



REPUBLIC OF KENYA



KENYA LAW
THE NATIONAL COUNCIL FOR LAW REPORTING
Where Legal Information is Public Knowledge

FK v LK (Civil Appeal E047 of 2021) [2024] KEHC 7447 (KLR) (Family) (20 June 2024) (Ruling)

Neutral citation: [2024] KEHC 7447 (KLR)

REPUBLIC OF KENYA
IN THE HIGH COURT AT NAIROBI (MILIMANI LAW COURTS)
FAMILY
CIVIL APPEAL E047 OF 2021
HK CHEMITEI, J
JUNE 20, 2024

BETWEEN

FK APPLICANT

AND

LK RESPONDENT

RULING

1. In his chamber summons application dated January 16, 2024 the applicant prays for the following orders:-
 - (a) That this court be pleased to review, set aside, vary and or discharge its judgement *vide* mediation settlement agreement dated July 12, 2022 and issued an order to the effect that both the Applicant and the Respondent provide for the minor NKK on equal basis.
 - (b) That this court be pleased to issue an order of actual custody of the subject minor NKK.
2. The Applicant prayed that costs be provided for.
3. The application is based on the grounds thereof and the Applicant's sworn affidavit dated January 17, 2024.
4. The Respondent has opposed the same *vide* her grounds of opposition, her replying affidavit sworn on January 31, 2024 and that of her father TMM sworn on February 1, 2024.
5. When the matter came up for hearing the court directed that it be heard by way of written submissions which the parties have complied.
6. The issues as contained in the affidavits are not novel. The Applicant and the Respondent are biological parents to the subject minor. They sued each other at the Children's Court *vide* Children's Case Number 1710 of 2021, Nairobi.



7. It appears from the averments of the Applicant that the court granted him actual custody of the minor. Subsequently the parties engaged themselves in a mediation process which culminated into an agreement dated 12th July 2022.
8. In the said agreement the parties agreed to shoulder responsibilities in upbringing of the minor. It was agreed among others that the Respondent was to provide shelter for the minor and the Applicant was to pay Kshs 15,000 monthly towards her maintenance.
9. The other germane agreement was to do with the fact that the agreement was to be reviewed after five years “but if circumstances change before 5 years either of the parties can apply for review.”
10. This is what has brought the current application. The Applicant deposes that the Respondent is no longer responsible in taking care of the minor for the reason that she has resorted to her alcoholic behaviour leading to her dumping the minor at her parent’s place which as a result has caused the child to suffer malnutrition.
11. He accused the Respondent of transferring the minor from the Ivy school she has been attending which has seen her drop academically and has necessitated him to look for extra tuition for her.
12. He also accused the Respondent of being unable to meet her rent obligation which has caused her to be evicted from the house she has been living in.
13. He went on to state that he was now jobless and thus unable to meet his part of the mediation agreement as by then he was employed. He was also raising up another family.
14. He also accused her of denying unlimited access to the child despite paying the Kshs 15,000 monthly.
15. He therefore prayed for the mediation settlement to be reviewed.
16. On her part the Respondent vehemently opposed the application arguing that there was nothing to be reviewed. She denied that the Applicant had been granted full custody of the minor by the trial court.
17. She said that the child was joining PP1 this year and it was too early to argue that the child cannot grasp what was being taught. In any case she went on she had enrolled her in a good school as well.
18. Further that the Applicant works in Maralal and thus unable to have custody of the minor and that she believes the step mother, the Applicant’s wife, cannot replace her as the mother.
19. She therefore prayed that the application be disallowed and the content of the mediation settlement not to be interfered with.
20. Her father’s affidavit mentioned above has denied that the Respondent left the minor at his home after signing the mediation agreement. He however deponed that nothing stops her from going to his home with the minor at any time they deem appropriate.
21. He accused the Applicant of peddling lies that the minor was at his home yet he was aware that she studies at Nairobi Joy Academy and therefore cannot be in one place at the same time.
22. The court has perused the submissions by the parties and need not reproduce them herein. They all generally hinge around the issues raised in the rival affidavits. I have also perused the cited authorities.

Analysis and determination.

23. The main issue is whether this court can review the mediation agreement entered between the parties herein in the manner requested by the Applicant.



24. The grounds for reviewing an order or judgement are provided under Section 80 of the *Civil Procedure Act* and order 45 of the *Civil Procedure Rules*. Section 80 provides that;

“Review

Any person who considers himself aggrieved—

- (a) by a decree or order from which an appeal is allowed by this Act, but from which no appeal has been preferred; or
- (b) by a decree or order from which no appeal is allowed by this Act, may apply for a review of judgment to the court which passed the decree or made the order, and the court may make such order thereon as it thinks fit.”

25. The question therefore is whether the Applicant has brought himself within the purview of the above portion of the law. It must be noted that the consent entered pursuant to the mediation settlement was binding on all the parties.
26. There was no evidence of coercion or any undue influence on either of the parties. The only issue that the applicant is raising is on the issue of the physical custody of the minor.
27. Taking cue from the now notorious case of *Flora Wasike v Destimo Wamboko* (1988) eKLR, a consent judgement can only be interfered with if the same was obtained through fraud, collusion or contrary to public policy among others.
28. To this extent this court does not find any reason to alter the terms of the consent. I doubt whether the parties and in particular the Applicant in the current application meant that this court should change the terms. Simple reading of the terms of the consent leads to an irresistible conclusion that by and large the parties have adhered to it.
29. That leaves the question of the custody of the minor. I think the Applicant is playing hot and cold to say the least. I state so for the fact that nowhere has he claimed that the Respondent has denied him access to the minor. The allegation that he only accesses the minor after paying the Kshs 15,000 first has not been backed by any credible evidence.
30. The issue of the schooling in my view is not complicated. There is sufficient evidence that she was going on with her school well and at no time did she miss her schooling. The changing of the schools does not seem to have had such difficulty to the child contrary to the Applicant’s averments.
31. Further it is preposterous for the Applicant to take a toddler, who is 4 years old or thereabouts to undergo a remedial class so as to catch up with the rest! What is the hurry? Even if the child is to be in an Ivy school I do not think that she must be rushed in that manner at PP1 to be such a genius.
32. There is no professional report indicating that she was suffering some inability to learn because of being transferred to another school. In any case it has not been indicated that the school she is enrolled currently is of low academic performance.
33. Be it as it may this is an issue which both parents are allowed continuously to engage for the benefit of their child.
34. On the issue of payment of Kshs 15,000 as indicated in the consent, I do not think that the Applicant is saying that he cannot meet. He signed it voluntarily and now that he has some job he should continue meeting his obligations despite having a second family.



- 35. The Applicant has not discounted the fact that he wants the minor to stay with the step mother. This would have been a consideration if he could prove that the Respondent was such an irresponsible mother to warrant this courts intervention. There is no evidence of such including the allegation of her drinking habits.
- 36. I think the court has stated much to show that there is nothing to review for now as far as the settlement agreement herein is concerned. There is no new facts discovered by the Applicant, no error on the face of record or any other sufficient reason to warrant this courts intervention.
- 37. The application is otherwise dismissed with no order as to costs.

DATED SIGNED AND DELIVERED AT NAIROBI VIA VIDEO LINK THIS 20TH DAY OF JUNE 2024.

H K CHEMITEI

.....

JUDGE

I certify that this is a true copy of the original

Signed

DEPUTY REGISTRAR

