



**EGE v DKK (Divorce Cause 7 of 2017) [2023] KEHC 21761 (KLR) (Family) (7 July 2023) (Ruling)**

Neutral citation: [2023] KEHC 21761 (KLR)

**REPUBLIC OF KENYA**  
**IN THE HIGH COURT AT NAIROBI (MILIMANI LAW COURTS)**  
**FAMILY**  
**DIVORCE CAUSE 7 OF 2017**  
**PM NYAUNDI, J**  
**JULY 7, 2023**  
**IN THE MATTER OF REG-K( MINOR**

**BETWEEN**

**EGE ..... APPLICANT**

**AND**

**DKK ..... RESPONDENT**

**RULING**

1. The applicant, presents application dated June 27, 2022 under article 53(2) of the Constitution, Section 4(2), 98,99 and 100 of the Children Act and seeks the following orders -
  1. Spent
  2. That the honourable court be pleased to review the consent order dated March 23, 2016 and October 16, 2019 and to reduce the applicants contribution to the child's monthly maintenance to USD 2000 due to the change in circumstances and the applicant's increased financial responsibilities.
  3. That this honourable court be pleased to review he consent order dated March 23, 2016 and October 16, 2019 to provide that the applicant will be required to pay monthly maintenance until the child turns 18.
  4. That this honourable court be pleased to review the consent order dated March 23, 2016 and October 16, 2019 and declare that the applicant should cease making alimony payments to the respondent as she is no longer entitled to the same.
  5. That the respondent be ordered to make contribution towards the maintenance of the child.
  6. That costs of this application be provided for.



7. Any other orders that this honourable court may deem fit to grant.
2. The application is supported by the affidavit of the applicant sworn on the 24<sup>th</sup> day of June 2023 and further affidavit sworn on the September 9, 2022. The respondent opposes the application vide replying affidavit sworn on the July 18, 2022.
3. This application was filed contemporaneously with the respondent's application for execution dated June 27, 2022, which is countered by the applicants replying affidavit sworn on July 18, 2022. In supplementary affidavit sworn on September 28, 2022 the respondent informed that the applicant had made a bulk payment bringing his payments upto date therefore dispensing with the notice to show cause.
4. Parties consented to prosecute the application through written submissions. The applicants submissions are dated September 9, 2022, whilst those of the respondent are September 28, 2022 along with list of authorities of even date.

### **Background**

5. The parties are the parents of REG- K. Their marriage was dissolved on the June 14, 2018. It is the applicant who filed for divorce and the petition was not contested by the respondent. On the application of the petitioner the court adopted the agreement dated March 23, 2016 as an order of the court and formed part of the judgment.
6. On the October 16, 2019, the parties entered into further agreement reviewing the agreement dated March 23, 2016. In 2022 the applicant sought to further review the agreement, which request was not agreed to by the applicant hence this application. At the same time the applicant sought to execute the decree notice to show cause.
7. On July 21, 2022, Hon Muchelule J (as he then was) directed that both applications be heard together and that the petitioner remit USD 3000 monthly to the respondent.

### **Summary of Applicants Case**

8. The applicant seeks a review of the consent order on the following grounds
  - a. He signed the consent under duress, in fear that unless he did so the respondent would remove the child from the jurisdiction of the court
  - b. The terms of the consent are onerous on him as he is required to remit USD 7000 on a monthly basis to the respondent in addition to the meeting the educational and medical costs of the child
  - c. In the agreement as currently framed that respondent does not make any financial contribution to the maintenance of the child
  - d. His circumstances have changed and his income has reduced
  - e. He anticipates that his income will reduce as has a fiancé, whom he hopes to marry and that he will have less income at his disposal.
  - f. Circumstances have further changed as the respondent has relocated to the UK and fee payable for her education has increased.
9. The respondent opposes the application on the following grounds



- a. That there is no shift in circumstances to justify the review of the order
- b. That the agreement reflects a consultative and negotiated settlement between the parties.

### Analysis and Determination

10. Having considered the rival pleadings, affidavits filed and submissions, authorities cited and the relevant law, I discern the following as the issue for determination
  - a. Whether the consent orders dated March 23, 2016 and October 16, 2019 should be reviewed in the manner proposed by the applicant.
11. The principles to guide courts in considering an application to review a consent order were well articulated in the Jamaican decision in the case of *Windsor Commercial Land Company Ltd & others v Century National Merchant Bank Trust Ltd* SCCA 114/2005 where the court stated;

“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.”
12. Kenyan Courts are also well settled on the issue and in the case of *Flora N Wasike v Destimo Wamboko* [1988] eKLR the court observed, while citing with approval the decision in *Purcell v F C Trigell Ltd* [1970] 2 All ER 671, where Winn LJ said at 676;

“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 knowledge of the material matters by legally competent persons, and I see no suggestion here that any matter that occurred would justify the setting aside or rectification of this order looked at as a contract.”
13. In *Brooke Bond Liebig v Mallya* [1975] EA 266 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.”
14. It is evident therefore that for the court to interfere with a consent judgment the party seeking to review the order must present sufficient grounds to enable the court exercise its discretion in that regard. In *Duncan Onyango Odera v Mary Adhiambo Wasonga & Eliud Otieno Odingo (Suing as Legal Representatives of the Estate of Benard Ooko Otieno alias Benard Otieno Odera [Deceased])* [2021] eKLR Aburili J observed

“[30] ..a consent order will only be set aside if it can demonstrated that it was procured through fraud, non- disclosure of material facts or mistake or for a reason which would enable the Court to set it aside.”



15. In that case the learned Judge guided by the Supreme Court decision in *William Olotch v Pan Africa Insurance Co Limited* [2020] eKLR, observed that the decision of the apex court overrides all other cases where courts were deprived of jurisdiction to interfere with and or vary consents entered into between parties. The Judge stated

"[40] "Courts do not exist in a vacuum and must therefore be responsive to the global effects. Courts exist to do justice and to make such orders that are just and expedient in the circumstances, each case being treated on its own peculiar merits"

16. In light of the above it is evident that if the applicant can demonstrate exceptional circumstances it is open to this court to review the consent orders of March 23, 2016 and October 19, 2019

17. I will therefore examine the grounds presented by the applicant.

18. The first is that he signed the contract in fear. This claim cannot be entertained. The agreement was executed in the presence of an Advocate and the applicant executed 2 parental responsibility agreements 3 years apart. It is the applicant who presented the agreement to court for adoption in an uncontested divorce cause.

19. The applicant seeks a review of his monthly contribution to the child owing to his changed circumstances. I note that in the revised agreement dated October 16, 2019, the parties agreed that the applicants remittance to the respondent should not exceed 60 per cent of his income. It is evident therefore that the parties in agreeing on the amount to be paid for the maintenance of the child were already mindful to cap it and identified 60 per cent as the boundary that ought not to be crossed.

20. The applicant seeks to review the order so that he limits the maintenance of the child to when she turns 18. Clause 12 of the agreement dated March 23, 2016 provides that

"The husband shall pay the aid maintenance until the child attains the age of 21 or until she completes her tertiary education whichever is the later."

21. The *Children Act* requires that in all matters relating to children, the child's best interests should be the primary consideration. I have considered the decisions cited by the applicant and agree that maintenance of a child should never be punitive and that it is a shared responsibility.

22. In the instant case the arrangement made for the maintenance of the child is one that was arrived at by consent. Considering that in the subsequent agreement the applicant and respondent agreed to curb the remittances at 60 % I am not persuaded that sufficient ground has been presented for me to revise this provision. The *Children Act* provides for extension of parental responsibility to provide for support to a child to enable them complete education.

23. The applicant seeks a review of the consent so that he stops making alimony payments. The payment of maintenance is provided for under clause 14 of the agreement of March 23, 2016 and it provides,

"The sum payable in respect of maintenance to the wife shall cease in the event that she remarries."

24. This clause 12 should be read alongside with clause 11 and 13 of the agreement. Clause 11 factors in how the maintenance to the child and the respondent is to be calculated when the respondent has an income. Clause 11 therefore does provide for contribution that the respondent makes to the maintenance of the child and herself. The parties had agreed on a formula.



25. Having found that the agreements as executed by the parties are valid and having considered the law and judicial precedents, I find that the applicant has failed to satisfy me that there exist exceptional circumstances to support review of consent order.
26. In the circumstances I dismiss the chamber summons dated June 27, 2022, find that the agreements as executed by the parties are valid and vacate the orders of Muchelule J (as he then was) issued on July 21, 2022

It is so ordered

**SIGNED, DATED AND DELIVERED VIRTUALLY AT NAIROBI THIS 7TH DAY OF JULY 2023.**

**P M NYAUNDI**

**JUDGE**

**In the presence of :**

**Ms Thongori SC.....Advocates for the Appellant/ Applicant**

**.....Advocates for the Respondent**

**Karani Court Assistant**

