



**In re DBG (Minor) (Civil Appeal E006 of 2024)
[2024] KEHC 12147 (KLR) (Family) (9 October 2024) (Judgment)**

Neutral citation: [2024] KEHC 12147 (KLR)

**REPUBLIC OF KENYA
IN THE HIGH COURT AT NAIROBI (MILIMANI LAW COURTS)**

FAMILY

CIVIL APPEAL E006 OF 2024

MA OTIENO, J

OCTOBER 9, 2024

IN THE MATTER OF DBG (MINOR)

BETWEEN

LI APPELLANT

AND

SW RESPONDENT

JUDGMENT

Introduction

1. This appeal was filed pursuant to the Judgment of July 5, 2019 in the Milimani Children’s case Cause No.643 of 2019 where the trial court ordered the Appellant to provide a monthly sum of Kshs. 14,909/- towards the minor’s monthly upkeep and maintenance.
2. The background of the matter is that by a plaint dated 8th May 2019, the Respondent herein (then a Plaintiff, suing as a mother and next friend of DBG, a minor) instituted a claim against the Appellant (then a Defendant) seeking to have the Appellant provide for educational and medical expenses for the child and a further monthly sum of Kshs. 14,909/- for the minor’s upkeep.
3. The Appellant entered appearance on June 10, 2019 and filed a statement defence and Counterclaim on the same date generally denying the Respondent’s allegations. In particular, the Appellant denied that he had neglected his parental responsibility towards the minor. In his counterclaim, he pleaded for custody of the minor.
4. On July 2, 2019, parties agreed and entered into a consent, partially settling the claim in the following terms; -
 - a. The Plaintiff (now Respondent) to provide shelter and clothing for the minor



- b. The Defendant (now Appellant) to provide school fees and related expenses as well as medical expenses.
 - c. Legal custody of the minor to jointly vest on the Plaintiff and the Defendant
 - d. Plaintiff to have actual custody
 - e. The Defendant granted access on terms to be mutually agreed by the parties.
 - f. The issue of maintenance to be determined by the court.
5. On July 5, 2019, the trial court delivered its judgment on the issue of maintenance and ordered the Appellant to pay a monthly sum of Kshs. 14,909/= towards the maintenance of the minor. No orders as to costs was made by the court.

The Appeal

6. Aggrieved by the trial court's Judgment of 5th July 2019, the Appellant lodged this appeal against the same, raising the seven grounds of appeal in his memorandum of appeal dated 24th January 2024 as follows; -
- i. That the learned trial magistrate erred in law and in fact by failing to consider the well-set principle governing parental responsibility, that it is jointly shared between the parents on a 50:50 basis.
 - ii. That the learned trial magistrate erred in law and in fact by considering the gross pay of the Appellant instead of the net pay, thus ordering the Appellant to provide for the minor beyond his financial capacity.
 - iii. That the learned trial magistrate erred in law and in fact by failing to take into account that the Appellant had already recorded a consent where he undertook to cater for the minor's education, medication and other related expenses that shoulder a heavier weight.
 - iv. That the learned trial magistrate erred in law and in fact thus misdirecting himself in holding that the Appellant pays a high percentage of his net pay towards maintenance of the minor yet he has another family and dependents to take care of against the principles governing granting of maintenance.
 - v. That the trial magistrate erred in law and in fact by granting sole actual custody of the minor to the Respondent and being silent on the aspect of legal custody yet parental responsibility is an obligation jointly and/or equally shared by both parents.
 - vi. That the learned trial magistrate erred in law and in fact in failing to appreciate the evidence adduced and to evaluate the evidence judiciously before arriving at his finding.
 - vii. That the trial magistrate's judgment was harsh, punitive and biased against the Appellant, the interest of the minor and the weight of evidence thus violating the laid principles of law.

Appellant's submissions.

7. The Appellant submitted that the trial court erred both in law and in fact in its judgment by assigning him a higher financial responsibility towards the minor as compared to the Respondent. According to the Appellant, this negates the constitutional principle that parental responsibility is to be equally and jointly shared.



8. The Appellant further submitted that while as at the date of the judgment the Respondent was unemployed, the situation must have changed by now since the Respondent must have already graduated from school and currently gainfully employed. The Appellant consequently argued that the amount awarded on maintenance ought to be shared equally in line with the statutory provision of joint parental responsibility. The Appellant cited the case of C.I.N v J.N.N [2014] eKLR in support of this argument.
9. On quantum, the Appellant argued that the amount of Kshs. 14,909 awarded by the trial court towards maintenance of the minor was high and excessive in the sense that the court failed to take into account his net income and general financial circumstances including the fact that he has another family consisting of a wife and three children to take care of. That instead of basing the financial provision on the Appellant's net income of 64,000/-, the trial court considered the gross salary of 198,000, thereby leading to an award which was erroneous.
10. The Appellant submitted that he lost his job in the year 2020 and that he is now a casual labourer with no permanent employment to maintain the minor and his family as well. Consequently, he submitted that currently he can only afford a monthly sum of Kshs. 5,000/- towards the minor's maintenance, in addition to paying medical expenses and, school fees and related expenses for the minor. Relying in the case of S.A.K v Z.D.N.P (2019) eKLR he urged this court to revise downwards the amount awarded by the trial.
11. Regarding custody of the minor, the Appellant submitted that the trial magistrate erred in law and in fact by granting sole actual custody of the minor to the Respondent while remaining silent on the aspect of legal custody despite the fact that parties had recorded a consent granting both the Appellant and Respondent legal custody with the Appellant having access rights as well.
12. It was therefore the Appellant's position that by failing to expressly award legal custody to both parties with the Appellant having right of access as per the consent of 2nd July 2019, the trial court acted against the best interest of the child and against the expressed wishes of the parties.
13. Citing the case of M.A.A vs A.B.S [2018] eKLR the Appellant submitted that the trial court erred in its failing to grant the Appellant legal custody and access to the minor since neither parent was declared unsuitable or unfit to have both actual and legal custody of the child. That further, the trial court did not give any reasons as to why it granted sole actual custody to Respondent without granting the Appellant legal custody and access to the child.
14. The Appellant therefore urged this court to set aside the trial court's judgment and order of 5th July 2019 by revising downwards the amount on maintenance and also grant him the legal custody of the child, visitation during holidays and weekends.

Respondent's submissions.

15. On her part, the Respondent supported the lower court's Judgment of 5th July 2019 and urged this court to uphold the same. The Respondent submitted that in her view, the trial court duly considered the respective parties' income earning capacity before making the order for financial provision for the maintenance of minor.
16. Citing the case of Z.M.O v E.I.M [2013] eKLR, the Respondent urged this court not to interfere with the trial court's finding on quantum.



17. On custody, the Respondent submitted that the Appellant has never had any interest in seeing the minor. According to the Respondent, the court was right in its judgment on the issue of custody since the Appellant did not dispute or oppose the Respondent's prayers to have actual custody of the minor.
18. It was further the Respondent's submissions that the Appellant's having abdicated his parental responsibility and obligation towards the minor, he does not deserve to be granted custody of the minor, both legal and actual.
19. The Respondent therefore urged this court to find no merit in the appeal and dismiss the same since the same does not serve the best interest of the child.

Analysis and determination

20. This being a first appeal, I am enjoined to reconsider evidence tendered before the trial court, reevaluate the same and draw my own conclusions. In doing so, I must bear in mind that I did not have the advantage of seeing and hearing the witnesses testify. This is the principle as laid down in the case of *Selle & Another vs. Associated Motor Boat Co. Ltd & Others* [1968] EA where the court stated that:

"...this court is not bound necessarily to accept the findings of fact by the court below. An appeal to this court ... is by way of retrial and the principles upon which this court acts in such an appeal are well settled. Briefly put they are that this court must reconsider the evidence, evaluate it itself and draw its own conclusions though it should always bear in mind that it has neither seen nor heard the witnesses and should make due allowance in this respect..."

21. I have considered this appeal and the submissions made by the parties in support of their respective positions. As indicated above, this appeal relates to a child and the primary consideration is to be given to the best interest of the child as instructed under Article 53 (2) of *the Constitution*.
22. It is not in dispute that the Appellant is the biological father of the minor in question. The dispute in these proceedings is the trial court's judgment of 5th July 2019 in which it directed the Appellant to remit to the Respondent a monthly sum of Kshs. 14,909 on or before 5th of every month towards the minor's upkeep and maintenance.
23. Having carefully reviewed the lower court's Judgment of 5th July 2019 against the pleadings and evidence in the lower court, I agree with the Appellant that the trial court did not, in its judgment, recognize that the parties had on 2nd July 2019 recorded a consent on the issue of custody. Apart from simply making reference to the consent in its judgment, the court did not incorporate the terms of the consent on its final orders.
24. From the proceedings and evidence on record, it is apparent that parties recorded a consent on 2nd July 2019 partially settling the dispute in the following terms; -

"By Consent of both parties,

- a. Plaintiff to provide for the minor as follows:
 - i. Shelter; and
 - ii. Clothing
- b. The Defendant to provide as follows:



- i. School fees and related expenses
 - ii. Medical
 - c. Legal custody of the minor to jointly vest in the Plaintiff and the Defendant
 - d. Plaintiff to have actual custody of the minor.
 - e. Defendant granted access on terms to be mutually agreed by the parties.
 - f. The issue of maintenance to be determined by the court.
25. From the above, it is therefore clear that all the issues in dispute except that of maintenance had been resolve by way of consent between the parties. However, despite having executed the consent, I note that the Respondent in her submissions in this appeal appears to be going back on the agreement by stating that the Appellant does not deserve to have custody of the minor. This position has also been confirmed by the Appellant who submitted that the Respondent has denied him custody and access of the minor.
26. It is settled law that consent between parties constitutes an agreement and remains valid and binding until set aside by fresh proceedings brought for that purpose. A consent order may only be set aside on grounds which would justify setting aside of a contract. See the case of SNI v AOF [2020] eKLR where Nyakundi J. adopted with approval the reasoning in the case of Windsor Commercial Land Company Ltd & others v Century National Merchant Bank Trust Ltd SCCA 114/2005 where the court stated that; -
- “The Court will not interfere or disturb a consent order between the parties other than on those grounds in which it would interfere with any other contract. These would include mistake, misrepresentation, duress and undue influence.”
27. Further in the case of Flora N. Wasike v Destinno Wamboko {1988} eKLR the Court held that: -
- “It is now settled Law that a consent Judgment or order has a 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. (See the decision in J. M. Mwakio v Kenya Commercial Bank Ltd CA No. 28 of 1982).”
28. For the above reasons and taking into account that there is no evidence on record of an application being brought by either party for the setting aside the consent of 2nd July 2019 between the parties, I will maintain and adopt the terms of the consent in this judgment.
29. Accordingly, and in line with the terms of the consent dated 2nd July 2019 between the parties herein, I direct that both parents shall have legal custody over the minor with the Respondent (mother) having physical actual custody.
30. The Appellant (father) shall have reasonable right of access to the minor every alternate weekend and half of the school holidays. The picking and dropping points will be on a neutral place to be decided by the Parties and the Appellant’s Advocate.
31. As rightly submitted by the Appellant, it is in the interest of the minor’s welfare, both in the short term and long-term, that he builds a bond and relationship with his father. The Respondent is therefore directed to ensure that the Appellant is at the times and in the manner specified, facilitated to have custody of the minor and that the access must be meaningful.



32. On maintenance, the Appellant argued that the amount of Kshs. 14,909/- awarded by the trial court towards maintenance of the minor was high and excessive in the sense that in assessing the amount payable, the trial court based its decision on the Appellant's gross salary of Kshs. 198,000/- as opposed to his net income of Kshs. 64,000/-, thereby leading to an award which was high and excessive.
33. The Appellant in his submissions argued that he can only afford a monthly sum of Kshs. 5,000/- towards maintenance of the minor, in addition to paying his medical expenses, school fees and school related expenses.
34. The question that this Court must determine is whether the learned Magistrate took into consideration all the relevant factors and evidence when it directed the Appellant to pay the disputed monthly sum of Kshs. 14,909/- for the child's upkeep. From the affidavit of means on record, it is apparent that the Appellant earns a net salary of Kshs. 64,675/-. The Respondent in her pleadings and testimony stated that the Appellant earns a monthly salary of Kshs. 198,000/=. Obviously, this did not take into account the taxes and other levies. It is also on record that the Appellant has another family consisting of a wife and three other children.
35. It is an established legal principle that an appellate court will not normally interfere with a finding of fact by the trial court whether in a civil or criminal case unless it is based on no evidence, or on a misapprehension of the evidence, or the judge is shown demonstrably to have acted on wrong principles in reaching the findings he did. See the case of *Mbogo v Shah* (1968) 93 in which De Lestang VP (as he then was) observed at page 94 that; -
- “I think it is well settled that this Court will not interfere with the exercise of its discretion by an inferior court unless it is satisfied that its decision is clearly wrong, because it has misdirected itself or because it has acted on matters on which it should not have acted or because it has failed to take into consideration matters which it should have taken into consideration and in doing so arrived at a wrong conclusion...”
36. A careful review of the trial court's judgement reveals that the court awarded maintenance of Kshs. 14,909/- based on the tabulation of the minor's needs as contained in paragraph 5 of the Respondent's affidavit of means. For the Appellant, the court simply reminded him that despite the fact that he has a family with three other children, he still had an obligation to provide for the minor herein. There is no evidence that the court addressed its mind to the Appellant's obligation in relation to the needs of his other three children.
37. Section 114 (2) of the Children's Act provides guidelines on factors to be considered by a court before making an order for financial provisions. The section specifies that some of the issues to be considered include, the income or earning capacity, property and other financial resources of the parties, both current and in the future, (b) the financial needs, obligations, or responsibilities of the parties, both in the immediate and in the future; (c) the financial needs of the child and the child's current circumstances.....and (j) the liability of that person to maintain other children.” [emphasis added).
38. In the circumstances and taking into account the guidelines under section 114(2) of the Children's Act, I hereby vary the terms of the trial court's judgement of 5th July 2019 and substitute the monthly sum of Kshs. 14,909/= on account of the child's upkeep with a monthly sum of Kshs. 10,000/=. The due date for payment remains as directed by the lower court, that is, before 5th day of every month.
39. As guided by Section 114 (2) of the Children's Act, quantum of maintenance should be within the limits of the parents' means and that it should reflect the income level and economic realities of the parents and also take into account the liability of that person to maintain other children. The



Appellant's obligation towards his other three children should equally be protected and should not be made to suffer by an award which fails to take into account the parent's financial and economic situation.

40. In his submissions to this appeal, the Appellant argued that he lost his job sometime in 2020. It was also his submissions that by now, it is possible that the Respondent may have completed her studies and secured some employment and should therefore be able to contribute more towards the minor's upkeep. These in my view are not issues to be dealt with at an appeal level, but on an application for review or variation of the judgment.
41. If indeed it is true that the Appellant has since lost his job as alleged in his submissions or that the Respondent has secured employment, the proper procedure for the Appellant is to move the trial court under section 119 of the Children's Act, with evidence, for variation of its orders of 5th July 2019. The section provides as follows in relation to variation of maintenance orders; -

“ 119. In relation to an order made under section 116, the Court may; -

- a. impose such conditions as the Court deems fit;
- (b) vary, modify or discharge any order made under section 116 with respect to making of any financial provision, by altering the schedule of payments or by increasing or diminishing the amount payable; or
- (c) 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 deems fit.”

42. As rightly observed by Musyoka J. in *SKM v MWI* [2015] eKLR, maintenance orders are meant to serve the best interest of the child involved, taking into account the financial means of the parents, including the parents' obligation to other children for whom the parent is responsible. It is not meant to punish or oppress any party.

43. In the premises, I find this appeal partly merited and hereby allow the same in the following terms; -
- i. The trial court's judgment of 5th July 2019 is therefore varied to the extent that the monthly upkeep sum of Kshs. 14,909/- is hereby substituted with a monthly sum of Kshs. 10,000/= payable to the Respondent on or before the 5th day of every month.
 - ii. The issue of custody of the minor to remain as per the consent of 2nd July 2019. However, for the avoidance of doubt and to ensure proper execution of the custody arrangements between the parties as per the consent, this court gives the following directions; -
 - a. Legal custody of the child is granted to both parties.
 - b. The Respondent (mother) shall have actual and physical custody of the minor.
 - c. The Appellant (father) shall have reasonable right of access to the minor every alternate weekend and half of the school holidays.
 - d. The picking and dropping points will be on a neutral place to be decided by the Parties and the Appellant's Advocate.
 - e. The Respondent is hereby directed to facilitate Appellant's access of the minor by availing the minor at the times and place in the manner specified in (c) and (d) above.



44. This being a family matter involving a child, I am of the view that each party should bear their own costs.

45. It so ordered.

SIGNED DATED and DELIVERED IN VIRTUAL COURT THIS 9TH DAY OF OCTOBER 2024

ADO MOSES

JUDGE

In the presence of

Moses – Court Assistant

N/A for the Appellant.

Stella ----- the Respondent.

