IN THE COURT OF APPEAL

AT NAIROBI

[CORAM: NAMBUYE, KOOME & SICHALE, JJA

CIVIL APPEAL NO.189 OF 2018

BETWEEN

VVA.....APPELLANT

AND

HSP.....RESPONDENT

(Being an appeal from the judgment and Order of the High Court of Kenya at Nairobi (Muchelule, J.) dated 6th March, 2018

in

HC Divorce Case No. 79 of 2006)

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JUDGMENT OF THE COURT

This is a first appeal arising from the Judgement of the High Court of Kenya at Nairobi, Milimani law courts, Family Division (**Muchelule, J),** dated 6th March, 2018.

The facts leading to the appeal are that, appellant and respondent got married on 2nd July, 1988. The marriage was subsequently dissolved by **K.H. Rawal, J** (as she then was) in a Judgment delivered on 24th July, 2008 in Divorce Cause No. 79 of 2006. On 25th July, 2008, the respondent successfully filed a chamber summons seeking an order for maintenance resulting in the orders made by **K.H. Rawal, J,** in a ruling delivered on 11th February, 2010, vide which appellant was ordered to pay to the Respondent Kshs. 120,000/- monthly as maintenance; Kshs. 60,000/- monthly for anticipatory rental premises, if and when she entered into a Tenancy Agreement for her own independent premises; and Educational and other expenses for their son until further orders appellant filed a Notice of Appeal dated 11th February, 2010, intending to appeal against the whole of the above ruling, on which he successfully anchored Civil Appeal Application No. 100 of 2010 under **Rule 5(2) (b)** of the Court of Appeal Rules (CAR), seeking stay of execution and further proceedings in High Court Divorce Cause No. 79 of 2006. In its Ruling of 9th July, 2010, the court allowed stay of execution on condition that appellant paid the respondent Kshs. 60,000/- monthly as maintenance, school fees and other expenses for their son as and when they fell due until further orders. The court suspended the order for payment of monthly rental allowance terming it anticipatory in nature. The appellant subsequently withdrew the notice of appeal dated 11th February, 2010. On 6th February, 2017, the Respondent filed an application for execution of the decree, accompanied by a notice to show cause directed at the Appellant to show cause as to why he should not meet the Decree.

Before the determination of the application for execution, the appellant filed a Notice of Motion dated 19th May, 2017, brought under **Article 159(2) (d)** of the Constitution of Kenya, **section 78 (c)** and **(d)** of the Marriage Act, **section 1A** and **1B** of the Civil Procedure Act and all other enabling provisions of the law, substantively seeking orders for stay of execution of the maintenance orders issued on 11th of February, 2010 and reviewed by the Court of Appeal on 9th July, 2010 pending *inter partes* hearing of the application; and for review setting aside and or discharge of the orders of maintenance granted on 11th day of February, 2010, supported by grounds on its body and a supporting affidavit of the appellant. The application was opposed by the Respondent's replying affidavit deposed and filed on 20th June, 2017. The hearing on merit of the application is what resulted in the impugned orders of **Muchelule, J** dated 6th March, 2016; in which the learned Judge rendered himself *inter alia* as follows:

".....I accept that position. The basis for the order sought to be reviewed was the appeal. Now that the appeal was withdrawn, the orders could subsist on their own.

5. The consequence is that, the orders of the Court of Appeal issued on 9th July, 2010 are no longer in place. Therefore, the application to review, set aside or discharge these orders is misconceived, misplaced and incompetent. It is struck out with costs."

The appellant was aggrieved and is now before this Court on a first appeal raising four (4) grounds of appeal, subsequently condensed into three thematic issues in the appellant's written submissions dated 6th November, 2018 and filed on 7th October, 2018, namely, whether:

1. The learned Judge exercised his discretion in a manner that led to an erroneous decision.

2. The Judgment of the learned Judge should be substituted with an order discharging the maintenance order of 11th February, 2010.

3. Who should bear the costs of the appeal?

The appeal was canvassed by way of written submissions adopted and highlighted by learned counsel **Mr. Kamunya P. W. and Ombis,** both appearing for appellant and **Miss Ngugi,** holding brief for **Miss Abdi Osman**. Supporting the appeal, **Mr. Kamunya** relied on the case of **Mbogo and another versus Shah [1968] EA 93,** as approved in the case of **Price & another versus Hilder [1984] eKLR**, **Mr. Kamunya** and faulted the Judge for exercising his discretion wrongly when: he failed to properly, assess, appreciate and take into consideration appellant's submissions, authorities cited, and grounds in the body of the application and affidavit in support of the application; he misapprehended and acted on the misconceived and erroneous notion that it was prayer 2 that fell for consideration before him, yet the said prayer 2 had firstly been compromised by consent of the parties on 22nd June, 2017; and secondly, it had also lapsed upon the withdrawal of the appeal on which it had been anchored; thirdly, it had also lapsed upon hearing of the application *inter partes*, as it had been prayed for pending hearing *inter partes* of the application. Prayer 3 was therefore the only prayer that fell for consideration before the Judge, who therefore fell into error when he failed to pronounce himself on this prayer.

It is also **Mr. Kamunya's** contention that the impugned orders should not be sustained as appellant had sufficiently demonstrated that: the respondent was a person of extremely good financial means, being a business person in gainful employment with considerable wealth and assets, with several sources of income and therefore more than capable of maintaining herself; that the continued stay with her mother also disentitled her to the order of rent which had reverted upon the lapsing of the Court of Appeal order to stay issued on 9th July, 2010. She was also a **Director [particulars withheld]** and **[particulars withheld] Limited** from where she also drew income. That appellant had personal knowledge that the respondent received rental income from properties she jointly owned with her family members inclusive of a joint bank account with her mother whose proceeds she benefited from. She also enjoyed the facility of a Company car fueled by the Company of which she was a Director. The only issue of the marriage was at the time an adult and a Managing Director of **[particulars withheld] International Limited,** and did not therefore need any maintenance support through the respondent. Lastly, that Appellant's financial position had greatly been affected by his removal from the Directorship of **[particulars withheld] International Limited** at the instigation of the respondent and her family.

To buttress the above submissions, **Mr. Kamunya**, relied on **sections 78** and **80** of the Marriage Act, because, according to him, it was the applicable law as at the time he presented his application. **Section 78** was cited to support the appellant's submissions that subsistence of an order for maintenance of a spouse is untenable where the spouse being maintained is able to support himself/herself while **section 80** was cited for donating jurisdiction to a court of law to revoke or vary an order for maintenance as deemed fit.

Mr. Kamunya also relied on the case of **P.K.M. versus P.R.M [2017] eKLR,** on principles that guide a Court of law in the exercise of its discretion to make an order for maintenance; the case of **MUM versus BML [2012] eKLR** as approved in **P.K.M versus**

P.R.M (supra), for the proposition that under the current Constitution 2010, both spouses have a duty to support themselves; that neither alimony nor an order for maintenance were to be paid as a matter of course as they are no longer to be used as a field where by spouses cash in on their partners; and that it is only available where there is demonstration that the party seeking an order for alimony or maintenance is incapacitated in such a manner as not to make his/her own earnings and therefore deserves the support of the other spouse. **Mr. Kamunya,** therefore urged the Court to allow the appeal with costs, set aside the impugned orders and substitute therefor an order allowing prayer 3 of the application dated 19th May, 2017 as prayed.

Opposing the appeal, the respondent submitted that determination of quantum under **section 25 (2)** of the repealed Matrimonial Causes Act, which was the guiding statute in the determination of the application giving rise to the order of **Rawal, J** of 11th February, 2010, involved an exercise of discretion by the court.

Relying on the case of **Mbogo & another versus Shah** (supra), the respondent submitted that the exercise of discretion by **Muchelule, J** should not be interfered with for the appellant's failure to demonstrate how the Judge either misdirected himself or acted on matters he should not have acted on or failed to take into consideration matters he ought to have taken into consideration and in doing so, arrived at a wrong conclusion. In the respondent's view, the record was explicit that the Judge clearly knew what was the main issue for determination, namely, that the maintenance orders issued on 11th February, 2010 were sought to be reviewed, set aside and/or discharged. That is why the Judge summarized the grounds upon which the application was premised. The Judge cannot therefore be faulted for arriving at the impugned decision for the appellant's failure to demonstrate that prayer 3 in the application of 19th May, 2017 met the threshold in **Order 45 Rule 1(b)** of the Civil Procedure Rules (CPR) for review, setting aside and discharge of the orders of 11th February, 2010; especially, when according to them appellant had not shown any evidence to support his assertions that the respondent's family was well to do; and that the Respondent

was in gainful employment.

The respondent further contended that in paragraphs 7-13 of the replying affidavit, she ostensibly outlined the appellant's financial position, a position not controverted by the appellant for the failure to file a further affidavit in rebuttal thereof. The appellant also failed to substantiate his allegation that the Respondent held positions in several companies from which she received financial support. Likewise, there was no basis for appellant's assertion that the respondent also held properties in high end areas, because, if appellant's assertions were true, the respondent would not be still living with her mother which is mainly on account of her inability to meet rental premises of her own following the Court of Appeal's order suspending payment of rental dues to her as had been ordered by **Rawal, J** in the orders of 11th February, 2010.

The respondent submitted further that, the order of 11th February, 2010, is unassailable as **Rawal, J**, properly carried out an evaluation of the financial position of the disputing spouses before her, appreciated the peculiar circumstances of the case before her before arriving at the conclusion reached that the Respondent was deserving of the maintenance order.

To buttress the above submissions, the Respondent relied on the case of **PKM versus RPM** (supra), on the principles that guide a court of law on prerequites for granting a maintenance order; the case of **PMAV versus EGMC [2016] eKLR** and **Kershaw versus Kersaw [1964] 3ALL ER 653,** in support of their submissions that the respondent who was a house wife throughout their marriage depended on the appellant for financial support; that the same life style she led while still living with the appellant was the life style that appellant was to maintain her on after divorce, and which was the same life style that **Rawal, J** re-evaluated, assessed, properly appreciated before arriving at the quantum forming the maintenance order of 11th February, 2010; the case of **WMM versus BML [2012] eKLR, and K versus K. Civil Appeal No. 74 of 1984,** cited with approval in **RPM versus PKM [2015] eKLR,** for the submission that there was no justification for interference with the maintenance order save substitution with lump sum payment, especially when the respondent had demonstrated that appellant had been frustrating her efforts to benefit from the fruits of the maintenance order which then stood in arrears as borne out by the decree she sought to execute. The case of **Gulabchand Popatlal Shah**

- **another Civil Application No. 8 of 1990 (UR)** as cited in **Econet Wireless Kenya Limited versus Minister for Information & Communication of Kenya & Another [2005] eKLR 281**, for the holding *inter alia* that, courts of law should not condone deliberate disobedience of its orders and should not shy away from its responsibility of dealing firmly with proven contemnors. On the totality of the above submissions, the Respondent prayed for the dismissal of the appeal with costs to her.

The appeal arises from the Judge's exercise of Judicial discretion in dismissing the appellant's application dated 19th May, 2017. Our mandate when determining whether the trial Judge exercised his discretion judiciously when he dismissed the said application is as was set out in the case of **United India Insurance Company Limited versus East African Under Writers Kenya Limited [1985] KLR 89,** and which we fully adopt. These are that, we can only interfere with the exercise of that discretion if we are satisfied that the Judge misdirected himself in law, misapprehended the facts, took account of considerations which he should not have taken into account, failed to take into account a consideration of which he should have taken into account, or that his decision albeit a discretionary one, is plainly wrong.

We have considered the record in light of the above mandate, rival submissions and principles of law relied upon by the respective parties in support of their opposing positions. The issue that falls for our determination is only one, namely, whether the Judge exercised his discretion judiciously when he declined to grant the appellant's application dated 19th May, 2017.

It is not in dispute that appellant's application dated 19th May, 2017, sought two substantive reliefs which we find prudent to reproduce herein as follows.

> ***"(2) That this Honourable Court be pleased to order a stay of execution of the maintenance orders issued on 11th of February, 2010 and reviewing by the Court of Appeal on the 9th July, 2010 pending inter parties hearing of this application.***
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> ***(30 That this Honourable Court be pleased to review, set aside and/or discharge the orders of maintenance granted on the 11th day of February, 2010."***

The Judge evaluated and analyzed the record in light of the rival pleadings, submissions and authorities relied upon by the parties then before him in support of their respective opposing positions and rendered himself as already highlighted above.

We have revisited the impugned orders. Our take on the same is that, a plain reading of the conclusions reached by the Judge on the rival positions before him, leaves no doubt in our minds that the thread running through the reasoning of the Judge is that, the order that fell for consideration and determination was prayer two (2) which dealt with a prayer for review and setting aside of the Court of Appeal order of 9th July, 2010 and not prayer 3 which was the substantive prayer seeking review, setting aside and or discharge of the order of the High Court of 11th February, 2010. This is clearly borne out by the following expressions of the learned Judge:

> ***"The consequence is that the orders of the Court of Appeal issued on 9th July, 2010 are no longer in place. Therefore, the application to review, set aside or discharge these orders is misconceived, misplaced and incompetent. It is struck out with costs."***

We have considered the above conclusions in light of the totality of the record. It is our finding that prayer two (2) as prayed for in the application dated 19th May, 2017 did not fall for determination by the Judge as at the time the impugned orders were made.

This is because; firstly, it was directed at the wrong forum. The orders of 9th July, 2010 sought to be reviewed, set aside and discharged in prayer 2 having been granted by the Court of Appeal, were incapable of being interfered with by the High Court. It was only the Court of Appeal that had the mandate to interfere with them. Second, in the manner framed, the stay order sought for in prayer 2 was to last "***pending hearing inter parties*.**" meaning that they would automatically lapse upon hearing *inter partes* of the application. Third, since they were anchored on the notice of appeal, they lapsed with the withdrawal of the Notice of Appeal on 23rd June, 2016 long before the application of 19th May, 2017 was filed and heard. It is therefore our reiteration that Prayer 2 did not therefore fall for the Judge's determination as at that point in time. Any conclusions reached thereon by the Judge are therefore erroneous and cannot therefore be sustained.

Turning to prayer 3, all that the Judge said of it was as follows:

> ***"It was her case that, the appeal having been withdrawn, the orders lapsed which took the matter back to what this Court had ordered on 11th February, 2010. I accept that position. The basis for the order sought to be reviewed was the appeal. Now that the appeal was withdrawn, the orders could not subsist in their own."***

We have considered the above conclusion in light of the record. It is our finding that it was correctly observed by the Judge that upon withdrawal of the appeal, parties were restored "*ante"* to the position they were in as at 11th February, 2010, when the maintenance orders were made. We however, do not agree with the position taken by the Judge with regard to the position of those orders as at the time the application of 19th May, 2017 was determined. The Judge having correctly found that the parties were restored to their position "*ante*" with regard to the orders of 11th February, 2010, it meant that, those orders were therefore amenable for review, setting aside and or discharge. All that was left for the Judge to do was to deal with the merits of prayer 3 based on the opposing pleadings and submissions as then laid before him.

It is however, evident from the record that, the Judge upon holding the above as the correct position on the record before him, did not proceed further to pronounce himself on the request for review, setting aside and/or discharge of the said orders of 11th February, 2010 as prayed for in prayer 3 of the said application. Instead, the Judge deemed those orders to have lapsed with the withdrawal of the appeal. It is this deeming of the said orders as having lapsed with the withdrawal of the notice of appeal that appellant has contended in his submissions that it is a misconception on the part of the Judge, hence the request for us to interfere with the exercise of that discretion of "**deeming the orders of 11th February, 2010 as having lapsed with the withdrawal of the appeal,**" set it aside and pronounce ourselves on prayer 3.

As already observed above, the position of the respondent is that, the Judge properly appreciated the facts, applied the law to those facts though not specifically mentioning so in the impugned Judgement and arrived at the correct conclusion on the matter. In **Mbogo & another Versus Shah [1968] EA93,** the predecessor of the Court stated explicitly that as an appellate Court, we can only interfere with the exercise of the Judge's discretion in deeming the orders of 11th February, 2010 as lapsed if satisfied that the exercise of that discretion was clearly wrong because, the Judge misdirected himself or acted on matters which he should not have acted upon or failed to take into consideration matters which he should have taken into consideration and in doing so arrived at a wrong conclusion.

In light of the above guiding principle, it is our finding that the Judge exercised his discretion wrongly in deeming the orders of 11th February, 2010 to have lapsed with the withdrawal of the notice of appeal because, these were the very orders that Appellant had appealed against. They could not therefore have lapsed with the withdrawal of the Notice of appeal. Second, the Judge with utmost respect to him appears to have confused the orders of 11th February, 2010 with those of 9th July, 2010 issued by the Court of Appeal and which we have already ruled above that these lapsed with the withdrawal of the appeal in the first instance; and upon hearing of the application *inter partes*, in the second instance, because of the manner the prayer was framed.

The issue that arises for our determination in light of the above finding is whether we have jurisdiction to pronounce ourselves on the merits of prayer 3 on which the High Court never pronounced itself for the reasons specified above. **Rule 29(1)** of the Court of Appeal Rules (CAR) donates jurisdiction to the Court on a first appeal to: "*re-appraise the evidence and draw thereon inferences of fact."*

> In ***Kinga versus Kinga & another [1988] KLR 348****, the Court pronounced itself that it has no mandate to substitute its own factual findings for that of a trial court unless there is no evidence to support the findings of the trial court or unless the Judge can be said to be plainly wrong. Second, that on a first appeal, the court has jurisdiction to review the evidence in order to determine whether the conclusion reached upon that evidence should stand. In* ***Abok James Odera t/a A.J.***
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> ***Odera & Associates versus John Patrick Machira t/a Machira & Co. Advocates [2013] eKLR****, it was stated inter alia that: on a first appeal from the High Court, the Court of Appeal should reconsider the evidence, evaluate it itself and draw its own conclusion thereon…., Secondly, that the responsibility of the court is to rule on the evidence on record and not to introduce extraneous matters not dealt with by the parties in their evidence in the Court below."*

The basis for appellant's invitation for us to pronounce ourselves on his request in prayer 3 of the application of 19th May, 2017, are the opposing pleadings and submissions on the basis of which he had invited the High Court to pronounce itself on that relief and in respect of which we have already stated above that the Judge did not pronounce himself on that prayer 3. We therefore have no decision made thereon by the Judge capable of being reviewed by us on its merit. As already stated above, the Judge failed to pronounce himself on prayer 3 of the application dated 19th May, 2017, based on the erroneous assumption, that it is prayer 3 of the application of 19th July, 2017 that had lapsed with the withdrawal of the appeal. This in our view, was a wrong exercise of discretion, based on a misapprehension and misconception of the correct facts that the Judge ought to have considered and appreciated in the determination of that prayer. We find merit in this appeal. Save for affirming that prayer 2 of the application dated 19th May, 2017, did not fall for determination by the Judge as at the time the Judge

determined appellant's application dated 19th May, 2017, the appeal is allowed. The orders of 6th March, 2018 are set aside and substituted with an order remitting the matter back to the High Court for rehearing of prayer 3 of the application dated 19th May, 2017 by a Judge other than **A.O. Muchelule, J.** Each party to bear own costs.

Dated and Delivered at Nairobi this 24th day of April, 2020.

R.N. NAMBUYE

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JUDGE OF APPEAL

M.K. KOOME

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JUDGE OF APPEAL

F. SICHALE

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JUDGE OF APPEAL

I certify that this is a true copy of the original

Signed

DEPUTY REGISTRAR