HA v LB (Civil Appeal 188 of 2021) [2024] KEHC 3933 (KLR) (22 April 2024) (Judgment)

Neutral citation: [2024] KEHC 3933 (KLR)

REPUBLIC OF KENYA

IN THE HIGH COURT AT MACHAKOS

CIVIL APPEAL 188 OF 2021

FROO OLEL, J

APRIL 22, 2024

BETWEEN

HA ..... APPELLANT

AND

LB ..... RESPONDENT

(Being an Appeal from the Ruling and Order of the Honorable Principal Magistrate B. Kasvuli (MR) on the 27th May 2021 and 4th November 2021)

JUDGMENT

A. Introduction

1. The respondent in this Appeal did file the primary suit claiming maintenance for the three minors namely; IMW (Born 23.06.2008), TC (Born on 15.11.2013) and SEM (Born on 20.12.2015). Pending inter-parties hearing of the said suit, the respondent did file an application dated 29.11.2029 seeking for interim maintenance orders of Kshs 80,000/= and that the Appellant be directed to pay school fee's as per the school fee structure and buy school related items. The said application was heard inter parties and vide a ruling dated 27.05.2021, the trial court did direct the Appellant to pay the respondent a monthly maintenance of Kshs 50,000/= to cater for the needs of the minors herein and to also pay their school fee's. The appellant was further granted unlimited access to the minors.

2. The Appellant being dissatisfied by the said ruling did file a notice of motion dated 3 .06. 2021 seeking to review the said court order dated 27.05.2021. This application too was heard inter-parties and vide a ruling dated 04.11.2021 the same was dismissed on the basis that it lacked merit. Being dissatisfied with the said ruling, the Appellant did file this Appeal challenging both the ruling dated 27th May 2021 and the one dated 4th November 2021 vide his memorandum of Appeal dated 18th November 2021, but he later Amended the same on 8th December 2021 to only challenge the second ruling dated 4th November 2021. The grounds of Appeal raised therein were that;

a. That the learned Magistrate erred in law and fact in failing to appreciate the evidence tendered and the principle of joint equal parental responsibility by the parties.

b. That the learned Magistrate erred in law and fact in failing to consider the Appellants affidavit of means and his other commitments, including the mortgage responsibility before granting the monthly maintenance of Ksh 50,000/= without granting any responsibility to the respondent.

c. That the learned magistrate erred in law and fact in ignoring to consider the new grounds raised by the Appellant in his Application for review and the children's officer report.

d. That the learned magistrate erred in law and fact in failing to appreciate the Appellants proposals on housing and his continued payment of school fees, medical, clothing and related expenses.

3. The Appellant did pray that this Appeal be allowed, the ruling dated 4th November 2021 be set aside and that this court be pleased to give any other order as it may deem fit as provided under section 78 of the *civil procedure Act*.

B. Submissions

(i) Appellants Submissions

4. The appellant did file his submissions on 12th September 2023 wherein he stated that the court was duty bound to re-consider and reevaluate the evidence tendered before the trial court and arrive at its own independent determination. It was trite law that as per section 24 of the children's Act, parental responsibility was joint and equal and this was further affirmed by Article 53(1), (e) of *the constitution* of Kenya 2010. It was also imperative for children's court, to look at the parameters provided for under Section 94(1) of the children's Act, when making an order for financial provision for maintenance of a child. Reliance was placed on CIN vrs JNN, Where Aroni .J. did proffer that the applicant in a child maintenance case, too had a responsibility of indicating what contribution he/she would make towards the support of the children

5. The appellant faulted the trial court for failing to consider these parameters as provided for in law and the evidence of the Appellant as contained in his replying affidavit. The trial court therefore, improperly proceeded to burden the Appellant to shoulder all the responsibility of taking care of the minors without assigning the respondent equal share in the same. The trial court was further faulted for ignoring the evidence contained in the report of the children officer, which report affirmed that the Appellant was shouldering the children's needs, which included payment of school fee's, medical cover, food and clothing singlehandedly.

6. The final issue raised by the appellant, was that the trial Magistrate ignored his evidence, that he was willing to reside with his children and provide for all their needs, without the need of paying rent and/or maintenance elsewhere. There was therefore no justification for the trial court to award the respondent a blanket Kshs 50,000/= as maintenance. The appellant therefore prayed that this Appeal be allowed and the direct for taking of additional evidence and a retrial of the issues determined under Section 78(d) & (e) of the *Civil Procedure Act*.

i. Respondents Submissions

7. The respondent did file her submissions on 23.11.2023 wherein she submitted that this Appeal was incompetent and should not be entertained as this court (Justice G.V Odunga) had made a ruling dated

24.01.2022, where he held that the appellant could not appeal as against the ruling dated 27.05.2021, and also seek for a review of the said order. To allow his to proceed with the same, (both the appeal and review application) would be an affront to provisions of section 1A and 1B of the *Civil Procedure Act*. The only ruling, which could be comfortably challenged in this Appeal was the one dated 04.11.2021.

8. The appellant had not proffered any cogent reason as to why this court should allow this appeal and had not shown that the trial court had not taken its decision in the best interest of the child. The trial magistrate had considered all the evidence tendered before he made a decision to direct monthly maintenance at Kshs 50,000/= per month. Further the trial magistrate appraised himself of the facts, considered the cross examined of both parties in open court and finally considered the children's officer report and found that the review application had no merit. It was therefore not true that the appellant was single handedly maintaining the minors, nor had he been paying for the monthly maintenance as directed forcing the respondent to take out a NTSC as against him. This clearly showed that the Appellant was not keen to maintain the minors herein and was avoiding his parental responsibilities.

9. The appellant consequently had not placed any new and important matter of evidence before the trial court for its consideration nor had he demonstrated any error apparent on the face of the record and/or demonstrated any other sufficient reason the basis upon which the court could be moved to warrant a review and/or variation of the orders issued on 27.5.2021. Based on the forgoing, it was the respondent's humble submissions that this court finds that this Appeal is bereft of merit and proceed to dismiss the same.

B. Analysis and Determination

10. A first appeal is a valuable right of the parties and unless restricted by law, the whole case therein is open for rehearing both on the question of fact and law. The judgment of the appellate court must therefore reflect its conscious application of mind and record the findings supported by reasons, on all issues arising along with the contentions put forth and pressed by the parties for decision of the appellate court. While reversing a finding of fact the appellate court must come into close quarters with the reasoning assigned by the trial court and then assign its own reasons for arriving at a different finding. This would satisfy the court hearing a further appeal that the appellate court had discharged the duty expected of it. See Santosh Hazari Vs Purushottam Tiwari (Deceased) by L.Rs (2001) 3 SCC 179.

11. A first appellate court is also the final court of fact and litigants are entitled to full fair independent consideration of the evidence. The parties shave a right to be heard both on issues of fact and issues of law, and the court must address itself to all issues raised and give reasons thereof. While considering the entire scope of section 78 of the *civil procedure Act* a court of first appeal can appreciate the entire evidence and come to a different conclusion. See Kurian Chacko vs Varkey Ouseph AIR 1969 Keral 316

12. I have considered the entire proceedings of the trial court, the entire record of Appeal and the submissions of the parties herein. I note that the appellant has rightly abandoned his appeal as against the ruling dated 27.05.2021 and correctly challenged the ruling dated 04.11.2024, which basically ouches on if indeed the trial magistrate did consider the parameters of review under the said ruling dated 04/11 /2021.

13. Section 80 of the *Civil Procedure Act* and Order 45 Rule 1 of the Civil Procedure Rules provides as follows: -

Section 80. Review

" 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."

14. Further Order 45, rule 1. Application for review of decree or order. Provides that;

"1. Any person considering himself aggrieved—

(1)

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.

(2) A party who is not appealing from a decree or order may apply for a review of judgment notwithstanding the pendency of an appeal by some other party except where the ground of such appeal is common to the applicant and the appellant, or when, being respondent, he can present to the appellate court the case on which he applies for the review"

15. From the above provisions, it is clear that while Section 80 of the *Civil Procedure Act* grants the court the power to make orders for review, while Order 45 of the civil procedure rules, sets out the jurisdiction and scope of review by hinging review to discovery of new and important matters or evidence, mistake or error on the face of the record and any other sufficient reason.

16. The Court of Appeal had the following to say in an application for review in the case of National Bank of Kenya Ltd vs Ndungu Njau.

> "A review may be granted whenever the court considers that it is necessary to correct an apparent error or omission on the part of the court. The error or omission must be self-evident and should not require an elaborate argument to be established. It will not be a sufficient ground for review that another Judge could have taken a different view of the matter. Nor can it be a ground for review that the court proceeded on an incorrect exposition of the law and reached an erroneous conclusion of law. Misconstruing a statute or other provision of law cannot be a ground for review."

17. To the statutory grounds, we may also be add instances where the applicant was wrongly deprived of an opportunity to be heard or where the impugned decision or order was procured illegally or by fraud or perjury: see Serengeti Road Services -v- CRBD Bank Limited [2011] 2 EA 395. Also, to be included as part of sufficient reason is where the impugned order if reviewed, would lead the court in promoting

public interest and enhancing public confidence in the rule of law and the system of justice: see Benjoh Amalgamated Limited & Another vs. Kenya Commercial Bank Limited (supra).

18. In Muyodi vs. 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 -vs- 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."(emphasis mine)

19. In Chandrakhant Joshibhai Patel -v- R [2004] TLR, 218 it had been held that an error stated to be apparent on the face of the record:

> " ...must be such as can be seen by one who runs and reads, that is, an obvious and patent mistake and not something which can be established by a long drawn process of reading on points on which may be conceivably be two opinions."

20. The basic and undeniable fact in this matter/appeal is that the trial magistrate did make a grave error, when he issued his orders of 27.05.2021 directing the appellant to pay a monthly maintenance amount of Kshs 50,000/= and school fees for the minors herein, without considering the equal/joint imput of the respondent, who had equal/ joint parental responsibility to undertake as provided for under Article 53(1), (e) of *the constitution* of Kenya 2010 and section 24(1) of the children's Act, No 29 of 2022. Vide the said impugned ruling, the trial court erroneously handed uneven parental responsibility to the Appellant without specifying which role and financial obligations the respondent would pick up. This constituted a grave and open error the basis upon which the trial court ought to have reviewed the said order.

21. Further by the ruling dated 04.11.2021, the trial magistrate wrongly grounds his reasoning on the best interest of the child, but ought to have been considered preliminarily as to whether there was an error on the face of the record, new facts and or if there was sufficient reason the basis upon which review could be granted. These were the parameters/issues he was expected to make a finding on under section 80 of the *civil procedure Act* and Order 45 of the civil procedure rules. Unfortunately, he did not do so and this is also a clear legal misdirection the basis upon which this court can interfere with the said ruling.

22. Finally the said ruling offends the clear provisions of Order 21 rule 4 & 5 of the civil procedure rules, as it does not provide for issues for determination, and the basis for refusing to review the earlier orders issued. The ruling by itself even without considering its merits too, is legally unsustainable and deficient in substance.

B. Disposition

23. The upshot and from analysis of the pleading and the law I do find that this Appeal is merited and proceed to set aside the ruling/order of Hon B. Kasavuli dated 04.11.2021 and substitute the same with an order allowing the notice of motion Application dated 03.06.2021 in terms of prayer 2(a) thereof.

24. The Appellant will continue to pay school fees of all the minors herein, provide for all school related expenses and for medical insurance of all the minors, while the respondent will provide for food and shelter of the minors pending hearing and determination of the primary suit.

25. The Appellant will also pay/contribute monthly maintenance/upkeep of Kshs 25,000/= for upkeep of the minors on or before the 10th of every month pending hearing and determination of the primary suit. He too will be given unlimited access to all the minor as earlier ordered.

26. This being a children's matter, which unfortunately has been pending before this court since 2021, I direct that Mavoko childrens case No 13 of 2019 be mentioned before the chief Magistrate -Mavoko within the next two weeks after delivery of this Judgment and the same will be allocated to a new trial magistrate, who will prioritize its hearing and determination within 120 days from the date hereof.

27. This being a family matter, each party will bear their own costs.

28. It is so ordered.

JUDGEMENT WRITTEN, DATED AND SIGNED AT MACHAKOS THIS 22ND DAY OF APRIL, 2024.

FRANCIS RAYOLA OLEL

JUDGE

Delivered on the virtual platform, Teams this 22nd day of April, 2024.

In the presence of;

Mr. Mandela for Appellant

Mr Langat for Respondent

Sam Court Assistant