



KSL v AO (Sued as the Mother and Next Friend of SAH - Minor) (Miscellaneous Application E015 of 2024) [2025] KEHC 5548 (KLR) (30 April 2025) (Ruling)

Neutral citation: [2025] KEHC 5548 (KLR)

**REPUBLIC OF KENYA
IN THE HIGH COURT AT EMBU
MISCELLANEOUS APPLICATION E015 OF 2024
RM MWONGO, J
APRIL 30, 2025**

BETWEEN

KSL APPLICANT

AND

AO (SUED AS THE MOTHER AND NEXT FRIEND OF SAH - MINOR) RESPONDENT

RULING

1. A.O, the respondent/applicant filed a notice of motion on 06th December 2024 seeking orders that:
 1. Spent;
 2. That the exparte orders issued on 03rd December 2024 be set aside pending hearing and determination of the present application;
 3. That the application dated 12th November 2024 be subjected to a fresh inter partes hearing;
 4. That the respondent applicant's replying affidavit to the application dated 12th November 2024 be admitted as properly and duly filed as a response to the said application;
 5. That the Honourable court do issue such further orders as it may deem convenient in the circumstances of the case; and
 6. That the costs of this application be provided for.
2. The application is premised on the grounds that the court had issued stay of execution of child maintenance orders exparte. It was her case that the applicant/respondent had misled the court into believing that he had not been served with the replying affidavit to his application despite being served. That the applicant/respondent failed to inform the court that he served his application upon the respondent 2 days before its hearing.



3. The respondent/applicant nonetheless filed her response on 30th November 2024 but the case had not yet been mapped onto the Judiciary Case Tracking System. By the time that mapping was completed and the response filed, the file had already been marked as closed hence filing was not possible because the court had already given the stay order. She stated that the order stayed is one of child maintenance and the court should have heard her on the application before allowing it.
4. In the result, the best interest of the child has been frustrated by the applicant/respondent's efforts to avoid execution at all costs. She stated that the maintenance amount is still accruing and it is in the best interest of the child that the court reviews its decision and the application for stay be reinstated.

Replying Affidavit

5. K.S.L, the applicant/respondent in response to the application, filed a replying affidavit dated 21st January 2025. In it, he denied that the respondent/applicant was being honest about the issue of filing a response to the stay application. He stated that in fact, the respondent/applicant backdated her response to persuade the court that she complied on time. That on the day when the stay order was granted, the respondent/applicant's advocate failed to log into the virtual court and when the order was given, the court directed that she may seek review of the order if she deems it necessary. He urged the court to dismiss the application since there is no proof that he has failed to comply with the orders of the trial court on maintenance of the child.

Parties' Submissions

6. The application was disposed of by way of written submissions as directed by the Court.
7. It was the respondent/applicant's submission that her application to set aside the *ex parte* orders is merited. She argued that for the court to set aside *ex parte* orders, it must satisfy itself that either proper service was not effected or the respondent failed to appear in court for good cause. She relied on the case of Philip Ongom Capt v Catherine Nyero Owota (Civil Appeal No 14 of 2001) 2003 UGSC 16.
8. She conceded that she was served, but only 2 days before the hearing of the application, therefore, there was insufficient time to respond and prepare for the hearing. Despite the short notice, she responded to the application but faced technical challenges while filing the same on the Judiciary e-filing portal. These were issues beyond her control. She urged the court to give priority to the best interest of the child as stated in Article 53(2) of *the Constitution*.
9. She relied on the case of Regine Bhutt v Haroon Bhutt & another [2015] KEHC 6902 (KLR) where the court elevated the best interest of the child in light of the provisions of Order 42 Rule 6 of the Civil Procedure Rules. She urged the court to note that the proceedings before the trial court proceeded uncontroverted and judgment was entered in favour of the respondent/applicant.
10. Through his submissions, the applicant/respondent rehashed his sentiments as stated in the replying affidavit. He submitted that the response to the stay application was filed long after the stay orders had been issued. The respondent/applicant had however failed to enter appearance or file a response in good time even though notice was issued to them.

Issues for Determination

11. The sole issue for determination is whether the court should review and/or set aside its *ex parte* orders issued on 03rd December 2024 and reinstate the application dated 12th November 2024 for inter partes hearing.



Analysis and Determination

12. The present application seeks review by way of setting aside an *ex parte* order issued on 03rd December 2024. Order 12 Rule 7 of the Civil Procedure Rules provides:

“Where under this Order judgment has been entered or the suit has been dismissed, the court, on application, may set aside or vary the judgment or order upon such terms as may be just.”

13. The applicant/respondent filed an application dated 12th November 2024 under certificate of urgency. The application was considered by the court and set down for hearing on 02nd December 2024. He produced an affidavit of service sworn by one Washington Kibet dated Thursday, 28th November 2024 indicating that the application as served at the respondent/applicant’s advocate’s offices the same day. Amongst the documents served was a hearing notice dated 27th November 2024. On the following Tuesday, 03rd December 2024, the court granted the orders sought *ex parte*, noting that there was no appearance for the respondent/applicant.

14. Through her supporting affidavit in the present application, the respondent/ applicant’s advocate stated that upon being served, she sought the instructions of her client on the Saturday following the Thursday when she was served. She prepared a replying affidavit and at the point of filing it over the same weekend, she ran into technical challenges with the e-filing portal. As she awaited resolution of this technical hitch, she served the replying affidavit upon the applicant/respondent through email. She produced copies of service made and received and her responses.

15. When the application was coming up for hearing, the respondent/applicant stated that she experienced technical challenges while trying to log into the court session and the call dropped. This is the reason why she did not appear in court on that day.

16. Review is provided for under Section 80 of the [Civil Procedure Act](#) as follows:

“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.”

Similarly, Order 45 Rule 1 of the Civil Procedure Rules provides:

“(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, after 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.”

17. The three grounds allowed for review are thus as follows: That new or important matter or evidence has been discovered which could not by due diligence have been produced at the firm of the order. That there is some mistake or error on the face of the record, or That there is any other sufficient reason.
18. In the case of Republic v Public Procurement Administrative Review Board & 2 others [2018] KEHC 2735 (KLR), the court emphasized that whatever the ground for review, it matters that the application is brought without delay. In this case, the respondent/applicant promptly filed her application on 06th December 2024, the third day after the exparte order was issued.
19. The center of focus of this application (and the previous one) is the minor whose rights take precedence as provided under Article 53(1)(e) and (2) of *the Constitution* as follows:

“ Article 53(1)(e) Every child has the right 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;

Article 53(2) A child’s best interests are of paramount importance in every matter concerning the child.”
20. The impugned exparte order gave relief to the applicant/respondent against execution for maintenance of the child. The court ordered that the appeal be filed within 21 days of that order. Despite this, she did serve her response, which fact was not disclosed to the Court. In addition, at the time of making the impugned order, the applicant/respondent failed to inform the court that he had been served with the respondent/applicant’s replying affidavit and that he himself had filed the application dangerously close to the scheduled hearing date.
21. The applicant asserts that there was a lapse in the e-filing portal and the virtual court attendance link on the respondent/ applicant’s side. Despite this, she did serve her response, which fact was not disclosed to the Court. The technical issues that come with technological advancement of court attendance and filing cannot be ignored. In my view, these fall into the review category “any other sufficient reasons” satisfactory to the Court. In such circumstances, parties may be accommodated on these grounds.

Conclusion and Disposition

22. As stated hereinbefore, an order of the court may be reviewed for any other sufficient reason besides those already provided. As ordered by the trial court, the child maintenance ordered is a continuing burden which the child deserves. It is not a fixed amount. The child is still growing daily and deserving of care by both parents. I am persuaded to reconsider the exparte order on this basis since the amount is still accruing monthly.
23. An exparte order should not trump the best interests of a child. It would thus be in the best interest of the child and in the interest of justice for the stay application to be canvassed inter partes. Accordingly, this matter is ripe for review and that is the order I will give.
24. In the result, the application succeeds as it is in the best interest of the child. Prayers 3 & 4 are granted as prayed. Each party will bear their own costs.
25. Orders accordingly.

DELIVERED, DATED AND SIGNED AT EMBU HIGH COURT THIS 30TH DAY OF APRIL, 2025.



R. MWONGO

JUDGE

Delivered in the presence of:

Mr. Chiriswa for Applicant

No Representation for Ameso for Respondent

Francis Munyao - Court Assistant

