



REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT KERUGOYA

HIGH COURT CIVIL APPEAL NO. HCCA 23 OF 2017

EKK AND NNK

(MINORS SUING THROUGH THEIR MOTHER ANK - NEXT FRIEND).....APPELLANT

VERSUS

HKK.....RESPONDENT

(From the Original Civil Suit Children Cause No. 14 of 2015 of Chief Magistrate's Court at Kerugoya).

JUDGMENT

1. The appellant **ANK** had filed a case before the **Children's Court Kerugoya Case No. 14 of 2015** seeking orders against the respondent **HKK** for a declaration that he has parental responsibility for the issues of their relationship **NNK** and **EKK**. She also prayed that she be granted custody of the two issues of marriage. That the respondent be ordered to maintain the children by making periodic financial payment.
2. The defendant in a statement of defence had prayed that the suit be dismissed.
3. On 28-9-2015 the parties entered a consent where they agreed as follows:

- (i) That the defendant shall pay for school fees until the children complete schooling but subject to extension of parental responsibility beyond the 18th birthday.*
- (ii) That the defendant shall cater for medical expenses for the minors and when the need arise.*
- (iii) That the defendant shall provide the minor's personal effects and food.*
- (iv) That the next friend shall cater for shelter and clothing and food.*
- (v) That actual custody be granted to the next friend with unlimited access to the defendant on alternate weekends.*
- (vi) That each party to bear its own cost. Given under my hand and seal of this court, this 28th day of September, 2015.*

4. The appellant filed an application dated 9/5/2017 seeking review of the Judgment which was delivered on 8/5/2017. From the record on 8/5/2017 the court made an order that:

“ I agree that as per the ruling delivered on 16/11/2017, the defendant should be paying Kshs; 30,000/= annually for NN. The defendant to pay Kshs; 30,000/=. The defendant given 2 months to pay the arrears.”

5. The appellant was dissatisfied with that order and filed application dated 9/5/2017 to challenge the order. The trial magistrate gave a ruling on 2/6/2017. He cited his ruling dated 16/1/2017 and dismissed the application. It is against the dismissal of that application that the appellant has filed this appeal based on the following grounds:

(i) THAT the honorable Magistrate erred both in law and in fact by dismissing the application when it is evident that the respondent failed to obey the terms of the consent judgment with impunity by failing to pay school fees for the 2nd appellant missing from one position.

(ii) THAT the honourable magistrate erred both in law and in fact by varying the terms of the consent judgment in favor of the respondent to the detriment of the appellants in particular varying of the school fees downwards in spite of the protests of the NEXT FRIEND.

(iii) That the honourable Magistrate erred both in law and fact by ignoring the facts that the respondent did finish paying his car loan thereby releasing his finances which ought to go into meeting his obligations towards the appellants in terms of the consent judgment.

(iv) That the honourable magistrate did error both in fact and in law by asking the parties to file affidavit of means way long after entering the consent judgment and using the said affidavit to vary the consent judgment to the detriment of the appellants.

(v) That the honourable magistrate erred both in law and in fact by approving and adopting the respondents affidavit of means whereby the respondent swore falsely that he was paying Kshs; 40,000/= towards clearing of car loan whereas his bank statement shows he was paying Kshs; 23,291/= monthly.

(vi) The honourable magistrate erred both in law and in fact by not considering that the respondent was in contempt of the consent judgment and ordering accordingly.

6. The appellant prays that the appeal be allowed and the Court to make orders in the circumstances of this case.

7. The respondent opposed the appeal. His contention is that the decision of the Lower Court was that he pays Kshs; 30,000/= as he could not pay more than that. That he does casual jobs and he presented to Court what he had. That the court ordered that they share. That the appellant did not comply with the court orders:

8. The parties agreed to proceed by way of oral submissions. I have considered the appeal. I find that two issues arise for determination.

These are;

(i) Setting aside of the consent judgment.

(ii) Parental responsibility.

1. Setting aside of the Consent Judgment.

The parties entered a consent Judgment on parental responsibility. The matter which was before the trial magistrate was a Children matter which is governed by the Children Act. (to be referred to as the Act), and other International Instrument like convention on the rights of the child and the African Charter on the Rights and Welfare of the child.

9. The principles for setting aside consent judgment are that:

(i) The consent was obtained fraudulently.

(ii) Collusion between affected parties.

(iii) The agreement is contrary to the policy of the court.

(iv) Mis representation of material facts or any other sufficient reason.

10. It is trite that a Court of law will not interfere with a consent judgment except in circumstances such as would form sufficient ground for rescinding or varying the contract between the parties. This has been settled by various authorities.

In Flora .M. Wasike -Versuus- Destimo Wamboko (1988) eKLR, Court of Appeal, It was stated:

“ It is now settled law that a consent judgment or order has contractual effect and can only be set aside on grounds which would justify setting a contract aside, or if certain conditions remain to be fulfilled which are not carried out.”

See the decision of the Court in: **J.M. Mwakio -versus- Kenya Commercial Bank Limited Civil Appeal No. 28 of 1982 and 69 of 1983.**

11. The burden to prove that there exists grounds to set aside the consent judgment rests on the person seeking to set aside the consent order.

12. Under Section 73 and 99 of the Act the court is given wide discretion to impose conditions and to 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:

“Power to vary maintenance agreements’.

“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 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 judgment in a matter concerning the child. The guiding principle is the best interest of the child. **Article 53 (2) of the Constitution** provides:-

“A Child’s best interests are of paramount importance in every matter concerning the child.” See also **Section 4 (2) of the Act.**

13. What this court has to consider is whether the variation of the order was in the best interest of the child.

14. After the consent was entered the respondent filed an application dated 30/5/2016 seeking orders that there be stay of execution of the consent judgment. The court be pleased to vary review and or set aside the judgment to the extent that it allows the minors herein to be educated in a day school or in a day school and/or in a school that the parents mutually agree. That the judgment be amended to read that the defendant will only cater for the minors personal effects and food when they visit. That the Court be ordered to review, vary and or set aside the orders of 18/4/2016 ordering the defendant to clear Kshs; 15,430/=. That costs be provided.

15. It was based on the grounds that though the judgment was by consent of the parties there was a mistake in that the Judgment ordered the respondent to cater for the personal effects and food fully, whereas the intention of the parties was for the defendant to cater for that when the children had visited him. The consent judgment was silent on whether the defendant had a say on choice of the school the minors attend. The defendant has been straining to pay school fees for the first(1st) born child who is a border in class 8 in [particulars withheld] Academy. He could not cater for school fees amounting to **Kshs; 59,300/=** per year, and that he has another family with one child. And the burden of educating the first born child has been too much.

16. The trial magistrate gave a ruling on 10th of June, 2016, ordered that consent adopted and recorded on the 28th September, 2015, be and is hereby amended to read as follows:

“The defendant to provide for the minors personal effects, among others”.

17. It seems that after that the parties did not agree and the court directed them to file affidavit of means, the parties complied and the court gave another ruling on 16th January, 2017 to the effect that the defendant to be paying annual school fees for the child, KNN **Kshs; 30,000/=**. The defendant will also take care for the school related expenses as they had agreed. The next friend is free to admit the child, at [particulars withheld] Girls High School as long as she is willing to pay the difference.

18. The issue which the trial magistrate was considering was school fees for the 1st child, and the personal effects for the same child. With regard to the school fees, the parties appeared before the trial magistrate and the appellant insisted that the child should go to a good school, because she had done well. And she also confirmed that she will assist the defendant to pay the school fees.

19. The consent order had other clauses which the magistrate did not review such as for the defendant to pay for the medical expenses for the minors, the defendant to provide for the minors personal effects and food, and an order for custody and access. In that case an order for payment of the school fees for the minor, and her personal effects was in the best interest of the child.

20. The court made the order after the appellant agreed to assist the defendant/respondent to pay school fees in a good school where the minor was selected, after doing well in her examination. Considering that the magistrate had jurisdiction to vary the order, and that he made the order after considering the affidavits of means of both parties, the magistrate was in order when he varied the consent order.

21. A school fees structure for the year 2017, from [particulars withheld] Girls High School which was presented before the trial court indicated that the school fees for the year 2017 was 53,554/=-, and since the trial magistrate ordered the respondent to pay Kshs;30,000/= annually being school fees and he pays related expenses as they had agreed, the trial magistrate had not erred. It is clear that the trial magistrate and even from what can be discerned from the proceedings the only clause in the consent order which was varied was the 1st clause. The trial magistrate had jurisdiction to do that.

2. PARENTAL RESPONSIBILITY.

It is trite that parental responsibility is shared equally between the parents. **Article 53 (1) (e) of the Constitution** provides that every child have the right to parental care and protection, which includes co-responsibility of the mother and father to provide for the child, whether they are married to each other or not. This is further buttressed under **Section 6 (1) and 24 of the Act**. So both parents have parental responsibilities and in matters in respect of maintenance and provision of the children, the court does not become

functus officio. When the need arises the trial magistrate will have discretion to vary the order depending on the circumstances of the case. In this case, the consent reached by the parties settled the issue of parental responsibility as both parents had a role to play in the maintenance of the children. As such, the Appellant had parental responsibility it could not be left to the defendant alone. Under the **Act**, the court is empowered to make any order that is in the best interest of the child and this is provided under **Section 76 (1)** gives the general principals in regard to proceeding in a children's court, provides:

“ Subject to Section 4, where a court is considering whether or not to make one or more orders under this ACT with respect to a child, it shall not make the order or any other orders, unless it considers that doing so, would be more beneficial to the welfare of the child, than making no order at all. ”

22. The order that the magistrate made considered the earning capacity of the respondent, and what he could afford to pay for the minor. Therefore, the magistrate was in order in his ruling that the 1st defendant pays Kshs; 30,000/= annually for the child, and meet all the school related expenses. And this was based on the Appellant's own suggestion that she would assist the respondent pay school fees. The trial magistrate properly addressed the issue of shared responsibility.

23. In the circumstances, I find no reason to interfere with the ruling of the trial magistrate as it relates to varying clause number 1 of the consent order, as the other orders were left intact.

24. In conclusion, I find that the Appeal has no merit, it is therefore, dismissed. I make no orders as to costs.

Dated at Kerugoya this 29th day of May 2020.

L. W. GITARI

JUDGE