



REPUBLIC OF KENYA



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**In re JMM (Minor) (Civil Appeal E022 of 2024)
[2024] KEHC 12846 (KLR) (23 October 2024) (Judgment)**

Neutral citation: [2024] KEHC 12846 (KLR)

**REPUBLIC OF KENYA
IN THE HIGH COURT AT EMBU
CIVIL APPEAL E022 OF 2024
LM NJUGUNA, J
OCTOBER 23, 2024
IN THE MATTER OF JMML, A MINOR**

BETWEEN

CKM APPELLANT

AND

JOL RESPONDENT

*(Appeal arising from the decision of Hon. J.N. Githaiga, SRM in Embu
CM Children case No. 49 of 2020 delivered on 13th January 2024)*

JUDGMENT

1. The appellant has filed a memorandum of appeal dated 07th March 2024 seeking the following orders:
 - a. That the appeal be allowed with costs;
 - b. That the ruling of the trial court and the mediation settlement agreement dated 26th October 2020 be set aside;
 - c. That the matter be reinstated and be determined on merit by a different magistrate.
2. The appeal is premised on the grounds that the learned trial magistrate erred in law and fact:
 - a. By dismissing the appellant's application dated 01st December 2023 when it is evident that the respondent failed to obey the terms of the mediation settlement agreement dated 26th October 2020;
 - b. In holding that the court was functus officio in respect to custody, maintenance and provision for the minor;



- c. In holding that the appellant had not met the threshold for setting aside the subject mediation settlement agreement;
 - d. In holding that there was nothing unconscionable, unfair and or oppressive in the subject mediation settlement agreement;
 - e. In putting the interests of the respondent before those of the minor contrary to Article 53 of *the Constitution*;
 - f. In failing to consider the minor's right to parental love and care by the appellant;
 - g. In failing to consider whether the subject mediation settlement agreement was in conformity to equal sharing of parental responsibility between both parties; and
 - h. In upholding that the minor remains in the physical custody of her paternal grandparents.
3. The applicant had applied for full custody of the minor and the matter was settled through mediation in Siakago Med.12 of 2020. The mediation settlement agreement states that the parties would leave the minor in the physical custody of the respondent's parents, her maternal grandparents in Kisii. The applicant sought setting aside of that mediation settlement agreement, stating that the child is not well cared for and her custodians have limited the amount of time she can see the child. That she has had to cater for some of the child's needs although through the mediation settlement agreement, the respondent had committed to cater for all of the child's needs.
 4. She deposed that she travels from Kisii to Embu to visit the child during school holidays but the child's grandfather does not allow her to see the child sometimes, thus she incurs many expenses on accommodation and travelling. That the respondent has abdicated his role as a parent and he does not visit the child even though the child lives with his parents. That sometimes the child misses school due to school fees arrears and she is ready to share the burden of caring for the child with the respondent. That she is a secondary school teacher in Embu while the respondent lives in Ruiru, thus if she is granted custody, access to the child will be easier and in the best interest of the child.
 5. Through his replying affidavit, the respondent stated that the court has since become functus officio, having adopted the mediation settlement agreement. That the applicant has not demonstrated grounds to set aside the mediation settlement agreement neither are there any changes in circumstances that would warrant variation of the agreed terms. He denied that the child misses school due to school fees arrears and he produced a letter from the child's school stating that her school fees is always up to date.
 6. He stated that the applicant abandoned the child since she was 4 years old and she has been living with the respondent's parents who take good care of her. That he ensures to visit the minor as often as possible and that the child's school performance is good because she lives in a good environment at home. That the applicant is a bad influence to the minor since she has been feeding her with false distressing information which may affect the child if she is removed from her grandparent's care. He urged the court to dismiss the application since the best interests of the child have already been catered for.
 7. The trial court found that the applicant had not satisfied the conditions necessary for setting aside the mediation agreement which was treated as a consent order by the court. The application was dismissed and the trial court rendered itself functus officio.
 8. The appeal was canvassed by way of written submissions.



9. In her submissions, the applicant relied on the case of PNK & another v AWW [2024] KEHC 8928 (KLR) where the court appreciated that issues of parental responsibility and maintenance of the child are constantly evolving, thus necessary orders may be made as they become relevant. That the issues of maintenance and provision for the minor are not static and the court cannot be functus officio in that regard. She relied on the case of EKK & NNK (Minors Suing through their Mother ANK – Next Friend) v HKK [2020] KEHC 5236 (KLR) and section 120 of the *Children Act*, 2022 and urged that the court has jurisdiction to vary any agreement reached on maintenance of the child so long as the variation is in the best interest of a child according to Article 53 of *the Constitution*.
10. It was her submission that it is the respondent’s parents and not the respondent who take care of the child but it is prudent that custody be given to an actual parent of the child. That some clauses in the mediation settlement agreement are not relevant to the interests of the child and that the court should set the agreement aside by considering the factors necessary for setting aside a consent order. She relied on sections 101(3) and 102 of the *Children Act* and the case of Githunguri v Githunguri (1981) KLR 598 and urged the court to allow the appeal.
11. The respondent submitted that the application is bad in law and he relied on Rule 39 of the Civil Procedure (Court Annexed Mediation) Rules, 2022 and the cases of *Dock Workers Union v. Kenya Ports Authority (2023) eKLR and Malika v Registrar of Lands (Judicial Review E178 of 2023)* [2024] KEHC 374 (KLR) (Judicial Review). He placed reliance on section 120 of the *Children Act* and the cases of EKK & NNK (Minors Suing through their Mother ANK – Next Friend) v HKK [2020] KEHC 5236 (KLR) and SNI v AOF [2020] KEHC 1244 (KLR) and urged that the applicant should prove that circumstances have changed thus variation of the agreement is necessary.
12. He submitted that the minor began living with his parents long before the mediation agreement was reached, and the applicant was aware of this at the mediation. That the living conditions of the child should be ascertained through a children officer’s enquiry report. That if the court varies the mediation agreement, the child will be destabilized yet she is performing very well in school. That the applicant has never been denied access to the minor, who is well provided for and does not miss school for whatever reason. He argued that the circumstances have not changed to warrant variation of the agreement, thus the appeal herein should be dismissed.
13. The issue for determination is whether the appeal has merit.
14. In the case of Williamson Diamonds Ltd and another v Brown [1970] EA 1, the court held that:

“The appellate court when hearing an appeal by way of a retrial, is not bound necessarily to accept the findings of fact by the trial court below, but must reconsider the evidence and make its own evaluation and draw its own conclusion.”
15. Through the application dated 01st December 2023, the applicant sought to set aside or vary the mediation settlement agreement signed on 26th October 2020. This agreement provided that the minor would remain in the physical custody of the respondent’s parents but the applicant was entitled to visit her with prior notice to the named guardians or the respondent. The parties also agreed that the respondent would provide for the child and will never ask for financial support from the applicant.
16. Through the application, the applicant drew the court’s attention to the minor’s instability, in that, her school fees was falling in arrears and she produced a letter dated 26th June 2023 from the school indicating as much. The respondent denied that the child fees was unpaid and he also produced an undated letter from the school indicating that the child is always punctual and present in school on the learning days. The applicant also deposed that when the child needed a scout uniform, she is the



one who provided it and she produced photographs to show for it, and the respondent did not rebut this position.

17. It is the applicant's contention that despite the agreement at mediation, her visits to the child are usually time-constrained and the respondent and his parents make it difficult for her to visit the child. She produced mobile phone message conversations between herself and the respondent and his mother as proof of the restrictions to her intended visits to the child. She noted that she travels from Embu to Kisii to visit the child yet she has stable employment as a secondary school teacher in Embu while the respondent works in Ruiru. She urged that if the court varied the agreement to give her custody of the child, it will be beneficial because the child will interact with her siblings and the respondent will have to travel a shorter distance to visit the child. She stated that she is willing to share the financial burden of maintaining the child.
18. Since the mediation settlement agreement was reached on 26th October 2020, the applicable mediation rules were the Mediation (Pilot Project) Rules, 2015 which the trial court referred to in its ruling. The said rules are silent on the issue of setting aside of a mediation settlement agreement but rule 14 thereof provided that the settlement agreement be adopted as an order of the court within 10 days of conclusion of the mediation. In this case, the settlement agreement was adopted on 26th March 2021, 5 months later and it became the judgment of the court. This goes to say that the respondent's argument that the Civil Procedure (Court Annexed Mediation) Rules 2022 apply herein, is flawed.
19. Going forward, the mediation settlement agreement, having been adopted as an order of the court, takes the form of a consent order. Therefore, its variation or setting aside will be determined by factors that would determine setting aside of a consent order. In the case of *Hirani v. Kassam* (1952) 19 EACA 131 at page 134, the Court of Appeal held;

“It is now well 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...”

Similarly, in the case of *Purcell v. F.C. Trigell Ltd* [1970] 3 All ER 671, the court stated:

“It seems to me that, if a consent order is to be set aside, it can really only be set aside on grounds which would justify the setting aside of a contract entered into with the knowledge of the material matters by legally competent persons.....”

20. This being a case involving a child, the best interest of that child is paramount as provided under Article 53(2) of *the Constitution*. The consent judgment can only be set aside or varied where there is a change in circumstances since the agreement and such variation is strictly to still fulfill the best interest of the child. In opposing the application, the respondent stated that the court had become *functus officio* after adopting the mediation settlement agreement. I differ with this argument since the mediation settlement agreement was on the custody and maintenance of a child, factors that could possibly change over time. I associate myself with the sentiments of the court in the case of *EKK & NNNK (Minors Suing through their Mother ANK - Next Friend) v HKK* [2020] KEHC 5236 (KLR), where it held thus:

“It is trite that parental responsibility is shared equally between the parents. Article 53(1)(e) of *the Constitution* provides that every child has the right to parental care and protection, which includes co-responsibility of the mother and father to provide for the child, whether they are married to each other or not. This is further buttressed under Section 6(1) and 24 of the Act. So, both parents have parental responsibilities and in matters in respect of



maintenance and provision of the children, the court does not become functus officio. When the need arises the trial magistrate will have discretion to vary the order depending on the circumstances of the case.”

21. From the application and the rebuttal thereof, I gather that in as much as the child is in the physical custody of the respondent’s parents, the applicant seems to be disadvantaged and can only access the child under strenuous circumstances. Reminded that both parents have equal rights and responsibilities to the child, it is my view that the agreement on custody and maintenance should be reconsidered. Considering the nature of the case, this is to be done purely on the basis of the changed circumstances of the child and not on factors that would invalidate the consent agreement.
22. I reiterate that the best interest of the child is paramount in this case and not the comfort of either of the parties. This court also considers the applicant’s sentiments that she is willing to share the responsibility of financially caring for the child with the respondent, the distance both parties have to travel to visit the child and the fact that the child has other siblings who live with the applicant.
23. The mediation settlement agreement records that the applicant withdraws the Children Case No. 6 of 2020. Once adopted as an order of the court, it became the court’s order thus.
24. Therefore, I find that the appeal herein is meritorious and it is hereby allowed with orders as follows:
 - a. The mediation settlement agreement reached on 26th October 2020 and adopted as judgment of the court on 26th March 2021 is hereby set aside in its entirety;
 - b. The ruling of the court delivered on 13th February 2024 is hereby set aside in its entirety;
 - c. The suit in Embu MC Children Case No.6 of 2020 is hereby reinstated and the same is to be placed before a different magistrate for adjudication taking into account the changed circumstances since the mediation agreement was entered into and adopted as the order of the Court.
 - d. The minor to remain in the custody of her grandparents pending further orders from the trial Court.
 - e. The parties are granted leave to apply for any orders as any of them may deem fit.
 - f. There shall be no orders as to cost.
25. It is so ordered.

DELIVERED, DATED AND SIGNED AT EMBU THIS 23RD DAY OF OCTOBER, 2024.

L. NJUGUNA

JUDGE

..... for the Appellant

..... for the Respondent

