REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT NAIROBI

DIVORCE CAUSE NO. 27 OF 2008

A M M …..……..……....……..APPLICANT

VERSUS

N A K ……..…….RESPONDENT

RULING

1. This is a Notice of Motion dated 28th July, 2014 and taken out under Orders 45 Rule 1, Order 51 Rule 1 of the Civil Procedure Rules, Section 1A, 1B, 3A and 3B of the Civil Procedure Act and all enabling provisions of the law. The applicant seeks the review and setting aside of the orders made on 30th June 2014, requiring him to pay Kshs. 30,000 per month to the respondent for her accommodation and that of the children of the marriage, so that he is now made to pay Kshs. 10, 000.per month.

2. The grounds upon which the application is premised are set out on the face of the application as well as in the affidavit of the applicant, A M M. The applicant's case is that the court arrived at the monthly maintenance after considering the house allowance amount of Kshs 62, 130.00, yet the said house allowance amount is subject to deductions and his net pay was Kshs. 60, 000.00. He states that he is the one who pays school fees, school-related expenses and medical expenses. He pleads that he is unable financially to pay the monthly maintenance and at the same time meet his other financial obligations.

3. The respondent has opposed the application. In her undated replying affidavit, filed in court on 23rd September 2014, she avers that the application contains half-truths, blatant lies, misrepresentation and obvious distortions of facts and gross exaggerations all meant to mislead the court into granting the orders sought. She avers that the applicant has not met the required threshold for review and that the ruling the applicant seeks to have reviewed is fair, just and in the best interests of the parties and therefore a review of the same would be prejudicial to her and the children in whose interest the same was made. It is further her averment that the applicant now earns a net pay of Kshs. 90,078.00 as opposed to the net pay of Kshs. 60, 543.50.00 as he had deposed in his replying affidavit of 6th December 2013.

4. When the matter was placed before me on 25th September 2014, I directed that the application be disposed of by way of written submissions. Both sides complied with the directions and have filed their respective written submissions. The applicant's submissions were filed on 22nd October 2014 while those of the respondent were filed on 4th of November 2014.

5. I have carefully perused through and considered the application, the affidavits on record and the rival written submissions.

6. The law enjoins this court to review any decree or order if there is discovery of a new and important matter of evidence which was not produced at the time the order was made or decree passed or if there is some mistake or error apparent on the face of the record or for any sufficient reason and the application be made without unreasonable delay.

7. **Order 45 Rule 1(a)** and (b) of the **Civil Procedure Rules,** which governs ordinary review, provides as follows:

"1. (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,*
c. *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."*

8. Does the instant application meet the abovementioned threshold? First of all, the application which was before this court for determination was a Chamber Summons dated 14th November 2013, in which the respondent herein sought orders for immediate provision of reasonable accommodation for herself and the children of the marriage. The court having carefully considered the application ordered the applicant herein to pay Kshs. 30,000.00 per month for accommodation until such time that the accommodation he said he was pursuing was availed. The court in that decision observed that the children were entitled to a reasonable accommodation that must be provided by both the applicant and the respondent. The court noted that it would not be fair to require the applicant to pay all his house allowance of Kshs. 62, 130.00 given that that he never receives the full sum, for house allowance is subject to tax. It was also noted that ordering him to pay Kshs. 62, 130.00 as house rent would mean that the respondent would contribute nothing to the house rent yet she also is in full time employment.

9. The abovementioned order has triggered the instant application for review. The applicant has not demonstrated that new and important matter or evidence has been discovered 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.

10. In the case of the *National Bank Of Kenya Versus Ndung'u Njau* (1997) eKLR the Court of Appeal held:-

"A review will be granted whenever the Court considers it is necessary to correct an error or omission on the part of the Court. The error or omission must be self-evident and should not require an elaborate argument to be established. It will not be a sufficient ground for review that another Judge could have taken a different view of the matter. Nor can it be a ground for review that the court proceeded on an incorrect exposition of the law and reached an erroneous conclusion of law. Misconstruing a statute or other provision of law cannot be a ground for review.

In the instant case the matters in dispute had been fully canvassed before the learned Judge. He made a conscious decision on the matters in controversy and exercised his discretion in favour of the respondent. If he had reached a wrong conclusion of law, it could be a good ground for appeal but not for review. Otherwise we agree that the learned Judge would be sitting in Appeal on his own judgment which is not permissible in law. An issue which has been hotly contested as in this case cannot be reviewed by the same court which had adjudicated upon it."

11. It is my view, in the circumstances of this case, that the applicant has not met the conditions for review as set out in the law as stated above. Clearly, there is no *apparent error or omission on the part of the court that would require this court to correct through review. The issue of accommodation was hotly contested and it appears still is and therefore it would not be proper to have it reviewed by the same court which had adjudicated upon it.*

12. What the applicant has told this court is that the court made a mistake that is apparent on the face of the record in arriving at the figure of Kshs. 30,000.00 per month being payment for accommodation only for the respondent and the children. The court gave its reasons for arriving at the figure and observed that the law enjoins both the applicant and the respondent to have a shared responsibility. No error apparent on the part of the court has been established.

13. The court in the case of *Draft and Develop Engineers Limited – v- National Water Conservation and Pipeline Corporation, Civil Case No. 11 of 2011* held 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 a real distinction between a mere erroneous decision and an error apparent on the face of the 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 a 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 apparent on the face of the record even though another view was also possible. Mere error or wrong view is certainly no ground for a review although it may be for an appeal."

14. In the end, I have come to the conclusion that the applicant has not made out a case for the review of the orders that I made on 30th June 2014. The said application dated 28th July 2014 is for dismissal and I do hereby dismiss the same. Each party shall bear their own costs.

DATED, SIGNED and DELIVERED at NAIROBI this 3RD DAY OF JULY, 2015.

W MUSYOKA

JUDGE

Mr. Ruiru for Dr. Kariuki advocate for the applicants-present

Ms. Ngigi for Ms. Mbiyu for respondent