VOA v LOM (Civil Appeal E140 of 2021) [2024] KEHC 16802 (KLR) (Family) (12 August 2024) (Judgment)

Neutral citation: [2024] KEHC 16802 (KLR)

REPUBLIC OF KENYA

IN THE HIGH COURT AT NAIROBI (MILIMANI LAW COURTS)

FAMILY

CIVIL APPEAL E140 OF 2021

BM MUSYOKI, J

AUGUST 12, 2024

BETWEEN

VOA .... APPELLANT

AND

LOM .... RESPONDENT

JUDGMENT

1. When the parties appeared before me on 10-07-2024, they informed me that the matter was coming for submissions on the appellant's application dated 11-03-2022 which was seeking stay of execution of the lower court's ruling. The parties had not filed submissions and I was asked to give them more time. I also informed the parties that there was an application dated 28-08-2023 which was asking for reinstatement of the appeal but upon perusal of the record, I did not see any order dismissing the appeal. It appeared to me that the parties were not keen in progressing the appeal. The appellant appeared to me as hesitant in prosecuting the appeal whereas the respondent wanted me to return the file to the lower court for purpose of her prosecuting notice to show cause which was slated for hearing on 17-07-2024.

2. In order to progress the appeal and despite there being no record of appeal filed, I made the following orders;

   a. The appellant shall file and serve written submissions in respect of the appeal within seven days.

   b. The respondent shall file and serve her submissions in the next seven days upon service of the appellant's submissions.

   c. Judgement will be delivered on 12-08-2024.

3. As at 4-08-2024, none of the parties had complied with the above orders of the court. It would appear to me that the appellant is not keen to prosecute his appeal. Were it not a children's matter, I would have dismissed this appeal for want of prosecution. I will proceed to write judgment based on what is on record.

4. On 21-04-2026 in a ruling on an application for interim maintenance and custody of the children dated 15th September 2015, Honourable Z.W Gichana RM made the following orders.

    a. The plaintiff shall retain actual custody of both minors.

    b. The parties shall have joint legal custody of their children.

    c. The defendant shall provide for all of the older child's school fees and school related expenses at the child's current school.

    d. The defendant shall further provide school fees and related expences for the younger minor when she comes of age.

    e. Choice of school or any changes to the minors' school shall be upon mutual consultations.

    f. The defendant shall provide Kshs 35,000.00 per month as part of his contribution to the minors' general upkeep.

    g. The defendant shall meet the shortfall therein and provide minors with clothing and shelter.

    h. The parties shall provide for the minors' medical needs by enrolling them in a medical insurance scheme or meet their needs as they arise on a 30:70 ratio by the mother and father respectively.

    i. The defendant shall have reasonable access over the minors on terms to be agreed between the parties.

    j. Each party to bear own costs.

    k. Each at liberty to apply.

5. The matter came for a hearing of the main suit on 21-09-2016 on which date the parties recorded the following consent;

    > 'By consent the interim orders made on 21-04-2016 is hereby adopted as judgement. Further by consent the monthly maintenance is hereby enhanced to Kshs 35,000.00.'

6. Nothing else is recorded to have happened until 2-09-2021 when the respondent came up with an application dated 30-08-2021 which was seeking that the court reviews the monthly maintenance from Kshs 35,000.00 to Kshs 60,000.00. The ground of the application was that the said sum of Kshs 35,000.00 was no longer sufficient as the cost of living had gone up. Honourable R.O. Mbogo on 5-11-2021 delivered a ruling on the application in which he increased the monthly maintenance to Kshs 50,000.00. That is the ruling which is the subject of this appeal.

7. The applicant has raised four grounds which appear to me to be revolving around one issue. That is, the magistrate erred in increasing the sum without considering the parties' ability and without enough evidence of the rise of the cost of living. As stated above, the parties have given a wide berth to this appeal but for the best interest of the children and in order to allow the matter go back to the trial court for other processes, I will rely on the documents filed by the parties in the lower court.

8. I have read the supporting affidavit of the respondent sworn on 30-08-2021, further affidavit dated 4-11-2021 and her affidavit of means sworn on 5-10-2021. I have also read the appellant's replying affidavit sworn on 19-10-2021 and his affidavit of means sworn on 19-10-2021. I have also read through the memorandum of appeal filed herein. Having done, so I form opinion that the only issues for determination in this appeal are the following;

    a. Whether the court erred in reviewing the consent order.

    b. Whether the trial court was justified in increasing the monthly maintenance sum to Kshs 50,000.00.

9. The consent order was recorded on 21-04-2016. The application for review came five years later. The Honourable Magistrate relied on section 80 of the *Civil Procedure Act*, Order 45(1) of the Civil Procedure Rules and the then Sections 98 and 99 of the repealed *Children Act*. It is trite law that a consent judgment or order has a contractual effect and can only be reviewed in circumstances which would be justifiable for setting aside a contract. In Board of Trustees National Social Security Fund vs Michael Mwalo (2015) eKLR it was held that;

    > 'The judgment arose from a consent of the parties to the suit. The law pertaining to setting aside of consent judgments or consent orders has been clearly stated. A court of law will not interfere with a consent judgement except in circumstances such as would provide a good ground for varying or rescinding a contract between parties. To impeach a consent order or a consent judgment, it must be shown that it was obtained by fraud, or collusion or by an agreement contrary to the policy of the Court.

10. Section 80 of the *Civil Procedure Act* and Order 45(1) of the Civil Procedure Rules provide for review of court orders, judgment or decisions which are appealable and not appealed. Where there is no open door for an appeal, no review under the said provisions of the law is allowable. It is my opinion that the consent order recorded by the parties in this matter was not appealable as a party cannot be aggrieved by what it has freely and voluntarily committed itself to. The magistrate therefore erred in applying the above provisions of the law while making its ruling dated 5-11-2021.

11. However, children's matters are special matters which are governed by their own special statutes. Section 99 of the then *Children Act* provided for the powers of the court to vary, modify or discharge any of its orders. The same provisions are found in Section 119 of the current *Children Act* Chapter 141 of the Laws of Kenya. In the last item of the consent, the parties agreed that each party was at liberty to apply meaning that they left the door open for any further applications. This must have been in recognition of the fact that children matters keep on evolving and changing as the children grow up. The fact that the parties recorded a consent does not bar any application in future for changing the terms of the consent. The discretion given to the children's court is so wide that the court has powers to decline to record a consent where it would appear to it that, it does not serve the best interest of the child. In EKK & Another vs HKK (2020) eKLR the court held that;

    > 'Under sections 73 and 99 of the Act, the court is given wide discretion to impose conditions and vary orders given regarding maintenance of a child. It would mean that in matters concerning maintenance of children, the court has discretion to vary the consent orders on application by the parties. Section 100 of the Act provides that where the parents, guardians or custodians of a child, have entered into an agreement whether oral or written in respect of maintenance of the child, the court may upon application vary terms of the agreement if it is satisfied that such variation is reasonable and in the best interest of the child. It is clear that

the court has jurisdiction to set aside consent orders or judgement on a matter concerning the child. The guiding principle is the best interest of the child.'

12. Section 100 referred to by the court in the above suit has since been replaced in the same terms by Section 120 of the current *Children Act* Chapter 141 of the Laws of Kenya. On the above basis, I hold that despite the magistrate having erred in quoting the *Civil Procedure Act* and Civil Procedure Rules in matters concerning review, he was not wrong in the position of whether or not he could review the consent orders.

13. As it is normal with matters of this nature, the parties in their pleadings and affidavits digressed to issues touching on each other's morals which to me were irrelevant to the matter before the court. The main reason for the respondent's application was that the cost of living had gone up. In support of this allegation, the respondent attached ten shopping receipts which I have been able to go through. The said receipts show that shopping was as follows;

    a. For August 2021 Kshs 10,725.00

    b. For July 2021 Kshs 300.00

    c. For June 2021 Kshs 440.00

    d. For May 2021 Kshs 2,360.00

    e. For December 2020 Kshs 838,.00

14. It should be obvious to anyone that going by the above figures, the receipts were of no probative value as regards the argument that the cost of living had gone up. The magistrate took judicial notice of the fact that the cost of living had gone up but there should have been laid a basis for enhancement of the appellant's contribution other than the general statement and the receipts produced above.

15. The respondent had filed an affidavit of means which showed that she was earning Kshs 118,961.65 with her total expenditure coming to Kshs 222,499.00. The appellant's affidavit of means dated 19-10-2021 showed that he earned a sum of Kshs 60,000.00 with expences of Kshs 258,500.00. Obviously both parties were exaggerating their expences while minimising their incomes in order to draw the court's sympathy or else, how were they surviving with such a huge deficit although some expences were not monthly?

16. In his ruling, the only reason the magistrate gave for enhancing the maintenance sum was that the cost of living had obviously gone up. That may have been so but it should be noted that parties must maintain their lifestyles within their means. I note that one of the items the respondent put as her expences was a loan of Kshs 50,000.00. This is a personal development issue which each party is entitled to but should not be used as means to constrain or constrict the other party unless the loan was taken for the benefit and use of the children. I also note that the appellant was paying for boarding facilities for the older child which obviously translates to less maintenance cost at home. It is also notable that the consent order provided that the appellant would meet the school fees and related expences to the younger child once she became of age. At the time of the order, the younger child was about 2 years. Five years later, she must have joined school. The said responsibility which was on the appellant must have come with more costs and expences. I do appreciate that children must be maintained but where hardships hit both parents, the children must also adjust to the realities of life. There was no complaint that the children were missing necessities of life.

17. In light of the above, I find that the magistrate erred in concentrating on the cost of living on one item of the order. In order to make an informed decision, the trial court should have analysed the burden of

all the other items of the order to ensure that no party was taking more burden than the other especially where their pockets were strained. I share position of Musyoka J in SKM v MWI (2015) eKLR where he held that;

> 'Maintenance orders are not meant to punish or oppress any party. They should be designed to provide for the needs of the child or children in question, while at the same time respecting the financial status of the parents. A child can only be maintained within the means of the parent in question.'

18. I take the averments by both parties on issues of medical needs and school expences as their words against each other. If the respondent had defaulted in any of his responsibilities, it was not a matter of review or variation of the court orders. The respondent was at liberty to take out notice to show cause against the appellant.

19. In view of my above observations, it is my finding that there was no enough evidence or reasons for the trial court to vary the order for maintenance. In the circumstances, this appeal succeeds. Consequently, the respondent's application dated 30-08-2021 is hereby ordered dismissed with no orders as to costs. The parties shall revert to the terms of the consent as recorded on 21-04-2016.

20. This judgment should not be understood to mean that the parties cannot make further applications in the event the circumstances change. Each party shall bear their own costs of this appeal.

DATED SIGNED AND DELIVERED AT NAIROBI THIS 12TH DAY OF AUGUST 2024.

B.M. MUSYOKI

JUDGE OF THE HIGH COURT.

Judgment delivered in presence of;

Mr. Gadu for the appellant, and

Mrs. Morara for the respondent