



REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA

AT MERU

HIGH COURT CIVIL APPEAL NO. 145 OF 2011

A N.....APPELLANT

- V E R S U S -

B K.....RESPONDENT

JUDGMENT

1. The Appellant was the plaintiff at the lower court in which the trial court raised the monthly maintenance from Kshs. 2000/- to Kshs. 5000/- per month as per court's order dated 16th July 2010. The respondent filed an application for review of the order. The Senior Resident Magistrate Mr. J. Ndubi upon hearing the same dismissed the application through a ruling dated 1<sup>st</sup> October 2010. The respondent was dissatisfied with the Senior Resident Magistrate's ruling and filed an application for review of the said orders through an application dated 21st September 2011. The application was heard by a Resident Magistrate Mr. S.M.Mwinzi and on 2<sup>nd</sup> October 2011 allowed the same by varying monthly maintenance from the 5000/- to Kshs. 3500/-.

2. The appellant being aggrieved by the review of the monthly maintenance of Kshs. 5000/- to Kshs. 3500/- preferred this appeal through an amended memorandum of appeal dated 27<sup>th</sup> September 2012 setting out eight (8) grounds of appeal as follows:-

***1. The trial magistrate erred in law and fact when he reviewed the order of 16th July 2010 against the best interest of the child.***

***2. The trial magistrate erred in law and fact in taking into account the respondent's best interest instead of the children's best interest in arriving at his decision.***

***3. The trial magistrate erred in law and fact in purporting to sit in appeal over a matter that his predecessor and Senior Children Magistrate had earlier ruled on.***

***4. The trial magistrate erred in law and fact in basing his decision entirely on the respondent's version and in totally disregarding my submissions and replying affidavit to the respondent's application for review.***

***5. The trial magistrate erred in law and fact in relying entirely on the respondent's December 2010 payslip and in failing to call for the respondent's current payslip and thereby reached a decision prejudicial and totally against the best interest of the child.***

**6. The trial magistrate erred in law and fact in failing to factor in that he ought to have increased the respondent's monthly contribution towards the child's upkeep instead of reducing it by a whole Kshs. 1,5000/-given that the Kenyan shilling has lost value over time from 16th July 2010 when the reviewed orders were granted.**

**7. The trial magistrate failed in his duty as custodian of children rights when he failed to handle the matter with a human face in the best interest of the child.**

3. The Appellant's counsel filed submissions dated 28<sup>th</sup> March 2013 combining all the grounds of appeal together whereas the respondents on his part filed written submissions dated 12<sup>th</sup> April 2013 combining all the grounds. I will therefore in this appeal consider the counsel submissions in respect of all the combined grounds without dealing with one ground after another.

4. The respondent in his application dated 21<sup>st</sup> September 2011 sought review of the order of the Senior Resident Magistrate issued on 16<sup>th</sup> July 2010 on the ground of none service of the application dated 1st June 2010; that if the order is not reviewed the applicant would be prejudiced and that there are grounds and sufficient cause for review. The grounds for seeking review of a court's order are well set out under **Order 45 (1) (1) (a) and (b) of the Civil Procedure Rules** as follows:-

***“45 (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 later 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.”***

5. The Respondent's application though seeking for a review of the order made by the Honourable J. Ndubi, SRM on 16<sup>th</sup> July 2010 did not raise a specific grounds for review as set out under Order 45 of the Civil Procedure Rules. The respondent main complaint was that the application was never served, it proceeded ex parte and that there is good and sufficient ground for review. The alleged good and sufficient ground for review I believe was that the court's order meant in execution there was going to be attachment of more than 45 per cent of the respondent's income considering his salary was 10717/- per month.

6. The Appellant urge that the court did not in reviewing the order act in the best interest of the child and that the court erred in taking into account the respondents best interests instead of that of the child.

7. **Article 53 (2) of the Constitution of Kenya 2010** provides:-

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

Further **Section 4 (3) (a) (b) (c) of the Children Act** provides

***“4.(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 interest 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 their rights and welfare of the child;***

***(b) conserve and promote the welfare of the child;***

***(c) secure for the child such guidance and correction as is necessary for the welfare of the child and in the public interest.***

8. The trial court in my view was in error in failing to consider the **provisions of the Constitution of and the Children Act** as regards the interest of a child as the first and paramount consideration and preferred to consider the respondent's best interest. The Appellant in her replying affidavit dated 24<sup>th</sup> September 2011 urged the respondent's salary was in excess of Kshs. 20000/- and the sum of the upkeep of Kshs. 5000/- was not excessive and that the respondent was guilty of non-disclosure of material facts by intentionally avoiding to annex his current/recent pay slip but annexed the one of December 2010 which the appellant urged was not a true reflection of his current pay. The Appellant urged the annexure "BK3" was irrelevant as it talked of employee's over committing his salary by over borrowing. That the trial court in its shortest ruling did not consider the matters raised by the appellant in the replying affidavit. The court in failing to do so fell to an error and made a wrong decision.

9. **Section 98 of the Childrens Act** gives court power to make order of maintenance of a child. It provides:-

***98. "A court shall have power to make an order and to give directions regarding any aspect of the maintenance of a child, including but not limited to, matters relating to the provision of education, medical care, housing and clothing for the child, and in this behalf may make an order for financial provisions for the child."***

10. The Respondent urged that there was an error in the court ordering attachment of 45% of the respondent's income considering that during the proceedings the respondent's basic salary was Kshs. 10,717/- per month. I have had the opportunity of perusing the respondent's payslip of October 2010. The basic salary is 10717/- however the total earnings is around Kshs. 20312/- which the trial court did not consider when it held that the amount court ordered to be paid by the applicant for maintenance of the child is a big per centage of his salary. I do not agree that the amount ordered is a big per centage of the respondent's total earnings or salary considering his monthly earnings is around Kshs. 20312/-.

11. The learned Resident Magistrate is faulted for reviewing a decision by a Senior Resident Magistrate who was at the station at the same time with him. The respondent held a different view and disagrees with appellant's position that the Resident Magistrate's action amounted to sitting on an appeal of a decision of a senior court. The respondent urged that the Resident Magistrate presided over the matter by virtue of having been gazetted as a children's magistrate court and being the only gazetted children's magistrate at the time of the review of the application. That the issue of seniority did not therefore arise.

12. The respondent did not in the application state that Mr.J. Ndubi SRM at the time of the hearing of the application he was not a gazetted children court nor is there any proof that the Resident Magistrate was the only gazetted children court at the time of the application.

13. **Order 45 Rule (2) (1) of Civil Procedure Rules** provides:-

***"An application for review of a decree or order of a court, upon some ground other than the discovery of such new and important matter or evidence as is referred to in rule 1, or the existence of a clerical or arithmetical mistake or error apparent on the face of the decree, shall be made only to the judge who passed the decree, or made the order sought to be reviewed."***

In view of the above mentioned order on the ground other than the discovery of new and important matter or evidence or existence of the clerical or arithmetical mistake or error apparent on the face of the decree is supposed to be made only to the Judge or Magistrate who passed the decree or made the order. The respondent's application was on other grounds than the ones spelt under order 45 Rule 2

(1) of the Civil Procedure Rules and should have been taken by the trial court, that is Mr.J.Ndubi SRM, and not before Mr.Mwinzi, Resident Magistrate by the said period.

14. **Order 45 Rule 6 of the Civil Procedure** Provides

***6. “No application to review an order made on an application for a review of a decree or order passed or made on a review shall be entertained.”***

15. The respondent had filed an application for review before Hon. Mr. J. Ndubi SRM which was then refused and he later filed a similar application before Hon. Mr. Mwinzi, R.M. which is subject of this appeal. The provision of **Order 45 Rule 6 of Civil Procedure** is mandatory that a second application for review shall not be entertained. It is my view and finding that the trial magistrate acted wrongly by entertaining and proceeding to allow the second application for review after the first application had been dismissed by Mr. J. Ndubi Senior Resident Magistrate as he then was.

16. The upshot is that the Appellant’s appeal is merited. I therefore make the following orders:-

**(a) The ruling delivered on 2<sup>nd</sup> October 2011 reviewing the monthly child supporting contribution is set aside and the decision of the Senior Resident Magistrate made on 16<sup>th</sup> July 2010 setting the monthly child support contribution at Kshs. 5000/- be and is hereby reinstated and/or upheld.**

**(b) The Appellant gets costs of the appeal.**

**DATED at Meru this 2<sup>nd</sup> day of July 2015.**

**J.A.MAKAU**

**JUDGE**

**2.7.2015**

**Delivered in open court in presence of:**

Mr. Muthomi for appellant

Mr.Mbugua Muriethi for Respondent

Court clerk- Penina/Mwenda

**J.A.MAKAU**

**JUDGE**

**2.7.2015**

