HKN v LNW (Civil Appeal E452 of 2022) [2024] KECA 437 (KLR) (12 April 2024) (Judgment)

Neutral citation: [2024] KECA 437 (KLR)

REPUBLIC OF KENYA

IN THE COURT OF APPEAL AT NAIROBI

CIVIL APPEAL E452 OF 2022

MA WARSAME, M NGUGI & JM MATIVO, JJA

APRIL 12, 2024

BETWEEN

HKN ..... APPELLANT

AND

LNW ..... RESPONDENT

(Being an Appeal from the Ruling of the High Court of Kenya at Nairobi, Family Division (Achode, J.) dated 28th day of April, 2022 in Family DivisionCivil Appeal No. 1 Of 2017)

JUDGMENT

1. The appellant, HKN and the respondent, LNW met in 2005. They had a romantic relationship out of which three children were born, CW, SN and JN aged 10, 5 and 2 years, respectively. The relationship did not flourish as planned and as expected, resulting in a protracted dispute. The respondent instituted proceedings in the Children's Court to compel the appellant to meet his parental responsibilities, including maintenance of Shs.100,000 on account of food, shelter, house help clothing, education and medical care towards the minors.

2. Of concern to this appeal is the ultimate finding by the Children Court (Hon. Z. W. Gichana, SRM) that the appellant provides maintenance of Kshs.35,000/- per month payable to the respondent. This was in addition to the finding that the appellant provides for school fees and related expenses for the children. The appellant appealed to the High Court against this finding. He faulted the children's court failure to take into account the respondent's means, existing provision towards the minors and his actual income of approximately Kshs.62,000/- per month, exposing him to destitution and thereby placing the responsibility of providing for the children solely on the appellant. While the suit was pending before the trial court, the parties had consented to the appellant paying a maintenance sum of Kshs.20,000/- per month.

3. After considering the appeal, the learned Judge of the High Court, Asenath Ongeri, J. determined that the maintenance of children was a joint responsibility of both parents. In rendering her judgment on 4th April 2019, the Judge ordered that the maintenance sum of Kshs.35,000 ordered by the trial court be

equally shared between the parties. Accordingly, the appellant was ordered to remit Kshs.17,500 into the respondent's account. In making this decision, the learned Judge took into account the fact that the appellant was paying fees and providing medical cover for the minors.

4. By an application dated 6th December 2021, the appellant sought to review the judgment made by the High Court. The extent of the review was that the parental responsibilities over the minors be reshared in the sense that the appellant pays school fees and related expenses and provides medical services. On the other hand, the respondent is to provide food and accommodation for the minors when they are on school holidays and/or when she is living with them.

5. The grounds upon which the application was founded were that the status upon which the judgment was made had significantly changed and that the appellant would not be able to handle any emergency or provide for the increasing and future educational and medical needs of the children. He stated that two of the three minors are in boarding school; that his remuneration had been reviewed downwards by the reduction of the clinical allowance by

Kshs.55,000/-; that he had a chronically sick, blind and bed- ridden mother who solely depends on him for medical and other needs; that the respondent is able bodied and can provide for one minor without straining as she is also a woman of means owning prime land in Murang'a and rental flats in Nairobi that generate undisclosed monthly income. The appellant therefore urged the court to vacate the order that he pays the respondent a monthly sum of Kshs.17,500/- and order the respondent to provide food (breakfast and supper) and reasonable accommodation for the minor, J.N. as the appellant provides all the other needs of the three minors.

6. The appellant filed an affidavit of means in which he deponed that he is an employee of the University of Nairobi earning a monthly gross salary of Kshs.262,212/- and after settling monthly obligations and statutory deductions, he is left with a net pay of Kshs.119,885/- as per the pay slip. The appellant then tabulated how he spends the said net pay and that on average his expenses amount to Kshs.122,420/- out of which an average of Kshs.59,500/- is spent on the children. In the premises, it was unsustainable to continue paying Kshs.17,500/- to the respondent

who was only left to provide breakfast and supper yet the parental responsibility is to be shared.

7. In response, the respondent filed a replying affidavit opposing the review. She deponed that if the judgment is reviewed, the respondent will suffer as the children will have to come and stay with her when the schools are closed and that the appellant had failed to disclose that he stays in a personal house he built in Kiserian and already has another family he is staying with.

8. The matter proceeded by way of viva voce evidence in which the parties reiterated their case. The respondent added that the maintenance from the appellant is purely used for rent and not food and that it is the appellant who chased the respondent and the minors out of their home thereby attracting the order to pay Kshs.17,500/-. She also testified that the appellant was in arrears and had not been remitting the maintenance amount, thereby leading to the respondent accruing arrears in rent. This in turn threatened the shelter for her and the minors.

9. In her ruling made on 28th April 2022, the application was held to be devoid of merit and was dismissed by Achode, J., on the grounds that allowing the application would not be in the best interests of

the children but prejudicial to their welfare. The Judge did not find any justification to reduce the maintenance sum, noting that the amount was arrived at on proper grounds and adequate consideration of all material facts pertaining between the parties. The learned Judge further considered that the appellant had, in his own testimony, noted that despite his contribution on maintenance, the children are living in deplorable conditions in the slum. The Judge found it reprehensible for parents to use their own children as pawns on a chess board to score against each other. In sum, the Judge disallowed the application for review as baseless and without merit.

10. Aggrieved by this ruling, the appellant filed the present appeal raising a total of 26 grounds of appeal vide the Amended Memorandum of Appeal dated 18th July 2022. In his written submissions, the grounds have been reduced into four substantive issues on the basis of which the appellant argues the appeal.

11. On whether the learned Judge disregarded the basic legal tenets of equal treatment of the mother and father of a child in making orders under the *Children Act* and the *Constitution*, the appellant submits that the Judge failed to appreciate the financial burden imposed on the appellant as opposed to the respondent yet both are biological parents. The appellant maintains that the change of circumstances in having two of the minors in boarding school increased financial obligations on his part, prompting the application for review. That making him to continue paying the monthly sum of Kshs.17,500/- for upkeep is tantamount to ordering the appellant to single-handedly cater for everything, thus forcing him to pay for upkeep twice. He cited the case of *M.O.A. v H.A.O.* [2021]eKLR to the effect that although parents may not have equal financial ability, for the court to demand equal contribution, one must at least exhibit seriousness in making some contribution as a sign of goodwill.

12. The second ground of appeal is whether the learned Judge failed to appreciate the evidence of change of financial circumstances as against the legal threshold to be met in an application for review. On this, the appellant appreciates the Court of Appeal's reluctance to interfere with findings of fact unless it is demonstrated that the trial court acted on wrong principles in reaching its conclusion. To buttress this position, he cites the Court of Appeal decisions in *Nkube v Nyamiro* [1983] KLR 403 and *Josphat Mailu Ndolo (suing on behalf of the state of Antony Ndolo Mailu) v Director of Public Prosecutions & Another* [2020] eKLR. On the strength of this position, he argues that the finding by the High Court was based on a misapprehension of evidence.

13. The appellant explains that his apparent increase in earnings from a net pay of Kshs.62,000/- to Kshs.119,885/- is that his rent and insurance premiums were being deducted directly from the payslip and he changed the mode of payment to cash. That he had moved and stopped paying rent to the employer but was rather spending it on transport, security, etc. The appellant faults the judge for steering clear of these issues, leaving the appellant financially frustrated and feeling punished at the expense of the respondent who should ideally chip in to meet the minor's expenses.

14. The third ground of appeal relates to the alleged disregard of the provisions of Article 53 of the *Constitution* of Kenya 2010 on equal responsibility of the mother and father to provide for the child. The appellant faults the learned Judge for dismissing the application without getting evidence from the respondent on the breakdown of her contribution of Kshs.17,500/-, the respondent's rent arrears which had nothing to do with the appellant, the actual expenditure

    from the appellant's contribution in the wake of rental arrears, the respondent's unsubstantiated assertion of joblessness and the fact that despite the equal contribution by both parents, the minors were still living in squalid conditions in the slums where the rent does not exceed Kshs.4,000 and the respondent cannot account for the remaining Kshs.31,000/-.

15. The appellant contends that the court ought to have taken into account the income earning capacity, property and financial resources of the parties both then and in the foreseeable future. He refers to section 94(1) of the *Children Act* on the considerations that guide a court in making an order for financial provision for the maintenance of a child. He also refers to constitutional principle of equal parental responsibility of both parents of a child as espoused in *C.I.N. v J.N.N* [2014] eKLR. Further, the appellant is aggrieved by what he terms as the trial Judge disregarding the High Court Civil Rules and Procedures and the *Evidence Act* by allowing the respondent not to serve the appellant with her response and or not requiring the respondent to produce the affidavit of service thus delivering a ruling not in line with the basic tenets of fairness.

16. On the final ground, the appellant argues that in the alternative of provision for the minors, whether the Court failed to consider that if the respondent was unable to bear her part of the responsibility, actual custody be granted to the appellant. He faults the learned Judge for correctly noting that the respondent was using the children as pawns on a chess boar but failed to remedy the situation. He points out that the remedy for the children living in squalid conditions was not to overburden the appellant with maintenance obligations as the minors even opted to live with the appellant during the school holidays and enjoy a good relationship with the minors. Recourse is made to the constitutional and statutory provisions of Article 53(2) and section 4(2) and 3(b) of the *Children's Act*, respectively. The appellant concludes by imploring us to intervene and find merit in the appeal.

17. The respondent opposed the appeal and contends that the same has no merit. It is the position of the respondent that the appellant has the ability, capacity and financial strength to pay the sums ordered by the court. The respondent further contends that the appellant is reluctant and unwilling to shoulder his parental responsibly. It is also submitted by the respondent the sum is a

    drop in the ocean in comparison to the financial needs and requirements of the minors. Consequently, the appeal has no merit.

18. With the above background, we conclude that the focal point of the appeal relates to the extent to which the appellant should be made to provide maintenance for the minors. In particular, the appellant disagrees with the directive to pay the sum of Shs,17,500/- imposed on him, in addition to the other obligations placed on him by the court.

19. In addressing the appellant's grievance, we must of necessity contextualise the appeal. First, we note that this is a second appeal. Secondly, it relates to exercise of discretion and thirdly, it arises from a ruling seeking to review a judgment.

20. On the first front, there is a long line of settled jurisprudence that our mandate in dealing with a second appeal. Thus, this Court confines itself to matters of law only, unless it is shown that the courts below considered matters they should not have considered or failed to consider matters they should have considered or looking at the entire decision, it is perverse (See *Maina v Mugiria* [1983] KLR 78, *Kenya Breweries Ltd v Godfrey Odongo*, Civil Appeal No. 127 of 2007, and *Stanley N. Muriithi & Another v Bernard Munene Ithiga* [2016] eKLR).

21. Section 80 of the repealed *Children's Act*, 2001 allowed an appeal at the first instance to the High Court and a further appeal to the Court of Appeal. However, section 99 of the prevailing *Children's Act*, 2022 applicable at the time of the hearing of this appeal has narrowed the Court's jurisdiction on a second appeal in the following manner:

    > " 99. Unless otherwise provided under this Act, in any Appeals, civil or criminal proceedings in a Children's Court, an appeal shall lie

a. in the first instance, to the High Court on points of fact and law; and

b. in the second instance, to the Court of Appeal on points of law only" (Emphasis ours)

22. In the English case of *Martin v Glywed Distributors Ltd (t/a MBS Fastenings)* 1983 ICR 511 it was held inter alia that, where a right of appeal is confined to questions of law only, an appellate court has loyalty to accept the findings of fact of the lower court

(s) and resist the temptation to treat findings of fact and law, and, it should not interfere with the decisions of the trial or first appellate court unless it is apparent that, on the evidence, no

reasonable tribunal could have reached that conclusion, which would be the same as holding the decision is bad in law.

23. The upshot of the foregoing is that the Court will, in the present appeal, only limit itself to the points of law within the above set parameters. The import of our above position is that we have to give deference to the learned judge's findings of fact. This is buttressed by the fact that the judge was not dealing with the appeal where it was open to re-evaluate the facts but with an application for review.

24. Article 53(2) of the *Constitution* provides for the right of every child to parental care and protection, which includes equal responsibility of the mother and father to provide for the child, whether they are married to each other or not. There is common ground from the parties, and the courts below did take this position into account in arriving at their respective decisions. Having perused the arguments and decision on record, we do not see any error in the trial court's assessment of the facts and the conclusion emanating therefrom.

25. The appellant sought to make adjustments to the order for maintenance which was duly considered. The trial court, acknowledged its power to make adjustments to the order for maintenance and was not persuaded in favour of the appellant. The trial court, on the application for review, was not persuaded by the appellant.

26. We need not rehash the paramount consideration in any decision on a matter concerning children-the survival and best interest of the child. This consideration is not dependent on the wishes of any of the parents but a legal responsibility bestowed upon the parents jointly. It is not lost to us that whenever matters relating to children end up before courts, the parents are usually at loggerheads and sometimes using the children to settle their own personal scores. It is therefore incumbent upon the court to become the ultimate protector of the minors in the clouded environment where each parent purports to assert the best interests of the child. In doing so, the court is granted judicial discretion to make certain findings upon hearing the parties. Such are the findings of fact, peculiar to the circumstances of each case that we, as an appellate court and of second instance in this case should exercise restraint in interfering with.

27. The grounds upon which a court should review its findings are enunciated in the provisions of Order 45 of the Civil Procedure Rules, 2010. These are: discovery of new and important matter or evidence which, after the exercise of due diligence, was not within the knowledge or could not be produced by the applicant 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. The application should be made without unreasonable delay. In *Benjoh Amalgamated Ltd v Kenya Commercial Bank Limited* [2014] eKLR, it was held that the residual jurisdiction of the Court to review its own decisions should be invoked with circumspection. As stated by the Supreme Court in *Menginya Salim Murgani v Kenya Revenue Authority* [2014] eKLR, it is a general principle of law that a Court after passing

judgment, becomes functus officio and cannot revisit the judgment on merits, or purport to exercise a judicial power over the same matter, save as provided by law.

28. The gist of the appellant's protest is that the respondent is not pulling her weight in the maintenance in the wake of increased financial obligations on the appellant as a result of two of the three minors going to boarding school. In the same breath, the appellant cites his diminished income arising from the reduction of his clinical allowance. We bear in mind that the amount had on appeal been reduced from Shs.35,000/- to Shs.17,500/-.

29. The appellant, as we perceive him, is no more than asking us to review the amount of maintenance without any basis. As earlier pointed out, the responsibility to maintain children is not one which is bargainable depending on the parent's real or perceived intentions. Doing so is tantamount to asking the court to sit on appeal on its decision and reverse it. The fact that a party believes that the court should have reached a different conclusion or that the decision was erroneous are matters fit for appeal rather than review which is limited in scope. Notably also, courts have held that; "the process of reasoning cannot be treated as an error apparent on the face of the record justifying the exercise of the power of review" and that; 'an erroneous order/decision cannot be corrected in the guise of exercise of the power of review.' (See *Republic v Advocates Disciplinary Tribunal Ex-Parte Apollo Mboya* [2019] eKLR).

30. The second and third front of the context of the appeal necessitates our limited intervention. On the facts we note that the variation of the net income is attributed to the fact that the appellant no longer paid rent to the employer but instead used the same income for transport, security etc. This in our view amounted to a change on the nature and mode of expenditure from rent to transport and from direct check off through the employer to direct payment by the appellant. It did not necessarily amount to change of income to warrant the variation of the order for maintenance.

31. Unfortunately, we do not find this persuasive enough as to fall within the parameters of review at this instance. The irrefutable conclusion that we arrive at is that the appellant has not disproved the basis of the factual finding and exercise of discretion by the learned Judge. This leaves us with no basis to interfere and vary the said findings on the basis of the injudicious exercise of discretion or to justify the need for review by the High Court. The appellant therefore fails in the second and third context of the appeal, the appellant having failed to dispel the points of law as applied to the case by the learned Judge in the impugned ruling. This finding does not of itself deprive the appellant of the option to review the court's orders on maintenance. At the opportune time and when circumstances permit, it will always remain open for the court to make adjustments.

32. In the end, the appeal is unmerited. Owing to the nature of the matter as involving maintenance of children, we see no reason to burden any of the parties with costs. We therefore make no order as to costs.

DATED AND DELIVERED AT NAIROBI THIS 12TH DAY OF APRIL, 2024.

M. WARSAME

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JUDGE OF APPEAL

MUMBI NGUGI

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. JUDGE OF APPEAL

J. MATIVO

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JUDGE OF APPEAL

I certify that this is a True copy of the original

Signed

DEPUTY REGISTRAR