REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT NAIROBI

MILIMANI LAW COURTS

CIVIL APPEAL NO 134 of 2007

MARIA WAMBUI T/A

ST JUDE MEDICAL CLINIC…….APELLANT

VERSUS

G O (minor suing through S A

A Grandmother and Next Friend)…….....…….RESPONDENT

J U D G M E N T

This appeal arises from the ruling and order of Hon. A.O.Aminga, Resident Magistrate in Senior Resident Magistrate's Court at Limuru in Limuru SRM CC No. 477 of 2004 delivered on 20th February, 2007, dismissing the appellant/defendant's application dated 1ST December, 2006 seeking for stay of execution of decree in the suit and for review of the court's own order issued on 14th November, 2006.

By a plaint dated 14th December 2004 the respondent herein **S A A** who was the plaintiff in the trial court instituted proceedings in the Resident Magistrate's Court seeking damages for injuries sustained during the birth of baby boy, G O on 9/8/2004. The plaintiff G O was a minor suing through his grandmother and next friend **S A A.** The plaint and testimony in court as given in favour of the plaintiff was that on 9th august, 2004, one, B O gave birth to a baby boy who upon examination was found to have suffered a broken right arm and other soft tissue injuries caused or inflicted by the defendant in the course of assisting the baby's mother deliver at the defendant's clinic. It was claimed that the defendant was negligent in the manner in which she handled the expectant mother during **such delivery.**

The plaintiff respondent sued for general damages and special damages, costs and interest. The trial magistrate upon hearing the plaintiff found the defendant liable in negligence for the injuries sustained by the baby G and awarded him Kshs 140,000 general damages for pain and suffering plus costs and interest. This was on 9th June, 2006.

The appellant herein **MARIA WAMBUI** who was the defendant was served with summons to enter appearance but she failed to enter appearance or file defence. Judgment was therefore entered against her together with costs of Ksh 23,205.

The appellant filed an application dated 26/10/2006 seeking for stay of execution pending appeal and leave to file the defense out of time. The application was heard on 7/11/2006 and ruling delivered on 14/11/2006 wherein a conditional stay was granted and the appellant was also ordered to file the defence

within 10 days.

Through another application dated 1/12/2006 the appellant sought stay of execution of the ruling dated 14/11/2006 and at the same time a review of that ruling. The application was also heard and ruling delivered on 20/3/2007. In the latter ruling, the lower court dismissed the appellant's application seeking stay of execution of the decree and or a review of the ruling dated 14/11/2006 on the ground that it was an abuse of the court process since the applicant/appellant had not complied with the orders granted earlier. It is this ruling of 20th March, 2007 that is subject of the appeal herein challenging the ruling of the trial court on 3 main grounds.

> ***1. That the learned magistrate erred in law and in fact by dismissing the application knowing that the terms and conditions he had put to allow the statement of defence were extremely oppressive.***
>
> ***2. That the learned magistrate erred in law in fact by holding that the application had no substance worthy his review and that the defense was not filed to enable the court see whether it raised triable issues.***
>
> ***3. That the learned magistrate erred in law and in fact by compounding the inadvertence of my counsel with the merits and demerits of the application.***

The appellant prayed that the ruling of the learned magistrate be set aside and the case be remanded for hearing before any other court with the jurisdiction to handle the matter.

The appeal was admitted to hearing on 21st July, 2014 and placed before this court for directions which were given on 28/11/2014 and the matter was fixed for hearing.

At the hearing the appellant appeared in person, she told the court that the respondent in this case was served by way of registered mail. She also stated that the respondent did not serve her with summons to enter appearance, she only learnt of the matter when the auctioneers came to attach her property. She claimed that she was not given an opportunity to be heard after the false accusation by the respondent. She urged the court to set aside the ruling and allow her to state her position before another court.

I have carefully perused the record including the lower court pleadings and the ruling. I have also carefully considered the grounds of appeal, and the issues are:

1) whether or not the Trial Magistrate on matters of fact was entitled to grant a stay of execution of ruling dated 14/11/2006;and

2) Whether or not the Trial Magistrate on matters of fact was entitled to review the said ruling.

The respondent herein did not participate in this appeal. This court was however satisfied as to the service of process upon the respondent and directed the appellant to proceed and prosecute the appeal ex parte. Therefore, the appeal is not challenged. That notwithstanding I will proceed to determine the appeal on merit.

As a first appellate court the duty of course is as espoused in section 78 of the Civil Procedure Act, to approach the whole of the evidence on record from a fresh perspective and with an open mind. This court is obliged to analyze, evaluate, assess, weigh, interrogate and scrutinize all of the evidence and arrive at its own independent conclusion.

On whether stay could be granted, stay of execution is grantable at the discretion of the court on sufficient cause being established by the applicant. Sufficient cause will depend entirely on the Applicant satisfying the court that:

a) Substantial loss may result to the applicant unless the order is made;

b) The application has been made without unreasonable delay; and

c) Such security as the court orders for the due performance of the decree or order as may ultimately be binding on the applicant has been given by the applicant.

In her supporting affidavit, the appellant deposed that the impugned ruling was delivered in the absence of both counsels. She stated that she could not comply with the order because her monthly income did not exceed Ksh 5000 but that she was willing to give her property land reference number **Limuru/Kamirithi/T.377B** as alternative security to be allowed to defend.

In my view the trial magistrate did not err in dismissing the application for stay of execution. The appellant did not satisfy the required conditions for granting stay of execution. The reasons given by the appellant's advocate that the conditions were oppressive cannot be relied on as condition to grant stay. The conditions are set by the law, not by the court. The appellant did not show any sufficient cause why the court could not, in the circumstances of the case, invoke the applicable provisions of Order 41 Rule 6 of the Civil Procedure Rules.

The trial court had earlier ordered the appellant to deposit the decretal sum of Ksh 140,000 either in court or in a joint account to be operated by both counsels for the respective parties to the suit. The trial court also ordered the appellant to pay costs at Ksh 6000 per month and the auctioneer's charges. The appellant did not comply with any of those orders made by the trial court.

Court orders are not made in vain. They are meant to be complied with and if for any reason a party has difficulties complying with court orders the most honorable thing to do is to come back to court and explain the difficulties faced by the need to comply with the orders. See **Morris Sagala & 29 others v Deputy Inspector General of National Police Service & 2 others [2014] eKLR**

The orders the appellant was seeking are equitable and discretionary relief, she ought to have played her part by obeying the orders first before coming court.

On the second issue of whether review could be granted, from the record it is not clear why the appellant was seeking a review of the ruling ***dated 14/11/2006***. Mr Wariuki who represented the appellant told the court that the conditions granted by the trial court were oppressive to the appellant and she was unable to satisfy them. In opposing the application, Mr Okwemwa counsel for the respondent stated that the appellant was asking the court to sit in its own appeal by seeking a review. He stated that there was no error apparent on the record and the appellant was in contempt of court order for not depositing the decretal sum as directed by the court.

The substantive and procedural law in an application for review is found in Section **80 of the Civil Procedure Act** and **Order 45 rule 1** the *Civil Procedure Rules***.** Under **Section 80**:

80. 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.

Order 45 Rule 1 which is the handmaiden to section 80 of the Act provides:

(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.

The applicant in seeking a review of the court order is obliged to state clearly and specifically the sufficient reason, error that is apparent on record, basis of the new matter or evidence and strictly prove the same. The Court of Appeal in **Rose Kaiza v Angelo Mpanju Kaiza Civil Appeal 225 of 2008 [2009] eKLR held:**

> ***"An application for review under Order 44 r 1 must be clear and specific on the basis upon which it is made. The motion before the superior court was based on the discovery of new facts. However, it is not every new fact that will qualify for interference with the judgment or decree sought to be reviewed."***

By stating that the conditions granted by the court were oppressive and could not be satisfied by the appellant, in my view, is not a ground for review. The Court of Appeal in **Benjoh Amalgamated Limited & Another v Kenya Commercial Bank Limited [2014] eKLR was clear that:**

> ***"The basic philosophy inherent in the concept of review is acceptance of human fallibility and acknowledgement of frailties of human nature and sometimes possibility of perversion that may lead to miscarriage of justice. In some jurisdictions, courts have felt the need to cull out such power in order to overcome abuse of process of court or miscarriage of justice.***
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> ***27. In the High Court, both the Civil Procedure Act in section 80 and the Civil Procedure Rules in Order 45 rule 1 confer on the court power to review. Rule 1 of Order 45 shows the circumstances in which such review would be considered ranging from discovery of new and important matter or mistake or error apparent on the face of the record or any other sufficient reason but section 80 gives the High Court greater amplitude for review."***

In the instant case, the reason that was given by the appellant in seeking for review of the orders of the trial magistrate made on ***14/11/2006*** do not in any way fall under any of the circumstances in which review can be considered.

In my view, the learned trial magistrate cannot be faulted; the court exercised its discretion according to the law. In the case of **Equity Bank Ltd vs. West Link MBO Limited (Civil application No.78 of 2011), Musinga JA, while addressing the issue on whether the Court of Appeal has inherent power to grant interim orders pending hearing and determination of appeals, stated that:**

> ***"Courts of law exist to administer justice and in so doing they must of necessity balance between competing rights and interests of different parties but within the confines of the law, to ensure that the ends of justice are met. Inherent power is the authority possessed by a Court implicitly without it being derived from the Constitution or statute. Such power enables the judiciary to deliver on their constitutional mandate."***

The respondent minor being a successful litigant in the lower court ought to be given the opportunity to enjoy the fruits of his lawfully obtained judgment while considering the appellant's right of appeal. The

appellant herein was required to comply with specific conditions set by the court below, which she has not complied with to date.

The prayers that the appellant sought before the trial court are discretionary orders. She had to demonstrate that she upholds the rule of law and approach the court with clean hands. Her conduct of evading complying with court orders betrayed her and therefore the trial court could not be expected to exercise its discretion in her favour.

Accordingly, I find that the appeal herein has no merit. I dismiss it and uphold the ruling of the trial magistrate dated ***14/11/2006.***

As the respondent did not participate in the appeal herein, I order that each party shall bear their own costs of this appeal.

Dated, signed and delivered in open court at NAIROBI this 5th day of June, 2015.

R.E.ABURILI

JUDGE