JN & another v KNK (Civil Appeal E108 of 2023)
[2025] KEHC 9900 (KLR) (10 July 2025) (Judgment)

Neutral citation: [2025] KEHC 9900 (KLR)

REPUBLIC OF KENYA

IN THE HIGH COURT AT THIKA

CIVIL APPEAL E108 OF 2023

TW OUYA, J

JULY 10, 2025

BETWEEN

JN ..... 1ST APPELLANT

MNN ..... 2ND APPELLANT

AND

KNK ..... RESPONDENT

JUDGMENT

1. The appellants, JN and MNN, filed an appeal to this court through a Memorandum of Appeal dated 20th June 2022, seeking to set aside the ruling delivered by the lower court on 25th May 2022, issuing a warrant of arrest against the 2nd appellant and giving actual custody of the minor to the respondent.

2. In their Memorandum of Appeal, the appellants raised seven (7) grounds of appeal in which they faulted the learned trial magistrate for granting an oral application which had the effect of disposing of the entire suit at an interlocutory stage without a full trial; for relying on oral evidence from the bar by the respondent's counsel to issue drastic orders; for failing to grant the appellants an opportunity to file appropriate evidence to respond to the oral application thereby denying them a fair hearing; and for granting actual custody of the minor to the respondent, contrary to the consent orders signed by the parties granting joint and shared custody of the minor to the appellants and the respondent.

3. The appellants further faulted the learned trial magistrate for granting actual custody of the minor to the respondent based on an oral application and contrary to the prayers in the plaint whereby the respondent claimed for joint and shared custody; for issuing warrants of arrest in the absence of breach of court orders or even an application for contempt of court; and for issuing orders that were not in the best interest of the minor.

4. By consent of both parties, this court on 7th November, 2024, directed that the appeal be prosecuted by way of written submissions. The appellants submissions dated 27th November, 2024, were filed on their

behalf by Kibanya & Kamau Associates Advocates while those of the respondent dated 5th December, 2024, was filed on his behalf by the firm of Njuguna J.K & Company Advocates.

5. The appellants in their submissions, contended that the learned trial magistrate erred by granting substantive orders during a mention as their learned counsel, who had attended court with a view for the mention of the case, was not prepared to handle an elaborate oral application seeking the four substantive orders.

6. The appellants submitted that they were not granted adequate notice to prepare for the oral application, and that they should have been served with a formal application, to enable them prepare for the same and participate in the proceedings.

7. They further submitted that they were not only denied an opportunity to present evidence and submissions on the issues that were raised before the court, but they were also denied an opportunity to participate in the proceedings, contrary to Section 4 of the *Fair Administrative Action Act*, which provides that every person has the right to be heard and make representation in a case.

8. It was the appellants submissions that the trial court was not fully appraised on the facts of the case, and the learned trial magistrate relied on insufficient evidence from the bar and contested counsels' submissions to make factual findings in the ruling. They submitted that the application presented contested factual position that required evidence to be tendered by the parties as opposed to the counsels.

9. The appellants submitted that there was in place a consent judgement that granted joint custody to the 2nd appellant and the respondent, which consent had never been varied or set aside, as such, the ruling delivered by the trial court was contrary to the consent judgement entered into by the parties.

10. The appellants contended that the order by the learned trial magistrate granting actual custody of the minor to the respondent set aside and varied the consent judgement entered into by the parties on 2nd August, 2021, which was an error of law, as there was no application to vary or set aside the consent judgement before the court. The appellants submitted that such an application should have been formal and supported by appropriate evidence as opposed to a mere oral application from the bar.

11. The appellant further contended that it was erroneous for the learned trial magistrate to grant actual custody of the minor to the respondent in exclusion of the 2nd appellant, as this amounts to amendment of the respondent's plaint post judgement, considering that the respondent in his plaint only prayed for joint and shared custody of the minor by both parents as well as shared parental responsibility.

12. The appellant submitted that the order for arrest issued against the 2nd appellant was too harsh and drastic, given that the warrants of arrest were issued without the 2nd appellant being given an opportunity to be heard, as such, the same should be set aside.

13. It was the appellant's submission that Article 53 (2) of *the Constitution* as well as Section 4(3) of the *Children Act*, requires all judicial and administrative institutions, including the court to treat the best interest of the child as of paramount importance in every matter concerning the child. As such, given that the minor who is currently living in Australia with the 2nd appellant and is enrolled in a good school there, it would not be in the best interest of the child to destabilize the environment where he is living. They submitted that the matter at hand is about a minor and not squabbling parents, as such, the best interest of the child should guide the court as opposed to any wrong doing by the parents.

14. On his part, the respondent submitted that the 2nd appellant contravened the terms of their consent judgement, as she took the minor out of the jurisdiction of the court without his knowledge or consent; and her disobedience of the court's directions and orders were deliberate.

15. The respondent submitted that the 2nd appellant was able to remove the minor from the jurisdiction of the court with the help of the 1st appellant and that the 2nd appellant deliberately refused to attend court when required to, in order to escape with the minor who was at the time an award of the court.

16. It was the respondent's submission that on 13th of May, 2022, the trial court had ordered that the minor should be returned back to school, however by the 23rd of May, 2022, when the matter was coming for mention, the 2nd appellant had not returned the minor to school and the whereabouts of the child was unknown to him. That this contemptuous conduct of the 2nd appellant is what prompted the learned trial magistrate to issue the orders it did in its ruling dated 23rd of May, 2022.

17. The respondent contended that the trial court in issuing its ruling devoid of a substantive application, was guided by its overriding objectives as enshrined under the provisions of Article 159 (2) (d) of *the Constitution*. The respondent further submitted that the appellants were granted an opportunity to respond to his oral application made on 13th of May, 2022, as no orders were issued on the said date, but were rather issued on the 23rd of May, 2022, when the matter mentioned.

18. The respondent submitted that the appellants acted in bad faith when they failed to notify him that they had taken the minor out of school and out of the jurisdiction of the court until after the fact. As such, this court should not set aside the orders issued by the trial court on 23rd May, 2022, as the same were issued in the best interest of the child.

19. It was the respondent's submission that the status quo has continued to prejudice him, as he does not have physical access of the minor since the 2nd appellant removed him from the jurisdiction of the court, and that if this court grants the orders sought by the 2nd appellant then any chance of having access to the minor will be frustrated as the 2nd appellant has already proven that she does not comply with the orders of the court.

20. I have carefully considered the memorandum of appeal, the parties rival written submissions as well as the record of appeal. Having done so, I find that the main issue for determination is whether the present appeal is merited.

21. In this case, the appellants had alleged that there was a consent judgment in place, giving the 2nd appellant and the respondent joint custody of the minor and as such, it was erroneous for the learned trial magistrate to grant the 2nd respondent sole custody of the minor, whereas the said consent judgement had not been set aside or varied.

22. The appellants had also alleged that it was erroneous for the learned trial magistrate to issue a warrant of arrest against the 2nd appellant without according her an opportunity to be heard, and considering also that there was no evidence that she had disobeyed court orders.

23. From the records of the trial court, the parties entered into a consent wherein both the 2nd appellant and the respondent were to have joint custody of the minor, amongst other terms. The said consent was on 2nd of August of 2021, adopted as an order of the trial court and thereafter the file was deemed as closed.

24. As per the proceedings of the trial court, on the 23rd of May, 2022, a day that had been slated by the trial court for a mention of the case, the respondent's learned counsel informed the trial court that they were not aware of the whereabouts of minor, and they then made an oral application to have a warrant of arrest issued against the 2nd appellant and applied that custody of the minor should be granted to the respondent and that the minor should not leave the jurisdiction of the court.

25. Learned counsel for the respondent further made an oral application to have the 1st appellant arrested to help trace the minor, who according to him was undergoing agony. The appellant's learned counsel in response, stated that the 2nd appellant and the minor had travelled to Australia.

26. The learned trial magistrate then made a ruling issuing a warrant of arrest against the 2nd appellant and that the custody of the minor would revert back to the respondent upon the child returning back to the court's jurisdiction.

27. The reasons that the learned trial magistrate gave for issuing the said orders was that on the 13th of May, 2022, the court had issued an order to the effect that the 2nd appellant and the minor should appear in court on the 23rd of May, 2022, which they had failed to do, as such, the learned trial magistrate issued the warrant of arrest and granted the respondent sole custody of the child on grounds that the 2nd appellant had disregarded the order of the court issued on the 13th of May, 2022.

28. On my part, I have gone through the proceedings of the trial court for 13th May, 2022, and from the said proceedings there was no order by the trial court that the 2nd appellant and the minor should appear in court on the 23rd of May, 2022. The only order that had been issued by the court on that date was for the minor to be taken to the current new school.

29. It was therefore unfair for the learned trial magistrate to issue a warrant of arrest against the 2nd accused on grounds that she had disobeyed court orders, whereas there was no order issued directing that the 2nd appellant and the minor should be brought before court.

30. That notwithstanding, assuming that the 2nd appellant had indeed disobeyed the orders of the trial court, and considering also that the respondent was seeking the committal of the 2nd appellant to jail for disobeying court orders, I am of the view that the best approach would have been for the learned trial magistrate to direct that the respondent through his learned counsel, make a formal application for contempt of court proceedings against the 2nd appellant presenting evidence of the said contempt, noting that the standard of proof for contempt of court is stricter than in civil cases, in that it is beyond the threshold in Civil cases of balance of probabilities.

31. The learned trial magistrate should have required the respondent to prove their case that indeed the 2nd appellant was in contempt of its orders, instead of relying solely on the submissions by the 2nd appellant's learned counsel that the 2nd appellant and the minor were in Australia to order that the 2nd appellant be committed to civil jail; more so because the respondent's learned counsel had disputed the claim by the appellants learned counsel that the 2nd appellant had left for Australia with the minor as there was no evidence to that effect.

32. The Court in St. Mary Taach Asis Secondary School versus Leev Contractors Limited (2023) KEHC 23576 (KLR) stated as follows regarding proof of contempt of court proceedings: "Contempt of Court is in the nature of criminal proceedings and, therefore, proof of a case against a Contemnor is higher than that of balance of probability. Due to the gravity of consequences that ordinarily flow from contempt proceedings, it is proper that the order be served and the person cited for contempt should have had personal knowledge of that order. This was aptly stated in Gatharia K. Mutikika v Baharini Farm Limited [1985] KLR 227, that: A contempt of court is an offence of a criminal character. A man may be sent to prison. It must be proved satisfactorily.... It must be higher than proof on a balance of probabilities, almost but not exactly, beyond reasonable doubt. The standard of proof beyond reasonable doubt ought to be left where it belongs, to wit criminal cases. It is not safe to extend it to offences which can be said to be quasi-criminal in nature. However, the guilt has to be proved with such strictness of proof as is consistent with the gravity of the charge... Recourse ought not to be had to

process of contempt of court in aid of a civil remedy where there is any other method of doing justice. The jurisdiction of committing for contempt being practically arbitrary and unlimited, should be most jealously and carefully watched and exercised with the greatest reluctance and the greatest anxiety on the party of the judge to see whether there is no other mode which is not open to the objection of arbitrariness and which can be brought to bear upon the subject... applying the test that the standard of proof should be consistent with the gravity of the alleged contempt... it is competent for the court where contempt is alleged to or has been committed, and or an application to commit, to take the lenient course of granting an injunction instead of making an order for committal or sequestration, whether the offender is a party to the proceedings or not."

33. Additionally, the Supreme Court in Republic versus Mohammed & another [2018] KESC 51 (KLR) stated as follows regarding the standard of proof required in contempt matters: "We are also conscious of the standard of proof in contempt matters. The standard of proof in cases of contempt of Court is well established. In the case of Mutitika v. Baharini Farm Limited [1985] KLR 229, 234 the Court of Appeal held that: In our view, the standard of proof in contempt proceedings must be higher than proof on the balance of probabilities, almost but not exactly, beyond reasonable doubt...The standard of proof beyond reasonable doubt ought to be left where it belongs, to wit, in criminal cases. It is not safe to extend it to an offence which can be said to be quasi-criminal in nature." The rationale for this standard is that if cited for contempt, and the prayer sought is for committal to jail, the liberty of the contemnor will be affected. As such, the standard of proof is higher than the standard in civil cases. This power, to commit a person to jail, must be exercised with utmost care, and exercised only as a last resort. It is of utmost importance, therefore, for the respondents to establish that the alleged contemnor's conduct was deliberate, in the sense that he or she willfully acted in a manner that flouted the Court Order."

34. Based on the above, and whereas I agree that disobedience of court orders should not be entertained, I am of the considered view that the learned trial magistrate was wrong in issuing a warrant of arrest against the 2nd appellant, based on the submissions made by the 2nd appellant's learned counsel, especially because the respondent's counsel had stated that there was no evidence that the 2nd appellant had left for Australia with the minor, and also because the onus was on the respondent to prove that indeed the 2nd appellant was deliberately disobeying court orders by adducing evidence before the said court to that effect; which the respondent failed to do.

35. I am also of the considered view that the learned trial magistrate should have given the 2nd appellant an opportunity to defend herself against the allegations of disobedience of court orders made against her, as issuing a warrant of arrest against her without according her an opportunity to defending herself was tantamount to condemning her unheard.

36. Regarding the order by the learned trial magistrate that custody of the minor should be granted solely to the respondent, there was in place a consent judgement between the parties, which was on the 2nd of August, 2021, adopted as an order of the court.

37. One of the terms of the said consent judgment was that the 2nd appellant and the respondent would have joint custody of the minor. There was no evidence that the respondent had made an application to have the said order varied or set aside, as such the consent judgement was still in place when the learned trial magistrate directed that the respondent should have custody of the minor in the event that the minor returns in the jurisdiction of the court.

38. It is trite that a consent judgement is binding on parties, and can only be set aside or varied if the respondent is able to prove that the same was procured through fraud, mistake, non-disclosure of material facts or for any other reason that would permit the court set it aside.

39. This position was restated by the Court of Appeal in Intercountries Importers and Exporters Limited v Teleposta Pension Scheme Registered Trustee & 5 Others (2019) eKLR; as follows:

> " The principles that appertain to setting aside of a consent orders are well established in a line of cases including Brooke Bond Liebig vs Mallya (1975) EA 266 where Mustafa Ag. VP stated thus; "The compromise agreement was made an order of the court and was thus a consent judgment. It is well settled that a consent judgment can be set aside only in certain circumstances, e.g on grounds of fraud or collusion, that there was no consensus between the parties, public policy or for such reasons as would enable a court to set aside or rescind a contract. In this case the parties and their advocates consented to the compromise in very clear terms; they were certainly aware of all the material facts and there could not have been any mistake or misunderstanding. None of the factors which could give rise to the setting aside of a consent agreement existed." And in the case of Flora N. Wasike vs Destimo Wamboko [1988] eKLR Hancox JA cited Setton on Judgments and orders (7th edition) vol 1 page 124, and reiterated that; "Any order made in the presence and with the consent of counsel is binding on all parties to the proceedings or action, and those claiming under them... and cannot be varied or discharged unless obtained by fraud or collusion or by an agreement contrary to the policy of the court...; or if the consent was given without sufficient material facts, or in general for a reason which would enable a court set aside an agreement." Essentially, the above cited authorities are clear that a consent Order will only be set aside if it can be demonstrated that it was procured through fraud, non-disclosure of material facts or mistake or for a reason which would enable a court set it aside."

40. Given the foregoing, I am of the considered view that the order by the learned trial magistrate that the respondent should be granted sole custody of the minor was erroneous, given that there was in place a consent order dated 2nd August 2021, granting the 2nd appellant and the respondent joint custody of the minor. The same could only be set aside or varied when the respondent made an application for setting aside the said consent judgement and only when he was also able to prove that the said consent was made through fraud, mistake, non-disclosure of material facts or if he was able to provide any other reasons that would have enabled the court set it aside.

41. Given the foregoing I am of the considered view that the order by the learned trial magistrate issuing the custody of the child solely to the respondent was erroneous as there was in place a valid consent judgement which was still in force. The respondent should have first sought to set aside the consent judgement before making an application to be granted sole custody of the minor.

42. It was therefore erroneous for the learned trial magistrate to issue custody of the minor to the respondent without the respondent having first made an application to set aside the consent judgement dated 2nd August 2021, which granted the respondent and 2nd appellant joint custody of the minor.

43. Flowing from the foregoing I am of the considered view that the instant appeal has merit and should be allowed. The impugned ruling by the learned trial magistrate and all consequential orders should be set aside. As regards costs, it is trite that costs follow the events and are issued at the discretion of the court, as such, the appellant should have costs of the appeal.

44. Finally, this court determines that this appeal succeeds with costs to the Appellant.

DATED, SIGNED AND DELIVERED ELECTRONICALLY THIS 10TH JULY 2025.

HON. T. W. OUYA

JUDGE