in turns.

Whether the court has jurisdiction to hear the matter having previously rendered its judgment

26. Is this Court functus officio? Could this Court in exercise of its review jurisdiction revisit its previous judgment and vary it? To answer this question, I would need to consider the doctrine of functus officio and its applicability to applications of this nature.

27. The Supreme Court of Kenya expounding on the doctrine of functus officio in Election Petitions Nos. 3, 4 & 5 *Raila Odinga & Others vs. IEBC & Others* [2013] eKLR cited with approval an excerpt from an article by Daniel Malan Pretorius, in *“The Origins of the functus officio Doctrine, with Specific Reference to its Application in Administrative Law,”* (2005) 122 SALJ 832:

“The functus officio doctrine is one of the mechanisms by means of which the law gives expression to the principle of finality. According to this doctrine, a person who is vested with adjudicative or decision-making powers may, as a general rule, exercise those powers only once in relation to the same matter.... The [principle] is that once such a decision has been given, it is (subject to any right of appeal to a superior body or functionary) final and conclusive. Such a decision cannot be revoked or varied by the decision-maker.”



28. In *Telkom Kenya Ltd versus John Ochanda & 996 others* [2014]eKLR the Court cited with approval the holding in *Jersey Evening Post Ltd versus Ai Thani* [2002] JLR 542 at 550 where it was said that:-
- “ A court is functus officio when it has performed its duties in a particular case. The doctrine does not prevent the court from correcting clerical errors nor does it prevent a judicial change of mind even when the decision has been communicated to the parties. Proceedings are only fully concluded, and the court functus officio when its judgment or order has been perfected. The purpose of the doctrine is to provide finality. Once proceedings are finally concluded the court cannot review or alter its decision; any challenge to its ruling or adjudication must be taken to a higher court if that right is available”.
29. This court delivered its judgment on 18th January, 2019. *vide* the said judgment this court pronounced itself on all the matters that came for determination before it. It would seem to me that having done so the court became functus officio.
30. Although the court is fundus officio the Respondent/Applicant is not without remedy. Muchelule J, as he then was, held in *EAW versus WAN* [2021] eKLR at paragraph 4 as follows: -
- “ The Children Court has the jurisdiction to periodically review and adjust the maintenance and education orders which it has issued where the circumstances of the child and the parents change (*JKW versus AWM* [2018]eKLR). In order to review upwards or downwards, as the circumstances may demand, the court has to fully hear the parties and examine whatever evidence of means that will be availed. It is only then that the court can reach a decision as to the appropriate maintenance and education amount. Such decision is reviewable, or appealable as the case may be”.
31. As correctly held by Muchelule, J, the court that may do so is the Children Court in accordance with section 2 of the *Children Act*, 2022 which defines “court” as being “the Children Court designated under section 90 of this *Act*”

Whether a case for review of the judgment of this court?

32. Having made the determination that the court is functus officio this issue is moot. That notwithstanding I do not think that the Respondent/Applicant brought forth new evidence which would justify review of the judgment of this Court. I have not seen an error of law or fact apparent on the face of the record. Lastly no sufficient reason for review has been given. This ground therefore fails.

Is the application an abuse of the court process?

33. The matter before me concerns the welfare of a child. In my opinion a party that seeks to protect the interests of a child cannot be said to be abusing the process of court when he or she pursues a cause that he or she conscientiously believes is for the best interests of a child.

Disposition

34. The foregoing leads me to one decision. This application for review is one I should dismiss.
35. I therefore make the following orders: -
1. I dismiss the Notice of Motion application dated 8th June 2022
 2. There will be no orders as to costs



36. Orders accordingly.

DELIVERED, DATED AND SIGNED THIS 12TH DAY OF MAY, 2023 AT MOMBASA VIA MICROSOFT TEAMS

.....

GREGORY MUTAI

JUDGE

In the presence: -

Ms. Asewe holding brief for Mr. Mutubia for the Appellant/Respondent

Mr. Abaja holding brief for Mr. Omwenga for the Respondent/Applicant

Winnie Migot – Court Assistant

