



IN THE COURT OF APPEAL

AT NAIROBI

(CORAM: KOOME, SICHALE & ODEK, JJ.A)

CIVIL APPLICATION NO. 199 OF 2014

BETWEEN

J K N.....APPLICANT

VERSUS

H W NRESPONDENT

(Being an application to correct errors and mistakes apparent on the face of the record of the Ruling delivered by this Court on the 18th December 2014)

in

NKR HCC APPL. NO. 40 OF 2014)

RULING OF THE COURT

1. The dispute that has given rise to the Notice of Motion before us is over custody of two minor children. J K N, the applicant herein, filed a suit seeking for custody orders over two minor children before the Children's Court in Nakuru being Civil Case No. 145 of 2013 against H W N. It appears from the record that the applicant and respondent were man and wife and they are the biological parents of the minor children. However they appear to have separated by the time the proceedings for custody were initiated. The matter of custody was tried before the Children's Court and the learned trial magistrate ordered that the legal and actual custody of the minors be given to the respondent, who is the mother of the children. The applicant, the father of the minors was granted unlimited access during the days when the minors were not in school.

2. There were other orders regarding the maintenance of the children but the order granting custody of the children to their mother seem to have aggrieved the applicant. He filed **Civil Appeal No 40 of 2014**, seeking to set aside the orders by the subordinate court, and contemporaneously sought a stay of execution of the said orders. The interlocutory application for stay of execution of the order of custody was heard, and by a carefully and well-reasoned ruling by **Wendo J.**, which ruling was also upheld by this Court, the applicant's application was disallowed.

3. Unrelenting in his bid to stop the respondent from having the custody of the minor children, the applicant filed an appeal before this Court and another application for stay of execution before this court

which was heard and a ruling was delivered on 18th December 2014, by **Karanja, Ouko & Mohammed JJA.** In dismissing the said application, this is what the learned Judges stated in a pertinent part of their ruling;-

“We note that the children who are currently with their mother will be returned to their father, the applicant herein, if the intended appeal succeeds. In the circumstances, it is our finding that the intended appeal, if successful, shall not be rendered nugatory by our refusal to grant the stay. Although the stay of execution of earlier orders, the learned Judge made positive orders upon dismissing the application directing that the minors be handed over to the respondent forthwith. From the circumstances of the application before us, the applicant has demonstrated that the appeal is arguable but has failed to demonstrate that the appeal will be rendered nugatory if the instant application is dismissed. The applicant has, therefore, failed to demonstrate the existence of both limbs as required by Rule 5 (2) (b) of this Court’s Rules.”

4. The application was dismissed with costs to the respondent. We do not know whether the applicant has now filed the substantive appeal before this court. We also do not know whether the applicant has prosecuted the Appeal that was pending before the High Court at Nakuru. The applicant is now engaging the three tiers of the Court system at the same time, the Subordinate Court, the High Court and the Court of Appeal. This practice must be discouraged such that a court seized with jurisdiction to deal with a matter must be allowed to do so to finality. Any party who is aggrieved by the decision of the court of the first instant can then move to the High Court and so forth so as not to subject the court processes to abuse. Be that as it may, what is before us now is a Notice of Motion lodged in the Registry on the 3rd February, 2015.

5. The applicant seeks to correct what he refers to as **“patent errors and mistakes apparent in the face of the record”**. The application is brought under Rule 35 of the Court of Appeal Rules which we find imperative to refer to verbatim as we analyze the issues for determination.

35. (1) A clerical or arithmetical mistake in any judgment of the Court or any error arising therein from an accidental slip or omission may at any time, whether before or after the judgment has been embodied in an order, be corrected by the Court, either of its own motion or the application of any interested person so as to give effect to what the intention of the Court was when judgment was given.

(2) An order of the Court may at any time be corrected by Court, either of its own motion or on the application of any interested person, if it does not correspond with the judgment it supports to embody or, where the judgment has been corrected under sub-rule (1), with the judgment as so corrected.”

6. The application is supported by the reasons stated thereunder and matters deposed to by the applicant in his supporting affidavit which was sworn on the 27th January, 2015. The applicant who represented himself addressed us during the hearing and emphasized the following; that the ruling by this Court contains errors and mistakes on the face of the record; the ruling was based on an assumption that there were orders of divorce or separation between the applicant and the respondent whereas they are still married as their marriage has not been dissolved nor is there a legal separation; the ruling was contrary to the provisions of the Marriage Act, Cap 151; the ruling misapprehended the provisions of the Children Act which should have been interpreted according to the Marriage Act. As a result of the said ruling by this Court, the applicant contends that he has been subjected to untold suffering as he was denied custody of his minor children and in turn the children have been subjected to untold suffering. The applicant thus urged us to correct the said errors, set aside the said ruling and revert the children to his custody.

7. This application was opposed by the respondent who was also acting in person and she relied on her replying affidavit which was sworn on 5th September 2014. She told us that the full effect of the orders made by the Subordinate Court allowed her legal and physical custody of the minor children; the applicant was given unlimited access to the children when not in school; the order in essence took into

account that the children needed to associate with both parents for their own balanced growth; the applicant was mixing the issue of divorce and separation with the issue of custody of children which are different.

8. According to the respondent, divorce will be determined at another forum but the matter that was before the court and was determined after both courts below heard the parties and also interviewed the children, was about the welfare of the minor children. Both courts below recognized the children were of tender age, there were certain things that the applicant could not do for them as a father which could only be done by their mother, another woman or a maid and thus found it was in the best interest of the children to grant legal custody to the respondent. Thus there are no errors on the face of the record, of the ruling of this Court.

9. We have considered this application that is brought under Rule 35 of the Rules of this Court. It is necessary to state that the Rule is meant to correct an error on the face of the record; an error to be corrected must be obvious, it must be manifest to the eyes of the Court. In other words an error on the face of the record does not require arguments or sworn depositions and lengthy submissions. A party wishing the Court to correct an error under Rule 35 can just write a letter to the Registrar of the Court pointing out the error and the Court in many circumstances may correct the error on its own motion or at the request of any interested party. We also need to state that we have no jurisdiction to interrogate the reasoning by the Judges of co-ordinate jurisdiction, in other words we cannot sit on an appeal of our own Court.

10. Are there any errors on the face of the ruling of the 18th December 2014? The errors pointed out by the applicant are that the Court failed to consider that he was still married to the respondent; there was no order of separation or divorce in force and therefore custody of children could not be made in the circumstances of this case take away his rights as the biological father in an existing union. These are the issues that formed the tapestry of this litigation all the way from the Children Court, the High Court, and the Court of Appeal. A refusal by this court to grant a stay of execution order despite the fact that the applicant is married to the respondent cannot be an error on the face of the record. The court considered the matter and arrived at a deliberate determination that the applicant's application failed to satisfy the test set out under Rules 5 (2) (b) for granting stay orders.

11. For the foregoing reasons, we see no error on the face of the record of the ruling of this court dated 18th December 2014, that may warrant any corrections under Rule 35 of this Court Rules. Accordingly we order this application be and is hereby dismissed as not only lacking in merit but also for being an abuse of the court process. The costs of this application shall abide the outcome of the intended appeal.

Dated and delivered at Nairobi this 31st day of July 2015.

M. K. KOOME

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JUDGE OF APPEAL

F. SICHALE

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JUDGE OF APPEAL

OTIENO-ODEK

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JUDGE OF APPEAL

I certify that this is a true copy of the original.

DEPUTY REGISTRAR