SSB v MLM (Family Appeal E037 of 2021) [2024] KEHC 4888 (KLR) (30 April 2024) (Ruling)

Neutral citation: [2024] KEHC 4888 (KLR)

REPUBLIC OF KENYA

IN THE HIGH COURT AT MOMBASA

FAMILY APPEAL E037 OF 2021

G MUTAI, J

APRIL 30, 2024

BETWEEN

SSB ..... APPELLANT

AND

MLM ..... RESPONDENT

RULING

1. This Court, in a ruling delivered on 22nd November 2023, allowed the appeal filed by the Appellant/Respondent, set aside the decision of the trial Court dated 3rd November 2021, reinstated the judgment of the Court below dated 27th May 2020, subject to the consent order dated 19th April 2021 and ordered the parties to bear their respective costs.

2. Vide a Notice of Motion dated 28th March 2024, the Respondent/Applicant sought the following orders: -

    1. That this matter be certified as urgent and the same be heard exparte in the first instance;

    2. That the honourable Court do issue an interim for the Respondent to have custody during holidays, in accordance with the reinstated ruling of Tononoka Children's Court dated 27th May 2020;

    3. That the honourable Court review the proceedings and ruling in HCFA NO E037/2021, particularly the absence of typed ruling delivered since 21st November 2023, and the partial implementation of the ruling without addressing other matters of concern.

3. The application was brought under Article 53 of *the Constitution*.

4. The grounds upon which the application was based were that the Respondent/Applicant hadn't received the typed judgment of the Court, he had been denied access to the children despite Court orders allowing him access and that the Appellant/Respondent had partly complied with the Court orders. Relying on Section 80 of the *Civil Procedure Act* and Order 45 Rule 1 of the *Civil Procedure*

Rules, 2010, the Applicant urged that grounds exist for review of the judgment of the Court. The application was supported by the affidavit of the Respondent/Applicant sworn on the said date.

5. The Appellant/Respondent opposed the application. Her counsels filed a Notice of Preliminary Objection dated 11th April 2024, which raised 3 grounds of attack against the application before the Court. It was contended: -

    1. That the High Court delivered a judgement on the appeal on 22nd November 2023 hence, the Court is functus officio with regard to the appeal;

    2. That the Court does not have jurisdiction to review a judgment made on appeal; and

    3. That the Respondent's complaint with regard to the ruling by the Tononoka Children Court could only be addressed via a separable appeal.

6. Vide a Notice of Motion dated 11th April 2024, the Appellant/Respondent sought to have the orders issued by this Court on 28th March 2014 set aside on the grounds that they were made in excess of the jurisdiction that this honourable Court has.

7. On 18th April 2024, I directed that the hearing would be on 22nd April 2024. On the said date, both parties had filed Written Submissions. The Court was urged to deliver a ruling on the basis of the Written Submissions. In the view of both parties the submissions they had filed were adequate.

8. The Respondent/Applicant submitted that I should allow the application on the basis of new evidence. He urged that new photographic evidence of the children warrants a re-evaluation of the case. Reliance was placed upon the case of *Republic v. Public Procurement Administrative Review Board & 2 others* [2018] eKLR and also on *Pancras T Swai v. Kenya Breweries Ltd* [2014] eKLR.

9. The Appellant/Respondent also filed submissions. In the submissions, it was urged that review could not be applied contemporaneously with an appeal against the same decision. Reliance was placed on the cases of *Serephen Nyasani Menge v. Rispah Onsase* [2018] eKLR and *Antony Njagi v. Republic* [2020] eKLR.

10. It was also urged that this Court could not review its own judgment. Reliance was placed on Section 77 of the *Civil Procedure Act*. As it was submitted that the Court lacked jurisdiction I was urged to down my tools and to take no further steps in accordance with the dictates of the Court of Appeal in the celebrated decision of *Owners of the Motor Vessel Lilian "S" vs. Caltex Oil (Kenya) Ltd* [1989] eKLR. Counsel also relied on the decisions of the Courts in *Equity Bank Ltd vs. Bruce Mutie Mutuku t/a Diani Tour Travel Ltd* [2016] eKLR and *Samuel Kamau Macharia & Another vs. Kenya Commercial Bank Ltd & 2 others* [2012] eKLR. In the latter decision, the Court stated: -

> "A Court of law only exercises jurisdiction as conferred by *the Constitution* or other Written Law. It cannot arrogate to itself jurisdiction exceeding that which is conferred upon it by law, and that a Court cannot expand its jurisdiction through judicial craft."

11. As the application filed by the Appellant/Respondent contests this Court's Jurisdiction I will determine it first. In the event that I find that I have no jurisdiction I will down my tools. I am guided by the holding of the Court in *Owners of Motor vessel Lilian "S"* (supra) where Nyarangi, JA expressed himself as follows: -

> "I think that it is reasonably plain that a question of jurisdiction ought to be raised at the earliest opportunity and the court seized of the matter is then obliged to decide the issue right away on the material before it. Jurisdiction is everything. Without it, a court has no

power to make one more step. Where a court has no jurisdiction, there would be no basis for a continuation of proceedings pending other evidence. A court of law down tools in respect of the matter before it the moment it holds the opinion that it is without jurisdiction."

12. Can I review my judgment? Section 66 of the *Civil Procedure Act*, which was referred to by the counsel for the Appellant/Respondent states as follows: -

> " Except where otherwise expressly provided in this Act, and subject to such provision as to the furnishing of security as may be prescribed, an appeal shall lie from the decrees or any part of decrees and from the orders of the High Court to the Court of Appeal."

13. Although the Respondent has the right of appeal, he chose not to exercise it and instead opted to file an application for review. I see nothing in section 80 of the Civil Procedure Rule and the Rules which bars a person aggrieved by a decree or order from which an appeal is allowed by this Act but from which no appeal has been preferred to file an application to review.

14. Having not filed an appeal against my decision, it is my view, and I find and hold accordingly, that I have jurisdiction to consider, hear and determine the application before me. For the foregoing reason, I dismiss the Appellant/Respondent's application dated 11th April 2024 as it is bereft of merit.

15. Does the application dated 28th March, 2024 have merit? Review may be made under Order 45 Rule 1 in the following circumstances: -

    1. If there is a discovery of a new and important matter or evidence which, after the exercise of due diligence, was not produced at the time when the decree was passed or order made; or
    2. On account of some error or mistake apparent on the face of the record; or
    3. For any other sufficient reason.

16. The Respondent/Applicant does not allege that there is an error or mistake apparent on the face of the judgment of this Court. Although he states that this Court did not pay sufficient heed to the best interest principles, the fact that the Court may not have done so, in my view, is not a ground for review; to the contrary, it is a ground for appeal as it goes to the merit of the decision. I cannot sit on appeal against my own decision.

17. What amounts to an error on the face of the record is well settled. In *Muyodi v Industrial and Commercial Development Corporation & another* [2006] 1 EA 243, the Court of Appeal described an error apparent on the face of the record as follows:

> " ...In *Nyamogo & Nyamogo v Kogo* (2001) EA 174 this Court said that an error apparent on the face of the record cannot be defined precisely or exhaustively, there being an element of indefiniteness inherent in its very nature, and it must be left to be determined judicially on the facts of each case. There is real distinction between a mere erroneous decision and an error apparent on the face of record. Where an error on a substantial point of law stares one in the face, and there could reasonably be no two opinions, a clear case of error apparent on the face of the record would be made out. An error which has to be established by long drawn process of reasoning or on points where there may conceivably be two opinions, can hardly be said to be an error apparent on the face of the record. Again, if a view adopted by the court in the original record is a possible one, it cannot be an error or wrong view is certainly no ground for a review although it may be for an appeal. This laid down principle of law is indeed applicable in the matter before us."

18. He urged that he had obtained photographs that would have been useful to the Court. In my view, the said discovery is not a ground review either. The children's opinion was discoverable with a bit of diligence and could have been ascertained if Mr Mohamed Liyakat Mohamed Kadernani had requested it. In the circumstances, I am not convinced that this ground has merit.

19. In making the above determination, I rely on the persuasive authority of the finding made by Mativo, J (as he then was) in In *Republic v Advocates Disciplinary Tribunal Ex parte Apollo Mboya* [2019] eKLR High Court of Kenya Nairobi Judicial Review Division Misc. Application No. 317 of 2018: -

    i. A court can review its decision on either of the grounds enumerated in Order 45 Rule 1 and not otherwise.

    ii. The expression "any other sufficient reason" appearing in Order 45 Rule 1 has to be interpreted in the light of other specified grounds.

    iii. An error which is not self-evident and which can be discovered by a long process of reasoning cannot be treated as an error apparent on the face of record justifying exercise of power under Section 80.

    iv. An erroneous order/decision cannot be corrected in the guise of exercise of power of review.

    v. A decision/order cannot be reviewed under Section 80 on the basis of subsequent decision/ judgment of a coordinate or larger Bench of the tribunal or of a superior court.

    vi. While considering an application for review, the court must confine its adjudication with reference to material, which was available at the time of initial decision. The happening of some subsequent event or development cannot be taken note of for declaring the initial order/ decision as vitiated by an error apparent.

    vii. Mere discovery of new or important matter or evidence is not sufficient ground for review. The party seeking review has also to show that such matter or evidence was not within its knowledge and even after the exercise of due diligence, the same could not be produced before the court/ tribunal earlier.

    viii. A mistake or an error apparent on the face of the record means a mistake or an error, which is prima-facie visible and does not require any detail examination. In the present case the petitioner has not been able to point out any error apparent on the face of the record.

    ix. Section 80 of the *Civil Procedure Code* provides for a substantive power of review by a civil court and consequently by the appellate courts. The words occurring in Section 80 mean subject to such conditions and limitations as may be prescribed thereof and for the said purpose, the procedural conditions contained in Order 45 Rule 1 must be taken into consideration. Section 80 of the Civil Procedure Code does not prescribe any limitation on the power of the court, but such limitations have been provided for in Order 45 Rule 1.

    x. The power of a civil court to review its judgment/decision is traceable in Section 80 *CPC*. The grounds on which review can be sought are enumerated in Order 45 Rule 1."

20. Is the reason given by the Respondent/Applicant "a sufficient decision" to justify review? In interpreting what "any other sufficient reason" is the Courts do so ejusdem generis. What amounts to sufficient reason must flow from discovery of new and important evidence or error or mistake apparent from the face of the record and be of the same kind or order. I have not seen anything in the Respondent/Applicant's application that would justify review on this ground either.

21. It is clear from the foregoing that I have no merit in the instant application. The same is dismissed. As this is a matter regarding the welfare of children I make no clear as to costs.

22. I note that the Respondent/Applicant has struggled to access his children. In my view, the proper Court for ventilation of disputes regarding access to minors or their maintenance, is the Court below. It is at the Tononoka Children's Court that he will find a proper forum for the redressal of his grievances. It is only when he is aggrieved by the decision of the subordinate Court that he may approach the Family Court on appeal.

23. Orders accordingly.

DELIVERED AND SIGNED THIS 30TH DAY OF APRIL 2024 AT MOMBASA. DELIVERED ONLINE VIA CTS PURSUANT TO THE PARTIES' REQUEST.

GREGORY MUTAI

JUDGE