REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT NYERI

CIVIL APPEAL NO. 38 OF 2006

J N W.....APPLICANT

VERSUS

J G K.....RESPONDENT

RULING

Two minors namely **M C W G** and **O W** through their Guardian **J N W**, hereinafter, referred to as the Applicant took the Motion dated 25/06/2012 in which they applied for:

1. **That the maintenance order made by the court against the respondent in favour of the applicants on 16/3/2009 be varied and increased to Kshs.21,350/=.**

2. **That the costs of this application be paid by the respondent.**

The Guardian swore the affidavit in support of the Motion. When served, **J G K**, the Respondent herein, swore a replying affidavit he filed to resist the Motion. When the Motion came up for interparties hearing, learned counsels from both sides recorded a consent order to have the motion disposed of by written submissions.

I have considered the written submissions of learned counsels. I have further taken into account the grounds set out on the face of the Motion and the facts deponed in the affidavit filed for and against the Motion. The Applicant is basically beseeching this court to make an order reviewing the consent order of maintenance recorded on 16th March 2009 directing the Respondent to pay a monthly sum of Kshs. 8,000 for maintenance of the two children. It is said that the cost of living has gone up making the aforesaid sum to be so meagre that the children who are aged 12 and 9 ½ years may not meet their needs. The applicant has further averred that the current monthly budget made up of a sum of Kshs.42,700 has gone up in view of the children growing up and going to upper classes since the time of filing suit. It is the Applicant's submissions that the Respondent can afford the proposed increase of the monthly amount of maintenance from Kshs. 8,000 to 21,350. The Respondent urged this court to find that the Motion is *res judicata*. It is said a similar application had been filed before the subordinate court which heard it and thereafter dismissed the same. It is also pointed out that the consent order clearly stated that the terms were meant to last until the minors attained the age of majority. The Respondent further argued that the consent order can only be altered by consent or on account of fraud or misrepresentation. The Respondent further argued that he is not in a position to pay more now.

Let me state from outset that the Motion before me is that it premised on **Sections 73** and **99** of the **Children Act**. Under **Section 99**, the law gave the court a wider discretion to impose conditions and to vary orders given regarding maintenance of a child. The dispute before this court seeks to vary an order recorded by consent. The question is how do courts treat consent orders? The answer can be deduced

from the decision of the Court of Appeal in **Wasike =Vs= Wamboko (1988) KLRP 429** in which the Court of Appeal held inter-alia as follows:

> ***"A consent judgment or order has contractual effect and can only be set aside on grounds which would justify setting aside a contract, or if certain conditions remain to be fulfilled which are not carried out."***

It would appear the law anticipated that parties would in proceedings regarding maintenance of children require to vary agreements entered on regular basis. This is clear when one examines **Section 100** of the **Children Act** which provides as follows:

> ***"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."***

It is clear from the above citation that the court has power upon application to vary the terms of the agreement if it is satisfied that such alteration is reasonable and in the best interest of the child. The Respondent has complained that the Motion is *res judicata* and that the conditions to set aside consent orders have not been shown. It is clear from the record that the applicant had filed a near similar application before the subordinate court but the same was dismissed on the basis that the orders sought to be varied no longer existed having been replaced by the consent order of 16th March 2009. With respect, I do not think the doctrine of res judicata applies to this application. In the application before the subordinate court, the applicant had sought to have the orders given on 13th May 2006 set aside. Those orders were superseded by the consent orders of 16th March 2009. The other aspect raised by the complainant is that there is no evidence of fraud or misrepresentation to upset the consent order. In order to understand the nature of this dispute, one must look at the proceedings before the trial court. The Applicant herein had sued the Respondent by way of the Plaint dated 16th March 2005 in which she sought for interalia monthly maintenance assessed Kshs.11,700. The case was heard and in the end the applicant was awarded judgment as prayed. In other words, the Respondent was ordered to pay the applicant Kshs.11,700 per month to cater for education, medical care, clothing, food and general maintenance for the children. The respondent was unhappy with the decision hence he preferred this appeal. When the appeal was placed before Hon. Justice Makhandia (as he then was), learned counsels appearing in the matter recorded a consent order to compromise the appeal as follows:

> ***"By consent the appellant to pay the respondent a monthly stipend of Kshs.8,000 with effect from 1st April 2009 until the minors attain the age of majority.***
>
> ***Each party to bear his/her costs for this appeal and in the subordinate court."***

In my view, the entire case was compromised by consent. In an ideal situation and in other cases, the court becomes functus officio upon adopting the order as its decision. The law does not permit the court to re-open the matter. However, in matters in respect of maintenance and provision for children, the court does not become functus officio. **Section 4 (3)** of the **Children Act**, all courts are enjoined before making any decision to treat the interests of the child as first and paramount. Under **Section 100** of the **Children Act** the court is permitted to revisit the matter and vary the decision on maintenance agreements on application if satisfied that such a variation is reasonable and is in the best interest of the child. Therefore, the Motion dated 25th June 2012 is properly and competently before this court. The main ground advanced by the applicant in seeking for the variation of the consent order on maintenance is that the cost of living and the children's needs have gone up. In his replying affidavit, the Respondent does not deny the applicant's assertion that the cost of living and the needs of the children have gone up. He simply relied on the ground that the court is functus officio. The Applicant has proposed for an increase of the amount from Kshs. 8,000 to 21,350. In my view, the suggested figure to be increased appears to have been exaggerated since one and a half years had lapsed from the date the parties recorded a consent order adjusting the decretal amount downwards from Kshs.11,700 to Kshs.8,000. In the subordinate court, the applicant was able to give in detail the monthly expenditure to be Kshs.16,900.

She prayed for the children to be given Kshs.11,700 as their monthly maintenance which was inclusive of the school fees. As of 2001 the Respondent was a Laboratory Technician earning Kshs. 13,000 per month. The record does not show whether the Respondent provided an affidavit of means. Even when he appeared before this court, the respondent did not supply an affidavit of means. The respondent basically hid that information from court. This court presume that the Respondent is able to pay any money over 13,000/=. The respondent attached a copy of an application by way of chamber summons dated 21/1/11 the Applicant made before the subordinate court. In the affidavit, the applicant swore on 21/1/2011 and filed in support of the summons, the applicant gave the monthly expenditure of Kshs.40,200. She however, asked for the amount to be adjusted from kshs.8,000 to Kshs.20,100. The aforesaid application was heard and dismissed by the subordinate court on a technicality, prompting the applicant file the current motion before this court. In paragraph 10 of the applicant's supporting affidavit, sworn on 25/06/2012 the applicant gave a figure of Kshs. 42,700 as the monthly expenditure on the children. I think the variation of the monthly expenditure provided for the year 2006 then 2011 and 2012 appear to be reasonable. I find the figure suggested to be a fair representation of the changing trend in the cost of living. I am convinced the Notice of Motion dated 25th June 2012 is well founded. It is allowed as prayed. Consequently, I order that the appellant do start remitting to the Applicants Kshs.21,350 per month with effect from 1st March 2014. I direct that each party meets his or her own costs.

Dated, Signed and delivered in open court this 21st day of February, 2014.

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J.K.SERGON

JUDGE

In the presence of:

Mr. Gori h/b Mr. Wahome Gikonyo for the Appellant

Mr. Kiboi h/b for Mr. Waweru Macharia for the Respondent