EGM v VAO (Civil Appeal 1 of 2023) [2025] KEHC 8310 (KLR) (13 June 2025) (Judgment)

Neutral citation: [2025] KEHC 8310 (KLR)

REPUBLIC OF KENYA

IN THE HIGH COURT AT NAIROBI (MILIMANI LAW COURTS)

CIVIL APPEAL 1 OF 2023

PM NYAUNDI, J

JUNE 13, 2025

BETWEEN

EGM ..... APPELLANT

AND

VAO ..... RESPONDENT

(Being an appeal from a ruling of the Hon. Georgina Nasaka Opakasi, Senior Resident Magistrate at Nairobi Children's Case No. E034 of 2021 made on 23rd November 2022)

JUDGMENT

1. Before this court for determination is the Appeal filed by EGM (the Appellant) through a Memorandum of Appeal dated 17th December 2022. The Appeal arises out of a ruling delivered on 23rd November 2022 by Georgina Nasaka Opakasi, Senior resident Magistrate at Nairobi Children's Case No. E034 of 2021.

2. The Appeal was canvassed by way of written submissions. The Appellant filed the written submissions dated 6th January 2025. The Respondent's submissions are dated 13th January 2025.

Background

3. The parties are the biological parents of the minor subject of these proceedings. On 22nd March 2021, the parties recorded a consent in the trial Court on the following terms

    1. The plaintiff shall have custody of the minor.

    2. Legal Custody shall be shared jointly between the parties.

    3. The defendants shall access the minor every once a month during school days and for two weeks during school holidays.

4. The defendant shall cater for the minor's education. The school fees and school related expenses.

5. The defendants shall cater for the minor medical expenses.

6. The defendant shall cater for the minor's food at the rate of Kshs 8000/- per month payable to the plaintiff on or before the 5th of every month.

7. The plaintiff shall cater for the minor's shelter, house help expenses, house hold updates and the reminder of the minor's food expenses.

8. Both parties shall cater for the minor's clothing and instatements (sic) equally

9. The consent order to be adopted as the final order of the Court.

10. Parties at liberty to apply.

4. The record shows that immediately after the recording of the Consent the parties flooded the Court with a flurry of applications culminating in the applications dated 11th April 2022 and 11th May 2022 which are the subject of the impugned ruling.

5. In the Application dated 11th May 2022, presented under Sections 98, 99, 101(5)(b) of the Chidren's Act, 2001 (now repealed) and Order 45, Rules 1,2 and 3 of the Civil Procedure Rules, the applicant sought a review of the orders of 22nd March 2021. The grounds on which the appellant sought to review the orders were that; the respondent had failed to comply with the orders of 22nd March 2021, especially with regard to his access to the minor and that his financial circumstances had changed and with reduced income he was not in a position to provide the maintenance as per the order of 22nd March 2021.

6. In his Submissions, the appellant frames the following as the issues for determination

i. Whether the appellant did not meet the conditions for varying the consent agreement dated 22 March 2021 between the appellant and the respondent.

ii. Whether the learned magistrate was entitled to consider the profits of Randas Medical Services in determining the Appellant's personal financial position and ability to cater for the minor herein.

iii. Whether it was necessary to order the respondent to file her affidavit of means for purposes of determining the financial ability of both parties to provide for the minor.

iv. The question of costs of this appeal.

7. On the 1st issue, the appellant submits that the trial court erred in finding that the Consent order would only be set aside if proved that the order was obtained by fraud, collusion or contrary to the policy of the court or misrepresentation. It is his position that in matters relating to children the Court should expand the inquiry to include the best interest of the child as required under Article 53(2) of *the Constitution* of Kenya and Section 2 and 8 of the *Children Act*. It was therefore in the Child's best interests to review the order.

8. On the 2nd issue, it is submitted that the Court erred in considering the income of Randus Medical Services, which is a separate legal entity and reference is made to the Salomon v Salomon & Co Limied [1896] UKHL 1 [1897] AC 22 decision.

9. Finally it is submitted that the respondent ought to have filed her affidavit of means. Finally respondent submits that he is entitled to costs.

10. In her Submissions, Violet Akinyi Oduor, the respondent frames the issue for determination to be

    1. Whether the Learned Magistrate erred in law and fact by disallowing to review the consent orders signed by both the appellant and the respondent dated 22nd March 2021.

11. The appellant refers to several decisions on the legal threshold to be met prior to the setting aside of a consent. These include Econet Wireless Kenya Ltd v Minister for Information and Communication of Kenya and Another [2005] eKLR 828; SMN vs ZMS & 3 others [2017] eKLR; Board of Trustees National Security Fund v Michael Mwalo [2015] eKLR; Flora M. Wasike v Destimo Wamboko[1988] eKLR; J M Mwakio vKenya Commercial Bank Limited [1997] eKLR

Analysis and Determination.

12. In considering this appeal I am well guided that the primary consideration has to be the best interests of the child. It is trite that in every decision undertaken concerning a child, the best interest of a child should be considered. This position is clearly captured in the UN Convention on the Rights of the Child and the African Charter on the Rights and Welfare of the Child. The same has also been captured under Article 53 (2) of *the Constitution* of Kenya as follows: 'a child's best interests are of paramount importance in every matter concerning the child'.

13. The same was well articulated in the case of MAA v ABS [2018] eKLR, where it was held as follows: -

> .... While considering this matter, this Court is alert to the welfare of the children herein who are of tender years. The matter is not about the applicant/appellant and the respondent; and their interests are secondary to those of the child. The foregoing provisions require this Court to treat the interests of the child as the first and paramount consideration and must do everything to inter alia safeguard, conserve and promote the rights and welfare of the child herein. Acting in the best interest of the children in question.

14. As correctly stated by the parties in considering an application for review of orders made by a Court in a matter touching on a child, the court will along with the grounds set out in Order 45 Rule 1 of the Civil Procedure Rules, consider the best interests of the child. Sections 99 and 100 of the *Children Act*, 2001 (now repealed) provided-

> Section 99 Power to Impose Conditions and to vary order
>
> The court shall have power to impose such conditions as it thinks fit to an order made under this section and shall have power to vary, modify or discharge any order made under section 98 with respect to the making of any financial provision,by altering the times of payments or by increasing or diminishing the amount payable or may temporarily suspend the order as to the whole or any part of the money paid and subsequently revive it wholly or in part as the court thinks fit.
>
> Section 100 Power to vary maintenance agreements.and in the best interests of the child. (Emphasis Supplied)
>
> 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

15. These provisions are identical to the provisions of Sections 119 and 120 of the *Children Act*, 2022. It is for good reason that Courts will be reluctant to revisit consent orders. By way of analogy, when parties record a consent it were as though they agree to confine themselves to a room lock themselves from the inside and then throw away the key in the deep deep sea from where it cannot be retrieved. The Court does have a master key but will only avail it and open the room to let the parties out if the conditions as set out in the case of Flora N. Wasike (Supra) are met.

16. In this appeal, the applicant does not submit that there was fraud, collusion or that the agreement was contrary to the policy of the Court, he wants out because the respondent is being difficult and his financial muscle has atrophied, post the recording of the consent. For good measure he submits it is in the best interests of the Child to vary the order.

17. The trial court in considering the application was clear that there was no evidence presented before her that showed the respondent was not complying with the order of the Court, further on varying the maintenance orders she was of the view that it would not be in the child's interests to reduce the maintenance given the cost of living.

18. On my part, I find that the appellant has not met the threshold for varying a consent order and reiterate as did the trial court, that in the current circumstances it would not be in the best interests of the minor to vary the maintenance by reducing it or ordering remission of the sums that the respondent has defaulted in paying.

19. I believe that adding the best interests of the child as a factor for consideration in an application to vary a consent order actually raises the threshold to be met. The orders if varied will affect the child directly. The applicant had an obligation to demonstrate to the trial court that the variance of the orders in the manner proposed by him would enhance the child's interests. He did not do so.

20. The Appeal is therefore dsmissed in its entirety. Each party will bear their own costs.

SIGNED, DATED AND DELIVERED VIRTUALLY AT NAIROBI THIS 13TH DAY OF JUNE 2025.

P . M. NYAUNDI

JUDGE

In the presence of:

Eddison Githua Mundia for the Applicant

Fardosa Court Assistant