



REPUBLIC OF KENYA



**KENYA LAW**  
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**BNM v VWM (Civil Appeal E145 of 2024)  
[2025] KEHC 13800 (KLR) (Family) (3 October 2025) (Judgment)**

Neutral citation: [2025] KEHC 13800 (KLR)

**REPUBLIC OF KENYA  
IN THE HIGH COURT AT NAIROBI (MILIMANI LAW COURTS)**

**FAMILY  
CIVIL APPEAL E145 OF 2024**

**H NAMISI, J**

**OCTOBER 3, 2025**

**BETWEEN**

**BNM ..... APPELLANT**

**AND**

**VWM ..... RESPONDENT**

*(Being an appeal against the Ruling of Hon. Dr. Alice W. Macharia delivered  
on 25 October 2024 in Nairobi Children’s Court Case No. E1863 of 2022)*

**JUDGMENT**

1. This matter concerns the welfare of a minor, born to the Appellant and Respondent. The journey to this Court has been marked by a series of legal steps that are central to the determination of this appeal. The chronology of events, as gleaned from the Record of Appeal, is as follows:
2. The Respondent initiated proceedings in the trial court vide Complaint dated 6 December 2022. She sought, inter alia, actual and legal custody of the minor and a monthly maintenance sum of Kshs 21,000/= in addition to orders compelling the Appellant to cover the minor’s educational and medical expenses.
3. In response, the Appellant filed a Statement of Defence dated 9 January 2023. His primary prayer was for the court to adopt a pre-existing Parental Responsibility Agreement dated 15 November 2022. This agreement, which the parties had voluntarily executed before the local area Chief, stipulated that the Appellant would provide a monthly sum of Kshs 5,000/= for the minor’s upkeep, while continuing to shoulder the responsibility for school fees and medical expenses.
4. After hearing the parties, the learned Magistrate delivered judgement on 26 January 2024. The trial court granted joint legal custody to both parties, with actual physical custody vesting in the



Respondent. The trial court departed from the terms of the Parental Responsibility Agreement and ordered the Appellant to pay school fees, medical expenses, and an enhanced monthly maintenance contribution of Kshs 10,000/=.

5. Dissatisfied with the outcome, the Appellant made a significant procedural choice. Instead of lodging an appeal, he filed a Notice of Motion dated 5 February 2024, seeking to review the judgement under Order 45 of the Civil Procedure Rules. The grounds for review were a material change in his financial circumstances, specifically his limited income as evidenced by a payslip showing a net salary of Kshs 31,985.25 and the impending termination of his employment contract on 31 May 2024, which he argued made the Kshs 10,000/- order unsustainable.
6. The Application for review was heard and determined by the trial court, which, in a Ruling delivered on 25 October 2024, dismissed it for want of merit. In its Ruling, the Court observed that the Appellant had been granted adequate time to table all the evidence at his disposal to aid the court in reaching its determination. The court did so in a bid to avert overburdening any party. The Appellant did not provide any new evidence as underscored in Order 45 Rule 1 of the Civil Procedure Rules. It is this sequence of events that culminated in the lodging of this appeal.

### **The Appellant's Case**

7. This appeal is based on numerous grounds as articulated in the Memorandum of Appeal. First, the Appellant contends that the trial court erred in law and in fact by failing to honor and give legal effect to the mutual Parental Responsibility Agreement (PRA) dated 15 November 2022. He submits that the PRA was a homegrown solution that was functioning effectively and was in the best interests of the child. By disregarding it, the trial court undermined the constitutional imperative under Article 159, which encourages the application of Alternative Dispute Resolution mechanisms.
8. Secondly, the Appellant argues that the trial court failed to properly consider his financial capacity when it enhanced the maintenance sum. He posits that the order to pay Kshs 10,000/= was onerous, punitive, and unsustainable, having been made without due regard to the evidence of his limited income and the fact that his employment contract was not renewed. He maintains that a parent can only be ordered to provide for a child within their financial means.
9. The Appellant feels that the trial court did not adequately appreciate his consistent and voluntary efforts in providing for the child, including the payment of school fees and medical expenses, thereby unfairly casting him in the mould of a neglectful or "dead beat" father. His ultimate prayer is for this Court to set aside the judgement of the lower court and substitute it with an order that formally adopts the terms of the PRA, which would cap his monthly maintenance at Kshs 5,000/=.

### **The Respondent's Case**

10. The Respondent's primary argument is a preliminary one, challenging the competency of this appeal. She contends that the appeal is an abuse of the court process. By filing an application for review of the judgement dated 26 January 2024, the Appellant made a conscious and binding election of his remedy under law. Having been unsuccessful in that review application, he is now statutorily barred by Section 80 of the *Civil Procedure Act* from appealing the original judgement. The Respondent argues that the Appellant's right of appeal, if any, against the Ruling dismissing the review, and such an appeal would be confined on the narrow grounds upon which that review was dismissed. Since the grounds of the present Memorandum of Appeal attack the merits of the original judgement, the entire appeal is incompetent.



11. In the alternative, and without prejudice to the preliminary objection, the Respondent submits that the trial court acted correctly on the merits. The Application for review was properly dismissed as the Appellant failed to satisfy the stringent conditions for reviews under Order 45. The Appellant did not present any 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 the decree was passed. The Respondent argues that the Appellant’s financial situation was a central issue at the trial and was duly considered by the court.

### **Analysis & Determination**

12. Having keenly read the submissions by the parties, the first issue for determination by this Court is the preliminary objection: whether the appeal is competent in light of the Appellant having first sought the remedy of review.
13. The legal framework governing the remedies of review and appeal is found in section 80 of the *Civil Procedure Act* and Order 45 of the Civil Procedure Rules.
14. Section 80 provides:  
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.
15. The phrasing of subsection (a) is deliberate and dispositive. It creates two distinct and mutually exclusive procedural avenues for a litigant aggrieved by an appealable decree or order: they may either appeal, or, apply for review. A party cannot have it both ways. They cannot pursue both remedies simultaneously, nor can they pursue them sequentially for the same grievance. Once a party elects to travel down the path of review, the path of appeal of the original order is, by operation of statute, closed to them.
16. This principle is rooted in the sound public policy of ensuring finality in litigation and preventing the mischief of parallel proceedings before different judicial tiers, which could potentially lead to conflicting decisions on the same subject matter. I refer to the same case cited by the Respondent, *Gab International Construction Co Ltd -vs- Ndungu* (Civil Appeal E032 of 2022) KEHC 17548 (KLR), where Kemei, J stated:  

“In my view, a proper reading of section 80 of the Act and Order 45 Rules 1 and 2 of the Rules make it abundantly clear that a party cannot apply for review and appeal from the same decree or order. In the present case, the Appellant exhausted the process of review and now wishes to go back to the same order it sought review of and failed and try its luck with an appeal. The Appellant wants to have a second bite of the cherry. It cannot be permitted to do so.”
17. This position was affirmed in *HA v LB* [2022] KEHC 2886 (KLR), where Odunga, J. held that a party who has sought review of an order cannot subsequently purport to appeal against the same order. They can only appeal against the decision made on the review application.



18. In the instant case, the Appellant, being aggrieved by the judgement of 26 January 2024, elected to file an application for review. That application was heard on its merits and dismissed by a Ruling dated 25 October 2024. The Appellant's right of appeal thereafter was limited to challenging the correctness of the ruling of 25 October 2024. Such an appeal would be narrowly confined to the question of whether the trial court properly exercised its discretion in finding that the Appellant had not met the grounds of review stipulated in Order 45 rule 1.
19. A perusal of the Memorandum of Appeal reveals a fatal flaw. While the heading of the Memorandum correctly states that it is an appeal from the Ruling of 25 October 2024, all the grounds of appeal are a direct challenge of the findings and orders of the original judgement of 26 January 2024. The grounds challenge the quantum of maintenance, the alleged failure to consider the PRA, and the assessment of the Appellant's financial capacity. All these matters were canvassed and determined in the main suit. Not a single ground of appeal alleges that the trial court erred in its application of the principles of review under Order 45.
20. This is not a mere technicality that can be cured by invoking the provisions of Article 159(2) of the *Constitution*. It is a fundamental issue of jurisdiction and a clear abuse of the court process. The Appellant is attempting to appeal the original judgement through the back door, having foreclosed his right to do so by electing to file an application for review.
21. For these reasons, this Court finds that the preliminary objection raised by the Respondent is merited. The appeal as framed is incompetent and cannot be sustained.
22. The appeal is hereby struck out.
23. This being a family matter, each party shall bear their own costs.

**DATED AND DELIVERED AT NAIROBI THIS 3 DAY OF OCTOBER 2025**

**HELENE R. NAMISI**

**JUDGE OF THE HIGH COURT**

Delivered on virtual platform in the presence of:

For Appellant: Bernard Muema

For Respondent: Mr. Njugi

Court Assistant: Lucy Mwangi

