



REPUBLIC OF KENYA

IN THE HIGH COURT AT EMBU

CIVIL CASE NO. 5 OF 2017

PLMM.....APPLICANT/PLAINTIFF

VERSUS

AMN.....RESPONDENT/DEFENDANT

R U L I N G

A. Introduction

1. This ruling is for the applications dated 4th December 2018 and 21st March 2019 which were consolidated on 25/07/2019. The application dated 4/12/2018 the applicant seeks for orders that Order 3 in the ruling of this court delivered on 10/04/2018 be set aside on grounds that the order relates to children's matter and should be dealt with in Children's case pending in Siakago Court Case No. 18 of 2017. In the application dated 21st March 2019, the respondent seeks to have the orders made by this court in same ruling delivered on 10th April 2018 reviewed and/or set aside.

2. The aforementioned orders issued on the 10/04/2018 restrained the respondent from selling or interfering in way with land parcels No. Mbeti/Gachuriri/xxx, xxx, motor vehicles registration numbers KCG xxx G, KBX xxx E and KCG xxx H as well as directing the respondent to continue paying school fees and other educational requirements for the children of the marriage between him and the applicant. The respondent was also ordered to surrender to the applicant her original educational and professional documents.

3. It is the respondent's case that he is currently facing financial constraints that was not the case at the time of hearing of the matter due to the orders of the 10th April 2018. The respondent further states that he is not able to comply with the aforementioned orders as he has been restrained from the occupation and use of land parcel No. Mbeti/Gachuriri/xxx which he alleges to be his main place of business.

4. The respondent further states that the applicant has since gotten remarried and thus is no longer dependant on him and that he stands to suffer prejudice if his application is not granted.

5. In rejoinder, it is the applicant's case that the order in relation to the children's maintenance and education is best suited to be handled in Siakago Children's Case No. 18 of 2017 which was filed before the aforementioned orders were issued as it is a Children's matter and not a matrimonial property matter.

6. The applicant further states that the respondent does not merit orders of review as there is no new and urgent development to warrant review of the said orders. The applicant further denies getting remarried as alleged by the respondent.

7. Further, it is the applicant's case that the respondent is still earning income from his farming business as deposed in paragraph 12 of his affidavit and as such he will not suffer prejudice if the orders sought are not granted.

8. The applicant further states that if the orders sought are granted, the respondent is likely to dispose of or transfer the matrimonial property to a third party.

B. Applicant's Submissions

9. It is submitted that the court should endeavour to consider the best interest of the child as provided in the Children's Act and that it is in the best interest of the children of the marriage for the issues of child maintenance to be deliberated by the Children's Court in Siakago Children's Case No. 18 of 2017. As such, the applicant submits that her application dated 4/12/2018 should be allowed.

10. The applicant further submits that she is likely to suffer great prejudice if the orders sought are granted as the respondent is likely to tamper with the matrimonial property to the extent that this entire suit for division of property will be rendered nugatory.

11. It is further submitted that the respondent has not met the threshold set in Order 45 Rule 1(a) and (b) to warrant grant of review orders sought. It is submitted that there is no new and or important evidence to warrant issuance of the orders sought as he has been fully aware of the orders for a period of over one year since the ruling was delivered.

C. Respondent's Submissions

12. It is submitted that the respondent is experiencing hardship in complying with Order 3 of the ruling delivered on the 10/04/2018 as well as Orders 1 and 2 restraining him from use of the matrimonial property that would help him generate income so as to comply with order 3.

13. It is submitted that there is discovery of a new and important matter which warrants grant of orders sought this being that his second born son has now joined college and further that the applicant has since gotten remarried and is no longer dependant on him.

14. The respondent further submits that disallowing the application for review would highly prejudice him as he is likely to be cited for contempt.

D. Analysis & Determination

15. I have considered the pleadings herein by both parties. The first issue to be addressed is whether Order 3 of the orders issued by this court on the 10/04/2018 should be set aside.

16. It is the applicant's case that the order in relation to the children's maintenance and education is best suited to be handled in Siakago Children's Case No. 18 of 2017 which was filed before the aforementioned orders were issued as it is a children's matter and not a matrimonial property matter. The respondent on the other hand wants all the orders issued by this court on the 10/04/2018 reviewed or set aside on the basis that he has been denied his source of earning a living.

17. The Constitution of Kenya 2010 requires that in all matters concerning children, the best interest of the child shall be of paramount importance. Article 53(2) of provides: -

“(2). A child's best interests are of paramount importance in every matter concerning the child.”

18. Section 4(2) and (3)(b) of the Children Act echo the constitutional imperative:

“(2). In all actions concerning children whether undertaken by public or private welfare institutions, courts of law, administrative authorities or legislative bodies, the best interests of the child shall be the primary consideration.

(3) All judicial and administrative institutions, and all persons acting in the name of these institutions, where they are exercising any powers conferred by this Act 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) and promote the welfare of the child;

c) ...”

19. What is stated in Section 4 (3)(b) of the Act is the paramouncy principle which is vital in all matters concerning children and must be given prominence. While considering this matter, this court was alive to the welfare of the child herein who is of tender years. The matter is not about the appelland and the respondent for their interests are secondary to those of the child. The foregoing provisions require this court to treat the interests of the child as the first and paramount consideration and must do everything to *inter alia* safeguard, conserve and promote the rights and welfare of the child herein.

20. Section 6 of the Children Act on the other hand provides that:

“6. Right to parental care

a) A child shall have a right to live with and to be cared for by his parents.

b) Subject to subsection (1), where the court or the Director determines in accordance with the law that it is in the best interests of the child to separate him from his parent, the best alternative care available shall be provided for the child.

c) Where a child is separated from his family without the leave of the court, the Government shall provide assistance for reunification of the child with his family.”

21. At the time the orders for maintenance and education of the child were issued, this court was not made aware that there was a children's case pending at Siakago Court between the parties and in regard to the same minors. This court does not lack jurisdiction to grant the orders by I respect the hierarchy of courts. In matters relating to children, the High Court is an appellate court.

22. I have evaluated the material placed before me and I am persuaded under the law that the applicant merits grant of the orders sought in prayer as the children's court presided over by a magistrate is the court of first instance when it comes to handling matters of enforcement of children's right. It is the applicant and her counsel who sought for the said orders and failed to disclose the existence of the Siakago case.

23. On the issue of review of the other orders made in the same ruling sought by the respondent, I hereby examine the provisions of the law. **Section 80, 63 (e) and 3A of the Civil Procedure Act and Order 45 Rule 1 of the Civil Procedure Rules** provide that:

“Section 80. Review

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.”

Section 63 (e)

In order to prevent the ends of justice from being defeated, the court may, if it is so prescribed make such other interlocutory orders as may appear to the court to be just and convenient.

[Order 45, rule 1.] Application for review of decree or order.

“(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.

(2) A party who is not appealing from a decree or order may apply for a review of judgment notwithstanding the pendency of an appeal by some other party except where the ground of such appeal is common to the applicant and the appellant, or when, being respondent, he can present to the appellate court the case on which he applies for the review”

24. Therefore, Order 45 of the Civil Procedure Rules, 2010 is very explicit that a court can only review its orders if the following grounds exist: -

a) There must be discovery of a new and important matter which after the exercise of due diligence, was not within the knowledge of the applicant at the time the decree was passed or the order was made; or

b) There was a mistake or error apparent on the face of the record; or

c) There were other sufficient reasons; and

d) The application must have been made without undue delay.

25. The pertinent issue for determination herein, therefore, is whether the respondent has established any of the above grounds to warrant an order of review

26. In **Muyodi v Industrial and Commercial Development Corporation & Another [2006] 1 EA 243**, the Court of Appeal described an error apparent on the face of the record as follows:

“...In Nyamogo & Nyamogo -vs- 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.” (emphasis mine)

27. On discovery of new evidence and important matter which was not within the knowledge of the applicant, the Court of Appeal in **Pancras T. Swai v Kenya Breweries Limited [2014] eKLR** held that:

“In Francis Origo & another v. Jacob Kumali Mungala (C.A. Civil Appeal No.149 of 2001 (unreported), the High Court dismissed an application for review because the applicants did not show that they had made discovery of new and important matter or evidence as the witness they intended to call was all along known to them and in any case, the applicants had filed appeal which was struck out before the filing of the application for review. This court stated: -

“our parting shot is that an erroneous conclusion of law or evidence is not a ground for a review but may be a good ground for appeal. Once the appellants took the option of review rather than appeal they were proceeding in the wrong direction. They have now come to a dead end. As for this appeal, we are satisfied that the learned Commissioner was right when he found that there was absolutely no basis for the appellant’s application for review. We have therefore no option but to dismiss this appeal with costs to the respondent.”

We do not find it necessary to comment on the exercise of Court’s discretion on which counsel submitted because it was not an issue and in any case the appellant had not made out a case in that regard. Although the decision reached by Lesiit, J. was correct, it was however not based on the correct reasoning in that the application for review was premised on alleged error of law on the part of Njagi, J.

We think Bennett J was correct in Abasi Belinda v. Frederick Kangwamu and another [1963] E.A. 557 when he held that:

“a point which may be a good ground of appeal may not be a good ground for an application for review and an erroneous view of evidence or of law is not a ground for review though it may be a good ground for appeal.”

28. I have considered the reasons given by the respondent in seeking orders for review. It is my considered view that the Appellant has not satisfied the requirements for grant of the orders of review. The applicant’s argument that the advance of his second born son to college is a new discovery is not acceptable under the principles guiding review.

29. The issue of the children being in school and advancing year after year was in the knowledge of the respondent during the hearing of the interlocutory application in this case. A parent reasonably expects his/her child to advance his/her education in a tertiary institution so long as he/she is in school. Every parent knows what to expect as the children advance further in their education. These issues cannot be a new matter under Order 45. The applicant in paragraph 12 of his supporting affidavit states that he still makes some income from his farming business and further that the orders sought, did not restrain the respondent from using the matrimonial property to earn a living but from disposing the same to the detriment of the interests of the applicant whose suit is yet to be heard.

30. It is my view that if parties were allowed to seek review of decisions on grounds that they are not in a position to carry out the orders sought to be reviewed, or rather that the orders are not convenient to them, then a dangerous precedent would be set in which court decisions that ought to be complied with would attract numerous applications in the courts in which they were made under the guise of review and thereby clog the court system.

31. It should be noted that the grounds for review are very specific as provided under Order 45. The applicant herein has not demonstrated that he discovered new evidence which was not within his knowledge, neither that there was an error apparent on the record. He just thinks that complying with Order 3 of the ruling is difficult for him and he desires that the orders be reviewed so that he can comply. This is a court of justice but not a court of convenience such that it has to consider the desires of the parties after orders are made. The orders were made to serve the interests of justice and that position should remain pending the disposal of this suit.

32. The respondent has not given any particulars of his income from the farming and from his businesses before the orders were issued and for the current period. He has therefore not demonstrated that he has been adversely affected by the orders of this court issued on 10/04/2018.

33. It is my finding that the application is unmeritorious, the appellant has not established any ground for review of the orders and the Applications is therefore dismissed.

34. Accordingly, it is hereby ordered that Order 3 regarding the maintenance of the parties’ children is hereby set aside to give room for Children’s Court Siakago to deal with Children’s Case No. 18 of 2017.

35. The application dated 4/12/2018 is successful while the one dated 21/03/2018 lacks merit and is dismissed.

36. Each party to meet their own costs of the applications.

37. It is hereby so ordered.

DELIVERED, DATED AND SIGNED AT EMBU THIS 20TH DAY OF JANUARY, 2020.

F. MUCHEMI

JUDGE

In the presence of: -

Ms. Muthoni for Kamunda for Defendants

