



**VNM v DKR (Civil Appeal 106 of 2019)
[2024] KEHC 7999 (KLR) (Family) (14 June 2024) (Ruling)**

Neutral citation: [2024] KEHC 7999 (KLR)

**REPUBLIC OF KENYA
IN THE HIGH COURT AT NAIROBI (MILIMANI LAW COURTS)
FAMILY
CIVIL APPEAL 106 OF 2019
PM NYAUNDI, J
JUNE 14, 2024**

BETWEEN

VNM APPLICANT

AND

DKR RESPONDENT

RULING

1. The Appellant and Respondent are the biological mother and father of the minor herein. *Vide* Nairobi CM Children’s Case No. 1516 of 2017, the Respondent instituted a case by Plaint dated 18th December 2017. The Appellant opposed the case via statement of defence and counterclaim dated 4th January 2018. The matter proceeded to hearing and at the conclusion of the trial the Trial Court entered judgment on the following terms-
 1. That during school days, the Plaintiff/father shall have physical custody from Monday after school to Friday. The Defendant/ mother shall have physical custody of the minor from Friday after school upto Monday morning. The defendant/ mother shall drop the minor in school on the said Monday morning.
 2. Parties to share physical custody of the minor equally during school holidays. Each party to have custody of the minor for half of the school holiday.
 3. Both parties shall have joint legal custody of the minor.
 4. Both parties to contribute equally towards, the maintenance needs of the minor.
 5. No order as to costs.



2. Being dissatisfied with the Judgment the Appellant lodged the Appeal herein *vide* Memorandum of Appeal dated 20th September 2019. The Appeal was compromised by consent dated 5th February 2020 signed by the two parties and their respective counsel on record, subsequently the consent was adopted as an order of the Court on 6th February 2020 by Hon. Lady Justice A. Ongeru.
3. On 21st September 2023, the Respondent was in the house of the Appellant with the minor, supervising homework. At some point he struck the minor, the Appellant and the househelp both moved to restrain the Respondent as in their view the force was excessive and put the minor at risk. According to the Appellant, this was not an isolated incident as she felt that overall the Respondent tends to be harsh and exacting towards the minor. This however, according to the Appellant was the straw that broke the camel's back and she resolved to bar the Respondent from coming to the house and thereby limited his access to the minor. It is this action that prompted the Respondent to file Notice of Motion Application dated 28th September 2023 in which he sought the following orders-
 1. Spent.
 2. Spent.
 3. That the Respondent, VNM be cited for being in contempt of the court orders and be imprisoned for 6 months.
 4. That the Honourable Judge be pleased to set aside the consent Judgment dated 5th February 2023 (sic) and adopt the lower court's judgment that had been issued on 3rd September 2023. (sic)
 5. That in the alternative, the Applicant to have the minor on all school days; then on the weekends parties can share access where the Applicant has the minor on Sundays while the Respondent has the minor on Saturday.
 6. That the Respondent be ordered to caution the house help from interfering with the family affairs and in the alternative parties to agree on a different house girl.
 7. The costs of this application be provided for.
4. The Application was premised upon Section 5 of the [Judicature Act](#), Cap 8 of Laws of Kenya, sections 3, 3A, 63 of the [Civil Procedure Act](#), Cap 21, Laws of Kenya, Article 159 (2) (d) of the [Constitution](#) of Kenya and all other enabling provisions of the law and was supported by the Affidavit of even date sworn by the Respondent.
5. The Appellant opposed the application through the Replying Affidavit dated 16th October 2023.
6. The Appellant in turn filed Notice of Motion dated 29th September 2023 seeking the following reliefs-
 1. Spent
 2. Spent
 3. Spent
 4. Spent
 5. Spent
 6. Spent
 7. Spent



8. That the Honourable Court be pleased to review and/ or set aside the consent order entered on 6th February 2020.
 9. That the Appeal be reopened for hearing and determination on the merits
 10. That the costs of this application be provided for
7. The Application was premised upon Sections 1A, 1B,3A of the *Civil Procedure Act*, Order 45, Order 9 Rules 9 and 10, Order 51 Rule 1 of the *Civil Procedure Rules*, and all other enabling provisions of the law and was supported by the affidavit of even date sworn by the Appellant.
 8. The application was opposed by a Replying affidavit dated 9th October 2023 sworn the Respondent and a further replying affidavit sworn on 6th November 2023.
 9. The Appellant sought to amend her summons vide amended notice of motion 5th March 2024, the amended Notice of Motion was struck out on 14th March 2024 for the reason that it would delay the determination of the matter.
 10. On 11th October 2023, the Court had directed inter alia, “That, the Westlands Children’s officers to interview the minor and file a report on his welfare within 14 days. The Appellant to facilitate this”. As at the time of writing this ruling the report had not been availed.
 11. Both parties complied with the Court’s directions that the matter be canvassed by written submissions and filed their respective written submissions.

Analysis And Determination.

12. The questions that arise for determination are;
 - i. Whether the Respondent is in contempt of court orders.
 - ii. Whether the consent dated 5/2/2020 and recorded in court on 6/2/2020 should be set aside and revert to judgment of 17th October 2019 or reopen the appeal?
 - iii. Who should pay costs

Whether The Applicant Is In Contempt of Court Orders.

13. Contempt proceedings in Kenya are governed by Section 5 (h) of the *Judicature Act* which gives to the High Court and the Court of Appeal powers to punish for contempt of court.
14. In the case of *Christine Wangari Gachege v Elizabeth Wanjiru Evans & 11 Others* [2014] eKLR, the Court of Appeal sitting in Nakuru in Obiter dictum stated as follows:-

“The emphasis imposes a duty on the High Court, the Court of Appeal and law practitioners to ascertain the applicable law of contempt in the High Court of Justice in England, at the time an application is brought”.
15. It is trite law that orders made by a properly constituted court of law must be obeyed. In the case of *Hadkinson v Hadkinson* [1952] ALL ER it was held: -

“It is the plain and unqualified obligation of every person against, or in respect of whom, an order is made by a court of competent jurisdiction, to obey it unless and until that order is discharged. The uncompromising nature of this obligation is shown by the fact that it



extends even to cases where the person affected by an order believes it to be irregular or even void.”

16. In the case of *Econet Wireless Kenya Ltd v Minister for Information of Kenya & Another* [2005] eKLR, the Court relying on the decision of the Court of Appeal in *Gillab Chand Papatlal Shah & Another* Civil Application no. 39 of 1990 stated that:-

“It is essential for the maintenance of the Rule of Law and order that the authority and dignity of our courts are upheld at all time. The Court will not condone deliberately disobedience of its orders and will not shy away from its responsibilities to deal firmly with proved contemnors.”

17. In *Teachers Service Commission v Kenya Union of Teachers & 2 Others* [2013]eKLR the court stated as follows: -

“The reason why courts will punish for contempt of court then is to safeguard the rule of law which is fundamental in the administration of justice. It has nothing to do with the integrity of the judiciary or the court or even the personal ego of the presiding judge. Neither is it about placating the applicant who moves the court by taking out contempt proceedings. It is about preserving and safeguarding the rule of law. A party who walks through the justice door with a court order in his hands must be assured that the order will be obeyed by those to whom it is directed”.

“A court order is not a mere suggestion or an opinion or a point of view. It is a directive that is issued after much thought and with circumspection. It must therefore be complied with and it is in the interest of every person that this remains the case. To see it any other way is to open the door to chaos and anarchy and this Court will not be the one to open that door. If one is dissatisfied with an order of the court, the avenues for challenging it are also set out in the law. Defiance is not an option.”

18. In order to succeed on an application for contempt of Court the Applicant must satisfy the court of the following:-

- a) That the terms of the order (or injunction or undertaking) are clear and unambiguous and are binding on the Defendant.
- b) That the Defendant has knowledge of or proper notice of the terms of the order.
- c) The Defendant has acted in breach of the order.
- d) The Defendant’s conduct is deliberate.

19. The Appellant argues that she is not in contempt of the court orders. Her action of blocking the Respondent’s access to the minor was prompted by his actions of 21st September 2023 when she felt that the minor was at risk. She then moved to court via Application dated 29th September 2023.

20. The standard of proof required in cases of contempt is higher than that required in an ordinary civil case. Before a finding of contempt can be made, there must a demonstration of willful and deliberate disobedience of a court order.



21. In *Gatharia K. Mutikika v Babarini Farm Ltd* [1985] KLR 227 it was held 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 heard to process 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 part 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 on 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.” (own emphasis)

22. In *Oilfield Movers Ltd v Zabara Oil & Gas Limited* [2020]eKLR the court stated -

“It is important however that the court satisfies itself beyond any shadow of a doubt that the person alleged to be in contempt committed the act complained of with full knowledge or motive of the existence of the order of the court forbidding it. The threshold is quite high as it involves possible deprivation of a person’s liberty.....”

23. The Respondent was required to prove beyond reasonable doubt that the Applicant is in wilful and deliberate breach of the court orders of 6th February 2020. The matter herein concerns a child. The Court is mindful of the provisions of the *Constitution* of Kenya, 2010 and of the *Children Act* which require the Court to give paramount importance to 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.

24. The *Children Act* on the other hand provides at Section 4(3) that:

“In all actions concerning children, whether undertaken by public or private social welfare institutions, courts of law, administrative authorities or legislative bodies, the best interests of the child shall be a primary consideration.”

25. Bearing in mind that this is a minor who needs to be protected by the court, this court is prepared to accord the Appellant the benefit of doubt that she was acting in the best interests of the child when she barred access to the minor especially as she then moved to court seeking orders to vary the orders that granted access to the Respondent. The prayer to hold the Appellant in contempt of the orders of the Court is therefore declined.



Whether The Order Of The Court On 6Th February 2020 Should Be Set Aside.

26. It is trite law that a Court of law will not interfere with a consent judgment except in circumstances that would form sufficient ground for rescinding or varying the contract between the parties.
27. In *Flora .M. Wasike V 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.”
28. Both parties allege that there has been non compliance on part of the other and for that reason the orders of 6th February 2020 should be varied. It is the Appellant’s case that the Respondent is inclined to losing his temper and subjecting the minor to harsh treatment, including physical violence. One such incident was in the 21st September 2023. If she was aware of this tendency she would not have recorded the consent of 5th February 2020.
29. On his part the Respondent contends that the Appellant having denied him access has violated the terms of the consent and he would therefore wish to revert to the terms of the judgment of the trial court.
30. As stated earlier, although the Court called for a children’s officers report, the same was not availed, the Court therefore does not have an objective opinion on the events of 21st September 2023 and the impact on the minor, which is the genesis of the Applications before Court.
31. In addition to the laid down prerequisites on the circumstances under which a court will disturb a consent order, the guiding principle in determining whether or not to vacate the order of 6th September 2020 is whether it is in 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*.
32. I observe that after the order of 6th October 2020, neither party moved the Court until the crisis of 21st September 2023. That is almost 3 years. I can safely assume that both parties were complying and the arrangement as fashioned by them was working. The evidence placed before me is not sufficient to dislodge the finding of the trial court, which had the benefit of observing the parties and receiving 2 children officers’ reports, that both parties were suitable parents and it was in the best interests of the minor that he have access to both parents.
33. Subsequent to that judgment, the parties, who were both represented by counsel agreed to compromise the appeal by recording the consent. They are now keen on having the Court vacate the order. As observed all seemed well until 21st September 2023. At least no grave infraction was committed that would have necessitated either party to move the Court. I do not find that it has been demonstrated sufficiently that the Respondent poses a risk to the minor sufficient for the court to take draconian measures that have been proposed. I am prepared to find that the Respondent may be an overallly harsh parent but this will not warrant a restriction of his parental rights. It may cost him the quality of relationship with his son in the days to come but clearly does not warrant the setting aside of a consent judgment.
34. Notwithstanding the collapse of the relationship between the two they have been able to co parent with the Respondent coming to the house of the Appellant almost daily on school days to work with



the minor on his school work. Sufficient basis has not been laid to vacate the Consent, accordingly both applications are dismissed.

35. Given the nature of the relationship between the parties, Each will bear their own costs.

SIGNED, DATED and DELIVERED VIRTUALLY at NAIROBI this 14th day of June 2024.

P M NYAUNDI

JUDGE

In the presence of:

Fardosa Court Assistant

Kimani Mungai Advocates for the Applicant

Advocates for the Respondent

