REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA

AT MALINDI

CIVIL APPEAL NUMBER 22 OF 2020

MK.....APPELLANT

-VERSUS-

HAK.....RESPONDENT

(Being an Appeal against the Entire Ruling/Order of the Hon. J.Kituku -

Senior Principal Magistrate in ***Kilifi SPM Children's Case No. 3 of 2016***

delivered on 6th May, 2020)

Coram: Hon. Justice R. Nyakundi

M.Ananda & Co. Advocates for the Appellant

Messrs Odhiambo S.E. & Co. Advocates for the Respondents

JUDGEMENT

This is an appeal by the appellant challenging the review orders in a **Ruling** dated ***6th May, 2020*** by **Hon. Kituku** in **SPMCC Children's No. 3 of 2016**. The appeal is premised on the basis of the fourteen (14) grounds of appeal as outlined in the Memorandum dated 26th May, 2020; -

1. That the Learned Magistrate erred in Law and in fact by allowing the Plaintiff's Application dated 18th June, 2019.

2. That the Respondent failed to disclose material facts before the Lower Court that he had filed an Appeal in the High Court Malindi against the Ruling of the Lower Court delivered on 25th February, 2018 which Appeal is still pending in this Court.

3. That the learned Magistrate erred in Law in reversing the Orders issued on 25th February, 2018 which the Respondent had failed to comply with and had defaulted in the payments but instead had filed an Appeal in the High Court Malindi being Appeal No. 80 of 2019 which made the Application dated 18th June, 2019 Resjudicata and a gross abuse of the Court process.

4. That the effect of the said Order issued on 6th May, 2020 was drastic and effectively varied and the Orders of the Court concurrent jurisdiction issued on 25th February, 2018 of which the Learned Magistrate Orders herein sat on Appeal of the Orders already in place without Jurisdiction and varied Orders relating to the best interests of the child.

5. That the Learned Magistrate in delivering his Ruling failed to consider the replying affidavit sworn by the Appellant and filed in Court on 30th October, 2019 plus the annextures which opposed the Plaintiff's Application dated 18th June, 2019.

6. That the Learned Magistrate failed to consider that the Orders he issued on 6th May, 2020 were incapable of enforcement and contradictory in their nature and oppressive to the interests of the child and the Respondent contrary to basic principles

that obtain in children's cases.

7. That the Learned Magistrate erred in fact and in Law and failed to consider that the Respondent had already admittedly defaulted on the payment of Kshs.10,000/- per month as Ordered by the Lower Court on 25th February, 2018 and that is why the Respondent was executing the Orders where the amount had accumulated to Kshs.63,500/- by the 2nd October, 2019 and the Court issued a Warrant of Arrest against the Respondent after he failed to show cause why he had not complied with the Judgement delivered on 25th February, 2018.

8. That the Learned Magistrate failed to consider that the Respondent approached the Court with unclean hands after unreasonable delay as the Judgement was issued on 25th February, 2018 and he filed the review on 18th June, 2019 after 8 months leaving all the burden of the child's welfare to the Appellant who does not have a steady source of income.

9. That the Learned Magistrate failed to consider that the Application dated 18th June, 2019 was an abuse of the Court process.

10. That the Learned Magistrate failed to consider that the Orders issued on 25th February, 2018 were already executed upon and failed to consider what happened to the unpaid money almost amounting to Kshs.200,000/- that remain unpaid by the Respondent when the Orders issued on 25th February, 2018 were in force.

11. That the Learned Magistrate failed to consider that the Respondent had already filed an Appeal against the Execution of warrants and the Application of stay of execution on the Orders issued on 25th February, 2018 had been dismissed by the High Court at Malindi on 15th April, 2020.

12. That the Learned Magistrate failed to consider that the Appellant and the Respondent do not stay together and the Respondent has never in any occasion paid the child's school fees, uniform, bought any shoes, clothes or any other child's items since 2014 and every situation of care has been left to the Appellant.

13. That the Learned Magistrate failed to consider that the court issued the Order for Kshs.10,000 payable by the Respondent after a full hearing and listening to the parties and additional Orders were made for the Respondent to take medical insurance cover the child which he has never bothered to comply with and the Court Order remains unenforced to date of which the Respondent is in contempt of Court.

14. That the Learned Magistrate failed in Law and fact in not considering the basic principles that the child's welfare was paramount but seemed to encourage the Respondent to disobey the Orders granted by the Court on 25th February, 2018 with impunity.

I should say however that the crux of the matter in all those fourteen grounds, the appellant is actually aggrieved with the review orders made against an earlier Judgement of the Court with concurrence jurisdiction dated 25.2.2018. The common denominator in the two decisions happens to be an award of maintenance quantified at Kshs.10,000/- payable by H.K. at every month, in any event not later than the 5th of that due month with effect from the delivery of this judgement to take care of the school fees, school uniforms, school related items, shoes, home clothes among others.

The others which are not subject of this appeal include the order for the plaintiff to secure medical insurance cover for the subject and rights on access of the minor by both parents as agreed to provide parental obligations in that regard.

Essentially the appellant is aggrieved with a variation sought in respect of payer No. 2 in the Notice of Motion dated 18.6.2018 asking the Court to review the language and terms of the orders as initially couched in the aforesaid judgement. The new varied order was to read as follows; -

"That the order that the plaintiff do pay Kshs.10,000/- every month for school fees, school uniform, school related items, shoes, home clothes, among others be varied by reducing the said amount and/or stating that the plaintiff do pay school fees as per the fee structure, buy school uniforms, school related items, shoes and home clothes when the need for the same arises and when the same is required".

When the application came before Hon Kituku having accorded the matter some judicial attention and discretion, he pronounced himself to the effect **"that the plaintiff be allowed to deal with the school directly, that is allowed. What is important is the education of the minor, I see no prejudice of the earlier orders being varied in terms of prayer No. 2 of the Notice of Motion.**

That review and decreed order formed the current legal battle ground between the parties without due regard to the minor, who has been the subject matter in the entire litigation. It is implicit to acknowledge that the appeal was canvassed by the able legal counsels representing both the Appellant and Respondent respectively.

For the purposes of this appeal, I take the liberty of not reproducing each of the sentiments made by Learned Counsels in their submissions. Notwithstanding that the submissions remain to be the beacon which will contribute to the decision I intend to make in this appeal.

In this appeal as will be discussed herein under, in relation to the fourteen grounds of appeal I believe an important analogy would be drawn given the pivotal principles as to whether the Learned Trial Magistrate had the power to review the earlier orders issued on maintenance in

favour of the minor. I therefore regrettably so not able to discuss each ground as invited by the Appellant's Counsel.

DETERMINATION

The elephant in this appeal is whether under section 80 of the Civil Procedure Act, Section 99 of the Children's Act as read conjunctively with Order 45 rule 1 of the Civil Procedure Rules. The Learned Trial Magistrate correctly exercised his discretion to vary one of the substantive orders on maintenance in the judgement delivered on 25.2.2018?

The jurisdiction of the Court stems from the Constitution and Statutory power which deals with the jurisdiction on Civil Appeals and by the principles in ***Okeno V R [1972] EA 32 and Peters V Sunday Post [1958] EA 424; -***

> **"While the appellate court has the jurisdiction to re-assess and re-evaluate the evidence on first appeal, it is a very strong thing indeed for the Court not to interfere with a trial judge's findings on facts unless the circumstances enumerated in the above cases are fully satisfied."**

In ***Ephantus Mwangi & Another V Duncan Mwangi Wambugu [1982-88] IKAR 278,*** the court outlined that; -

> **"An appeal's Court will not normally interfere with a finding of fact by the trial court unless it is based on no evidence or on a misapprehension of the evidence or the judge is shown demonstrably to have acted on wrong principles in reaching the findings he did"**

The instant appeal challenges the findings of fact by the Learned Trial Magistrate where exercising review jurisdiction under section 99 of the Children's Act keeping in view the subject of matter of this appeal. Section 99 of the Act provides as follows; -

> **"The Court shall have power to impose such conditions as it thinks fit to an Order made under this section and shall have power to vary, modify or discharge any Order made under section 98 with respect to the making of any financial provision by altering the times of payments or by increasing or reducing the amount payable or may temporarily suspend the order as to the whole or any part of money paid and subsequently revive it wholly or in part as the court thinks fit."**

I recognize that the trial court has the inherent power the discretion to review earlier orders within the scope of section 98 and 99 of the Children's Act. However, the issue must be approached with caution and facts ascertainable be in consonant with the provisions under section 80 of the Civil Procedure Act and Order 45 of the Civil Procedure Rules.

As already stated according to section 99 of the Children's Act. The Court is called upon to review its decree on the ground it deems fit. Generally speaking, the Order made by the court under this section must be prompted by the desire to safeguard the survival and best interests of the child as expressly stated in section 4 of the Children's Act. More predominantly under subsection (3) and (4) of the Act, in which case under section 99 must be considered paramount and for the best interest of the minor.

As pointed out under jurisprudence review was never a jurisdiction donated to the Courts to sit as a Court of Appeal on their own orders, decisions or decree.

> **"There cannot possibly be review or variation of court orders, declarations, decrees or directions validly issued by a competent Court unless there has been a discovery of new and important matter or evidence, which after the exercise of due diligence was not within the knowledge or could not be produced by the applicant at the time of the initial order, decree complained of was made, or an accident of some mistake, or error of fact apparent on the face of the record."** See ***Order 45 Rule 1 of the Civil Procedure Rules.***

In order for an application to succeed under section 99 fore review of the orders made, one must show that there has been a discovery of any view and important matter, or evidence not within his knowledge, or existence of a mistakes error apparent on the face of the record or for any sufficient reason. See ***Daniel Macharia Karagacha V Monicah Watiti Mwangi CA NO. 159 of 2000, Godfrey Okumu V Nicholas Odera Opuya, CA No. 337 of 1996 Nyamugo and Nyamogo Advocates V Moses K.Kogo[2001] EA 173 in Evans Bwire V Andrew Ngida CA No.103 of 2000.*** **The court emphasized that an application for review will only be allowed on very strong grounds if its effect will not amount to re-hearing the original application afresh."**

Therefore, a trial court exercising discretion under section 99 should not grant leave to vary the orders as a matter of course. The Magistrate exercising jurisdiction under this section shall carefully scrutinize the case to see whether, it is a proper one for review. One may, perhaps have some sympathy for the applicant, but what is needed is proof of mistake, error, discovery of new matter, or evidence or for any sufficient good cause.

When one considers the affidavits filed there was no evidence that the applicant (Respondent) brought himself within the scope of section 99 and the provisions in section 80 of the Civil Procedure Act and Order 45 Rule 1 of the Civil Procedure Rule for the Learned Trial Magistrate to make any orders necessary to vary the initial decree for the purposes of meeting the ends of justice in the dispute. Furthermore, the court was entitled to particularly recognize the principle of the best interest of the child as embodied under Article 53 (2), of the Constitution and Section (4), (3) and 4 of the Children's Act the text of the order being varied in the judgement of the Court pronounced on 25.2.2018 apparently is notably very clear as earlier captured elsewhere in this ruling.

As discussed by the Appellant's counsel in this appeal in reference to the impugned ruling, the bench mark of the principle best interest of the child was never taken into account by the Learned Trial Magistrate. Learned Counsel raised questions as to the review decision whereas

an intended appeal was still pending on the same subject matter. That the Learned Trial Magistrate was entitled to take into account the delay by the Appellant to apply for variation and that the delay ought to have been declared inordinate.

That the jurisdiction conferred under section 99 of the Children's Act for review or variation of its own decisions has to be invoked upon by an application satisfying certain conditions, which in Learned Counsel's contention were lacking for that section to be invoked. The way I see it section 99 of the Act donated inherence jurisdiction to the Children's Court for all intents and purposes to entertain any issues maintainable in Law in determining the best setting for the welfare and best interest of the child.

The main justification given for the variation of the earlier formulation was that the best interest of the child would be served by directly paying the Kshs.10,000 to the school in place of the Appellant. Hence, the objective implicit in granting for such a variation seems to be intended to serve the best interest of the child. However basic reasons for variation in that ruling are not clear, why discretion had to be exercised in the manner, the Learned Trial Magistrate erected in making the decision. There were no mention on a plethora of other survival rights like school related items, school uniforms, shoes, home clothes, among others which are relatively outside the scope of tuition and other fees payable directly to the school account. This order as varied cannot be construed as transferring parental responsibilities of buying school uniforms, other collateral items, home clothes etc. to the school administration. With respect to the ruling a general effect of it was in its fullest sense taking away the capability of the Appellant to raise and take care of the child to an outside authority in the name of the school.

What the Court was not allowed to do was to review and vary the orders on payment of Kshs.10,000/- which in fact had been adjudicated upon with the armpit as specified in order (2) of the Court's judgement of 25.2.2018. A case in point the Learned Trial Magistrate humped together the needs stipulated in that order as a direct expenditure only payable to the school. He forgot to take judicial notice that the parent under whose custody the child is domiciled has the duty and obligation to purchase school uniforms, school related items – stationery, books, pens or the case may be, shoes, home clothes among others etc. None of these responsibilities should have been transferred to the school. This impugned decision shows that the problem that needed to be addressed by order (2) of the judgement under the notion of the best interest was in partial jeopardy.

Conceptualizing both rulings emanating from the Courts of concurrence jurisdiction by applying section 96,98, and 101 of the Children's Act, the first measure identified by this court was for the Learned Trial Magistrate to specifically demand for the enforcement of the judgement delivered by his brother Hon O on 25.2.2018. This means, the judgement read in its definite terms was a subject of execution and enforceability. The onus on review under section 99 of the Act could not have arisen without first an inquiry on the status of compliance with the valid judgement of the Court by the applicant. The normative or review jurisdiction of the court should also ensure, the corrective force of a judgement is not restricted by an application for review.

At a glance, of the record, it is quite clear that the order on review constituted complicity by the Court to give the applicant a life line to continue disobeying a Court judgement. In my view looking at the evidence and the ruling as a whole one can easily conclude that order of the trial court issued on 25.2.2018 remains unenforced, unexecuted and complied with by the applicant in the impugned ruling. On the question of disobedience and non-compliance of a court order the comparative decision in ***Canadian Metal Company Ltd V Canadian Broadcasting Corporation [1975] 48 DLR, 641, 669 O Leary J*** observed; -

> **"To allow Court orders to be disobeyed would be to tread the road towards anarchy. If orders of the Court can be treated with disrespect, the whole administration of justice is brought into scorn. If the remedies that the courts grant to correct, wrongs can be ignored then there will be nothing left for each person but to take the Law into his own hands. Loss of confidence in the Courts will quickly result in the destruction of the society"**

This predominant principle on disregard of Court orders has been sunctitly stated in the case of ***Attorney General v Times Newspapers Ltd [1974] AC 273*** as follows; -

> **"In an ordered community, Courts are established for the specific settlement of disputes and for the maintenance of law and order. "In the general interest of the community, it is imperative that the authority of the court should not only be imperiled and that resources to them should not be subject to unjustifiable interference. When such inference is suppressed, it is not that those charged with the responsibilities of administering justice are concerned for their own dignity, it is because the very structure of ordered life is at risk if the recognized Courts of the land are so flouted and their authority wanes and is supplanted."**

In essence the Appellant was not entitled to a remedy under section 99 of the Children's Act against the underlying principle on execution and enforcement of an outstanding valid judgement of the court. It is on that basis of the foregoing I agree with the Appellant's counsel that the applicant approached the seat of justice with unclean hands. He was not therefore to benefit from the inherent jurisdiction of the Court to vary the primary judgement.

It is also a general rule that the court in exercising its jurisdiction to see to it that no injustice is occasioned to a litigant under the inherent power to review or alter, add, or vary a judgement or ruling which is likely to be in contravention of order 21 Rule (3) of the Civil Procedure Rules. The criterion, it seems to me must remain safeguarded save for compelling reasons on review so as to preserve the sanctity and integrity of pronounced judgements of the Courts. If there exists fundamental issues on the impugned judgement or ruling an appeal will be most preferrable.

In similar vein to allow such a party who may be encountering difficulties with the judgement at the stage of execution could lead to a denial of access to a remedy of the fruits of judgement to a successful party to a claim. That other party filing applications for review not within a reasonable time would not only be an abuse of the court process, but it is a form of relitigation of the same subject matter between the same parties.

By implication, what the Learned Trial magistrate reviewed was a shut case under section 7 of the Civil Procedure Act. In this case a decree was passed against the applicant and it is to me incapable of being reviewed without contravening section 7 of the Act on *resjudicata*. The exercise of jurisdiction donated by the Act under section 99 of the Children's Act is in most cases applicable in circumstances in which an applicant demonstrates the underlying principles under order 45 rule 1 of Civil Procedure Rules. It follows, from what I have said, that in my opinion, this appeal succeeds to the fullest extent that the sums awarded remain due and payable to the Appellant and not directly to the school. It is here where in my opinion the misapprehension of the text under the section 98 & 99 of the Children's Act by the Learned Trial Magistrate reside. I believe the best interest principle of the Child forms the foundation for substantive justice in adjudication of Children cases.

I would not disturb the order nor can another concurrent Court be allowed to do so as it happened on 6.5.2020. On the whole, I am also persuaded by the Appellant that the judgement of 25.2.2018 remains under execution and enforceable against the applicant with effect from 25/2/2018. On costs, the applicant takes full responsibility for occasioning the nonsuited Notice of Motion on review which triggered the instant appeal. It is so ordered.

DATED, SIGNED AND DELIVERED VIA EMAIL AT MALINDI THIS 3RD DAY OF JUNE, 2021

.....

R. NYAKUNDI

JUDGE

NB: In view of the Public Order No. 2 of 2021 and subsequent circular dated 28th March, 2021 by Her Ladyship, The Acting Chief Justice on the declarations of measures restricting court operations due to the third wave of Covid-19 pandemic this ruling has been delivered online to the last known email address thereby waiving Order 21 [1] of the Civil Procedure Rules.

(manaseananda20@gmail.com, odhiamboseadvocates@gmail.com)