



**MS v BEG (Divorce Cause 4 of 2019) [2022] KEHC 9973 (KLR) (Family) (29 June 2022) (Ruling)**

Neutral citation: [2022] KEHC 9973 (KLR)

**REPUBLIC OF KENYA  
IN THE HIGH COURT AT NAIROBI (MILIMANI LAW COURTS)  
FAMILY  
DIVORCE CAUSE 4 OF 2019  
AO MUCHELULE, J  
JUNE 29, 2022**

**BETWEEN**

**MS ..... APPLICANT**

**AND**

**BEG ..... RESPONDENT**

**RULING**

1. The applicant MS and the respondent BEG both work for the United Nations Organisation. In 2019 when the applicant filed this petition to divorce the respondent they were both based at Gigiri in Nairobi. The petition was heard on 7<sup>th</sup> November 2019 and the divorce granted on the same day.
2. The couple has two children: NGS born on 19<sup>th</sup> September 2004 and LGS born on 5<sup>th</sup> May 2007. The couple had entered into agreements dated 11<sup>th</sup> July 2019 and 4<sup>th</sup> November 2019 for them to have joint legal custody of the children and for the applicant to have care and control of the children until they were of age. They agreed on access arrangements, education and their upkeep. The agreements formed part of the divorce judgment dated 7<sup>th</sup> November 2019.
3. The applicant filed the application dated 18<sup>th</sup> June 2021 seeking the attachment of the respondent’s salary in satisfaction of the sum of USD10,184 which was the accrued maintenance amount that the respondent owed between November 2020 and June 2021, and asked that the court reviews the consent dated 11<sup>th</sup> July 2019 and 4<sup>th</sup> November 2019 to enhance the respondent’s contribution due to increased financial and non-financial responsibility on her after the respondent relocated from Kenya to New York. Her case was that following the consents the respondent made some payments and thereafter stopped to make remittances and that in all USD10,184 was outstanding. She stated that since the respondent had neglected and/or refused to pay, despite requests, his salary should be attached to settle the claim. Secondly, following the respondent’s relocation to New York the monthly children expenses that they were sharing equally had now fallen on her alone. The expenses were USD



7593 monthly and included rent, food and households, utility bills, motor vehicle repairs, and so on. She wanted him to be ordered to share the expenses at the rate of USD3797 each, over and above the USD1498 that the respondent was defaulting on. It, however, appears clear from the applicant's further affidavit that the respondent has since paid the accrued maintenance and that he is now current. Her complaint now relates to the second prayer in her application.

4. The respondent not only opposed the application but also has his own application dated 13<sup>th</sup> August 2021 in which he sought the following orders:-

- “ 1) That this application be certified urgent and heard in the first instance for purposes of prayers 2 and 3 and the same be heard and determined on priority basis, and in case before the hearing of the plaintiff's application dated 18<sup>th</sup> June 2021;
- 2) that pending the hearing and determination of this application interpartes, this Honourable Court be pleased to issue an Order directing the plaintiff to disclose and submit to this court all her pay slips for a period between November 2019 to date to enable the court to assess her net income and ascertain the amount of the dependency allowance and other children-related benefits she received between November 2019 and January 2021;
- 3) That pending the hearing and determination of this application interpartes, this Honourable Court be pleased to direct the plaintiff to produce an accurate inventory of all the bills, invoices, receipts and other evidence of expenditures incurred in relation to the maintenance of the minors, including all medical bills and health insurance reimbursements, school fees paid and education grant paid by the United nations, and all other relevant expenses;
- 4) That this Honourable Court be please to review/revise the consent orders dated 11<sup>th</sup> July 2019 and 4<sup>th</sup> November 2019 by scrapping of the “buffer amount” of United States Dollars Six Hundred and Fifty Five (US\$655.00) (\$327.50 per person), stipulated in the consent order thereby leaving the child support amount at United States Dollars Two Thousand One Hundred and Forty Five (US\$2,145.00) (or US\$1,072.50 per person) instead of Two Thousand Eight Hundred Dollars (US\$2,800.00) (or US\$1,400.00 per person) to cover the expenses reasonably necessary to support the minors.
- 5) That this Honourable Court be pleased to review/revise or vary the consent orders dated 11<sup>th</sup> July 2019 and 4<sup>th</sup> November 2019 by revising downwards the amount payable by the Defendant as child maintenance in monthly instalment from One Thousand Four Hundred Dollars (US\$1,400.00) to One Thousand Dollars (US\$1,000);
- 6) That this Honourable Court be pleased to direct that fifty percent (50%) of the children-related benefits estimated at an amount of One Thousand (US \$1,000) per month paid to the plaintiff on a monthly basis by the United Nations be applied towards the maintenance of the minors as part of the Defendant's contribution thereby further reducing he defendant's monthly contribution to Six Hundred Dollars (US\$600.00); and



- 7) That the terms of the revised order in terms of prayer 6 to apply retroactively as from 1<sup>st</sup> November 2019 when the plaintiff unilaterally stopped remitting the defendant's share of the children-related benefits to date.
  - 8) That the costs of this application be provided for.”
5. The respondent stated that he has since paid all the arrears. However, since the consents, there has been material change in his personal circumstances. He now works and lives in New York where the cost of living is much higher compared to Nairobi. Secondly, he has since remarried and has a child. This has increased his financial obligations necessitating the review and variation of the consent orders. Thirdly, his case was that the applicant was the recipient of a dependency allowance and other children-related benefits from the United Nations which is the parties' material employer. The United Nations policy is that the said benefits can only be paid though one staff member for the benefit of both members where the staff members are married to each other. Consequently, the benefits cannot be split of between the two staff members unless the parties agree between themselves in an arrangement by which one staff member receives the entire amount and forwards to his or her spouse his or her share of the benefits. The applicant has since the divorce refused to share the benefits with the respondent. During the period in question, stated the respondent, the applicant has so far received USD12,000 towards benefits. She should have transferred half of it (that is, USD 6000) which she has declined to do. The respondent's case is that his net salary is about USD 11,356.51 and the applicant's is 10,004.42 per month. He wants the consents varied to take care of his present circumstances as, he says, the parties have an equal responsibility to take care of the children.
  6. On her part, the applicant's reasons for wanting an upward review of what the respondent presently pays is because she now has full custody of the children and she is consequently bearing a huge chunk of the material and non-material needs of the children with insufficient input from the respondent. This includes the day to day living expenses that the parties had agreed to share equally. She stated that she is currently overburdened as there are other needs of the children which had not been liquidated, which fall on her alone. In particular, the children's monthly expenses that she enumerated and which were previously shared are now being met by her alone.
  7. The applicant was represented by M/s Mbanya and the respondent by Mr Omiti. Each filed written submissions which I have read and considered.
  8. Section 100 of the *Children Act* provides that:-
 

“Where the parents, guardians or custodians of a child, have entered into an agreement whether oral or written in respect of the maintenance of the child the court may, upon application, vary the terms of the agreement if it is satisfied that such variation is reasonable and in the best interests of the child.”
  9. In the agreement dated 11<sup>th</sup> July 2019, paragraphs 4, 5, 6 and 7 provided as follows:-
 

“4)At present the wife received an education grant from her employer which funds 75% of the education expenses for the children;

With regard to education expenses not covered by the education grant provided by the employer, the parties shall pay in equal shares the children's school fees, tertiary education and ancillary expenses to cover inter alia, the cost of uniforms, school supplies, school sports, extra tuition and other extra-curriculum activities.



- 5) The parties shall provide in equal shares medical insurance and medical expenses for the children which are not provided by the employer of the parties;
- 6) The parties shall pay for the upkeep of the children, to include clothing, food, fuel and other related expenses in equal shares; and
- 7) The parties shall share equally the cost of the air fares for the children during the vacations.”

10. In the further agreement dated 4<sup>th</sup> November 2019, its paragraph 2 provided as follows:-

“2. With regard to paragraph 4, 5, 6 and 7, of the said agreement dated the 11<sup>th</sup> day of July 2019, the parties agreed that the sum presently payable by each party, not covered by the education grant referred to in paragraph 4 of the earlier agreement, in respect of medical premiums, school fees, tuition, clothing and extracurricular activities, is hereby agree at US \$1,400.00 which is based on the present sums and shall be paid into the joint account by each party for the benefit of the children. In the event that further sums are to be paid in respect of the above not covered, or any one off extraordinary payments, then parties agree that the sum payable will be paid by each party in equal shares. Parties will communicate with each other in respect of the need for such further payments which shall at all times be in the best interest of the children.”

11. Under Article 53(1) of *the Constitution* and section 90 of the *Children Act*, the applicant and the respondent have each an equal responsibility to maintain and take care of their two children. No parent has a superior right or claim against the other in the exercise of parental responsibility (SAK v ZNDP [2019] eKLR).
12. In reviewing and/or varying the agreement that the parties herein entered into over their two children, the court needs to consider what is reasonable and what is in the best interests of the children. The new terms must relate to the changed needs of the children and the ability of the parties to pay. If the children’s needs have not changed but the parties’ financial positions have materially changed, that will be taken into consideration.
13. The respondent indicated what each party presently takes home. It is material that the respondent relocated to New York where life is certainly more expensive compared to Nairobi. He has a new family and a child. It was not indicated whether or not his new wife has an income. To counter his new circumstances, the applicant stated she left her to alone to shoulder the material and non-material needs of the children which she enumerated. I further consider that she alone is receiving the dependency allowance and other children-related benefits from United Nations which she is not sharing with the respondents as was expected.
14. When all these are considered, and bearing in mind that the ultimate test is what is in the best interests of the children, I determine that it is not right or reasonable to interfere with the agreements entered into by the parties on 11<sup>th</sup> July 2019 and 4<sup>th</sup> November 2019. Of importance is that the needs of the children have not been shown to have changed. The result is that the applications dated 18<sup>th</sup> June 2021 and 13<sup>th</sup> August 2021 are each found to be without merit. They are dismissed with an order that each party shall bear own costs.

**DATED AND DELIVERED AT NAIROBI THIS 29<sup>TH</sup> DAY OF JUNE 2022**

**A.O. MUCHELULE**



**JUDGE**

