



**JNM v BPW; LWM (Interested Party) (Civil Appeal E086 of 2024)
[2024] KEHC 15740 (KLR) (Civ) (16 December 2024) (Ruling)**

Neutral citation: [2024] KEHC 15740 (KLR)

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

**CIVIL
CIVIL APPEAL E086 OF 2024**

**HK CHEMITEI, J
DECEMBER 16, 2024**

BETWEEN

JNM APPELLANT

AND

BPW RESPONDENT

AND

LWM INTERESTED PARTY

RULING

1. This ruling relates to the applications dated 1st October, 2024, 27th September, 2024 and 8th October, 2024.
2. The application dated 27th September, 2024 is filed by the Petitioner, MZW (suing on her own capacity and through the next friend LWM); seeking ORDERS THAT:-
 - (a) Spent.
 - (b) Pending the hearing and determination of the application inter partes, an interim conservatory order be issued restraining the Respondents from seizing the Applicant/Petitioner minor, detaining her, boarding her into any aircraft, removing her from Kenya, transporting her to the United States of America, United Kingdom or otherwise interfering with the freedom of the Petitioner within Kenya.
 - (c) Pending the hearing and determination of the Application/Petition, an interim conservatory order be issued restraining the Respondents from seizing the Applicant/Petitioner (minor), detaining her, boarding her into any aircraft, removing her from Kenya, transporting her to



United States of America, United Kingdom or otherwise interfering with the freedom of the Petitioner within Kenya.

- d. Costs.
3. The application dated 1st October, 2024 filed by the BPW, the Respondent/Applicant, seeks for ORDERS THAT:-
- (a) Spent.
 - (b) The Applicant and or her agents are hereby restrained from removing the child MZW, from the jurisdiction of this court and the Republic of Kenya pending the hearing and determination of this application.
 - (c) The contemnor, JNM, be found to be in contempt of court for willful disobedience of the court orders issued on the 21st of August, 2024.
 - (d) This Honourable Court be pleased to forthwith deny the Respondent any audience until she purges the contempt.
 - (e) The Director of Criminal Investigations as well as Anti – Human trafficking and Child Protection Unit, be directed to locate the child MW, and that upon finding her, to rescue her whether from the Respondent or any of her relatives or agents or any school or institution where the child may have been enrolled and or hidden and to hand her over to her father BPW, in execution of this honourable court’s order of 21st August, 2024.
 - (f) The Directorate of Criminal Investigations Department and the Anti Human Trafficking and Child Protection Unit as well as the Officer Commanding Station of the station nearest the child, and the Children’s Officer, be hereby ordered to ensure compliance with the court orders issued on 21st of August, 2024, and ensure the rescue and handover of the child MZW to her father, BPW.
 - (g) The Principal of Nairobi International School be directed to appear on a date to be fixed by the court to explain the refusal to facilitate the compliance with the orders issued on 21st August, 2024 and to show cause why the court should not punish her for contempt of court.
 - (h) Any agent, relative, school or any institution or organization where the child may have been placed, enrolled or hidden do forthwith release the child MZW to her father BW and or his appointed agent.
 - (i) If the Respondent fails, refuses and or neglects to release the child’s passport forthwith, the Applicant BPW, be hereby authorized to make the necessary immigration applications/process and travel arrangements including obtaining emergency travel documents and passport for the child, without requiring the consent of the mother.
 - (j) This Honourable Court be pleased to make any such further order as it may deem fit to facilitate compliance to the orders already issued in respect of this matter and the best interests of the child.
 - (k) The costs of this Application be provided for.
4. The application is supported by affidavit sworn by BPW on 1st October, 2024. He avers inter alia that he is MZW’s biological father who was born on 1st June, 2011 whose whereabouts have been unknown since 21st August, 2024.



5. On 21st August, 2024, this court issued orders setting aside the existing interim orders, directing JNM (hereinafter, “the Appellant/ Respondent”) to release the child with all her relevant travel documents to enable her travel to the USA for her studies and for the OCS and Children’s Officer to facilitate compliance with the order.
6. That the Respondent is aware of the order since her advocate was present when they were issued and she was also served via her last known email address and she and her advocates have been severally reminded to comply with the orders and the consequences of failure to comply with them.
7. The Respondent has failed and/or declined to comply with the orders her full knowledge of the Applicant’s presence in Kenya and readiness and willingness to receive the child. She has hidden the child and held her incommunicado since 21st August, 2024 when the orders were issued.
8. The child is missing key milestones at her school in the USA. The child has been enrolled at [Particulars Withheld] School without the Applicant’s knowledge and consent.
9. Further that on 23rd September, 2024, [Particulars Withheld] School’s principal informed the Applicant that she could not release the child to him without consulting with the Respondent. The following day, 24th September, 2024, the principal called the Applicant’s lawyer in his presence and informed him that the child had not attended school for the past 7 days and she was not aware when she would report back to school.
10. The Respondent’s actions infringe on the child’s best interests and her fundamental rights of association, education and freedom of movement. He therefore seeks that the Respondent be restrained from removing the child out of the jurisdiction of this court and that any travel of the child out of Kenya be in accordance with this court’s orders of 21st August, 2024.
11. The application is opposed vide grounds of objection dated 14th October, 2024 which is based on the following grounds:-
 1. The prayers sought in the notice of motion dated 1st October, 2024 are ultra vires the appellate court’s jurisdiction it not being the trial court which has already provided for custody of the minor in express terms and the application is a backdoor maneuver by BPW attempting to unprocedurally revoke and/or vary the Custody and Maintenance Order of 22nd October, 2015 contrary to Section 107 and 120 of the Children’s [Act No. 29 of 2022](#).
 2. The Consent Judgment dated 22nd October, 2015 has never been appealed, set aside or varied and remains in full legal force. The custody and maintenance orders have never been revoked or varied.
 3. The Consent Judgment dated 22nd October, 2015 by the trial court and the High Court Order dated 21st August, 2024 are conflicting in terms of the prevailing custody and maintenance orders and the doctrine of prospective overruling ought to apply. The Appellant cannot be held to be in contempt of the court’s orders for complying with another valid court order made by the trial court and still in active force as per the Supreme Court holding in Attorney general and 2 Others versus David Ndi and 79 Others (2022) KESC 8 KLR at para 343.
 4. The prayers Nos. 5 – 9 sought in the motion are fatally incompetent and an abuse of the court’s process for being intertwined with the prayers for contempt of court (Nos. 3 and 4).
 5. The High Court lacks the requisite jurisdiction to entertain the said prayers Nos. 5 – 9 as they are beyond the court’s powers acting in it’s appellate jurisdiction under Order 42 of the



Civil Procedure Rules which circumscribes this Honourable Court's powers in relation to the nature of any interim applications which can be made on appeal.

12. The application is opposed vide grounds of opposition dated 1st October, 2024 filed by the minor and based on the following grounds:-
 1. The Applicant in the contempt application is withholding a crucial material information that:-
 - a. The child does not have a legitimate visa for entering USA.
 - b. The Respondent used dubious diplomatic visa issued by the World Bank to enter the minor into the USA.
 - c. The visa is dubious because the Respondent is not a diplomat and the child is not a diplomat.
 - d. The diplomatic visa belongs to a person known as Margaux Vinex whom the Respondent claims to be his wife.
 2. Despite being served, the said Margaux Vinex the owner of the diplomatic visa has not opposed the Constitutional petition and the application for conservatory orders dated 27th September, 2024 seeking to restrain her from using force to remove the minor from Kenya.
 3. There is a binding decision of the Supreme Court in MAK v RMA & 4 Others (Petition 2 (E003 od 2022) [2023] KESC 21 (KLR) providing that a Kenyan child has a right to Nationality and the right to remain in Kenya.
 4. The best interest of the child is best served by:-
 - a. Taking due regard of the sentiments the child expressed at the interview before the trial court to the effect that:-
 - i) She is more comfortable living in Kenya compared to USA.
 - ii) She prefers to stay with her biological mother in Kenya longer.
 - b. Appreciating that an individual who is 13 years old is a young adult.
 - c. Not treating the minor as a commodity to be seized and handed over to be transported as prayed in prayer Nos. 5 and 6 of the application dated 1st October, 2024.
 - d. Not to further interfere with the education and current enrollment of the child at [Particulars Withheld] School as prayed in the contempt application.
 - e. Giving effect to consent custody judgment dated 22nd October, 2015 since the order is in force and has not been varied or set aside.
 5. The court ought not to give orders that will render the constitutional petition, the application for conservatory orders and application for review nugatory by allowing the Respondent to remove the child the subject matter of the proceedings and transport her to USA which is beyond the jurisdiction of this court.
 6. Prayers 2, 5, 6, 7, 8, 9 and 10 are misconceived because:-
 - a. The prayers are targeted at the minor.
 - b. The minor is not alleged to be in contempt of any order.



- c. The minor is not the Respondent in the contempt application.
 - d. The orders if granted will directly violate the constitutional rights of the minor without giving any proper hearing.
7. The court should take due regard to the fact that:-
 - a. The minor has been travelling from Kenya to USA and back on her own and unaccompanied.
 - b. It is the minor who made the decision to return to Kenya from USA.
 - c. It is the minor who has made the decision not to return to USA.
 8. The minor has made her own decision not to travel and has:-
 - a. Filed a Constitutional Petition No. E227 of 2024 and an application for conservatory orders to enforce her constitutional rights.
 - b. Filed an application to review orders issued on 21st August, 2024 for the court to clarify that it has not authorized the Respondent to use force or police to remove her from Kenya by force against her wishes.
 - c. The said petition and application are also before the honourable court and ought to be heard and determined together with this appeal.
 9. The Applicant is abusing the application for contempt to sneak in new orders targeted at the minor and which orders do not arise from alleged contempt.
13. The application for contempt against the mother should not be used to override the constitutional rights of the Applicant minor, particularly the right not to be forced to travel to USA against her wishes to the extent of using Police to hunt her down like a common criminal or a child in conflict with the law.
 14. It will be a tragedy for a court of law to order or allow another person to force a Kenyan child to return to the very place and people the child is running away from.
 15. The application is opposed vide notice of preliminary objection dated 14th October, 2024 filed by the minor premised on the following grounds:-
 1. There is a binding decision of the Supreme Court in MAK v RMAA & 4 Others (Petition 2 (E003 of 2022) [2023] KESC 21 (KLR) holding that:
 - a. A court of law cannot disregard an existing child custody order.
 - b. The aforesaid child custody order can only be revoked in accordance with Section 107 of the Children's Act or varied in accordance with Section 120 of the Act.
 - c) There exists a child custody order relating to the minor issued by the trial court on 22nd October, 2015 providing that:-
 - i) The minor child should be enrolled at Pembroke School in Kenya.
 - ii) During School terms the minor, be with the mother.
 2. The honourable court in its appellate jurisdiction does not have jurisdiction to hear and determine prayers No. 2, 5, 6, 7, 8 & 9 because:-



- a. The issues raised in the said prayers do not arise from the order appealed from in this appeal. That is, the negative order dated 6th August, 2024 dismissing the Appellant's application for injunction to restrain the Respondent from removing the child from Kenya.
 - b. The said prayers seek to introduce new parties at the appeal stage and in particular prayer No. 7 introducing [Particulars Withheld] School, prayer 8 introducing the agents, relatives, schools, institutions and other organizations whose names are not disclosed.
 - c. The orders sought in prayers No. 5 & 6 seeking to compel DCI to hunt down, arrest, detain and hand over the child to the Respondent to USA is unconstitutional in text and in effect. That is because the prayers reduce a 13-year human being into chattel or commodity to be seized and handed over from one person to another for transport.
 - d. The jurisdiction to hear and determine the new prayers remains in the Children's Court and not the Appellate jurisdiction.
 - e. The child custody consent judgment/responsibility agreement dated 22nd October, 2015 in the trial court is still in force and has not been revoked in accordance with Section 107 of the Children's Act or varied in accordance with Section 120 of the Act.
3. The aforesaid prayers No. 2, 5, 6, 7 & 8 & 9 are misconceived because:-
 - a. The prayers are targeted at the minor.
 - b. The minor is not alleged to be in contempt of any order.
 - c. The minor is not the Respondent in the contempt application.
 - d. The orders if granted will directly violate the constitutional rights of the minor without giving any proper hearing.
 - e. Issuing prayers No. 5 and 6 to allow the armed police to hunt down, seize and detain the minor like a common criminal or child in conflict with the law will traumatize the minor.
 4. The court does not have jurisdiction in a contempt application to issue orders directly affecting the minor because the orders do not arise from the order appealed from and the minor is not the alleged contemnor.
 5. The application for contempt against the mother should not be used to override the constitutional rights of the Applicant minor, particularly the right not to be forced to travel to USA against her wishes and or to the extent of using Police to hunt her down like a common criminal or child in conflict with the law.
 6. It will be a tragedy for a court of law to order or allow another person to force a Kenyan child to return to the very place and people the child is running away from and recorded in the ruling telling the court that she is not comfortable with.
16. The application is opposed vide replying affidavit sworn by JNM on 8th October, 2024 where she avers, inter alia, that the orders of 21st August, 2024 were not specific as to whom the minor was to be released to and BPW was out of the country then and the minor refused to travel to the USA unaccompanied. She has had the minor's physical custody since birth and in line with the court order



given in CHILDREN CASE NO. 1213 OF 2011: JNM VERSUS BPW. She has never surrendered this right.

17. She and B separated when the child was 2 months old and she has lived with her for 11 years while her father was away. She was enrolled at [Particulars Withheld] School and later [Particulars Withheld] School. B Reached out to her sometime in January, 2021 proposing that she and the minor relocate to USA and assuring her that the minor would get enrollment at [Particulars Withheld] School owing to her stellar performance in sports and academics.
18. On Benjamin's advice, she wrote to [Particulars Withheld] School withdrawing the minor from schooling there on the promise that B was processing their green cards and that the minor would report to [Particulars Withheld] School in September, 2021. She had to home school the minor from August, 2021 to November, 2021 because the green card process was not complete and she had already been withdrawn from [Particulars Withheld] School.
19. The Respondent went ahead to give chronology of events up to and including the enrollment of the minor at the American school which was expensive according to the father and later they enrolled her in a public school.
20. The child she went on later came to Kenya and she refused to go back stating that she was comfortable here.
21. Her failure to comply with the court order was not deliberate or willful but was occasioned by the minor expressing serious reservations about returning to the USA with her father and she cannot force her to go where she does not want. The minor has continuously resisted leaving Kenya and has threatened to self-harm if forced to leave the country or she will return to Kenya as a stowaway through West Africa.
22. The minor has communicated that she is comfortable living with her mother in Kenya. The minor is 13 years old and can be interviewed by this court on her wishes to remain in Kenya. She is a Kenyan citizen by birth and June is her biological mother and has lived in Kenya for the first 11 years of her life. She seeks for the child's protection under Article 53 (2), of *the Constitution* of Kenya, 2010. She is willing to appear virtually with the minor during the hearing on 9th November, 2024 for the court to confirm that she is safe and in good health.
23. The application dated 8th October, 2024 is filed by the minor seeking for ORDERS THAT:-
 - (a) Spent.
 - (b) The Applicant minor be joined in this suit in her own capacity and through the next friend LWM as the 2nd Respondent or in such other capacity as the court may deem fit.
 - (c) There be a stay of execution of the order issued in this matter on 21st August, 2024 pending inter partes hearing and determination of the Prayer No. 4 below seeking review and also pending hearing and determination of the Milimani HCC Petition No. E505 of 2024 to restrain the Respondent from using force, threats of force or armed police to force the Applicant minor to travel to USA against her wishes and interests.
 - (d) The honourable court be pleased to review the order issued on 21st August, 2024 to interpret or clarify the effect of the said order to the effect that:-
 - a) The order directing the Appellant herein to release the minor so that the minor can travel to the United States of America for schooling does not authorize the Respondent by himself, his servants or agents or police officers to use force or threats of force to



seize, detain and compel the Applicant minor to travel to the United States to America against her wishes and interests.

- b) The orders of 21st August, 2024 do not vacate the Child Responsibility Consent Judgment recorded in Milimani Children's Court case No. 1213 of 2011 on 22nd October, 2015 requiring, inter alia, that:
 - i) Clause 3(a) that the Applicant minor be enrolled at [Particulars Withheld] School in Nairobi, Kenya.
 - ii) Clause 3(b) that during the school terms, the Applicant minor will be with the mother in Nairobi, Kenya.
 - (e) The orders of 21st August, 2024 do not transform the permissive terms of Clause 3(e) of the Child responsibility Consent Judgment giving liberty to the Respondent to travel abroad with the Applicant minor to travel and reside abroad with the Respondent against her wishes and interests.
 - (f) The aforesaid Milimani Petition No. E505 of 2024 be heard together or otherwise be consolidated with this appeal.
 - (g) The costs of the application be provided for.
24. The application is supported by affidavit sworn by MZW on 8th October, 2024. She avers, inter alia, that a 13 year old Kenyan by birth and brings this application in her own capacity and through her next friend LW. She is aggrieved by the orders of 21st August, 2024 to wit she is a Kenyan citizen by birth, this lacks jurisdiction to expel a Kenyan from Kenya unless through extradition proceedings,
25. She averred that B was abusing the order by using force and threats against her yet she was mature enough to decide whether she want to live in United States of America with her father and step mother or in Kenya with her biological mother and her biological father has not secured a valid visa in his name to enable her travel to the USA.
26. She argued that application and the constitutional petition will be overtaken by events if the execution of the orders of 21st August, 2024 is not stayed. The orders of 21st August, 2024 need to be reviewed to provide clarity on whether it was intended to use police force and threats to effect it against her wish to go to the USA and whether it intended to vacate the Child Responsibility Consent Judgment recorded on 22nd May, 2015 in Milimani Children's Court Case NO. 1213 of 2011 requiring inter alia that she be enrolled at [Particulars Withheld] School in Nairobi, Kenya and she stays with her biological mother during school terms.
27. The application is opposed vide replying affidavit sworn by BPW on 11th October, 2024. He avers, inter alia, that the application is a further attempt at disobeying court orders by June thus being in contempt.
28. The allegations of the child's detention and discrimination in the USA were never brought up in the Children's Court, in the application for stay dated 9th August, 2024 and neither in the two years that the child lived in the USA. She informed the court on 5th August, 2024 that she loved living with her father and that she misses her mother, during the 1-hour interview at the Children's Court. This was also captured in the ruling of 6th August, 2024.
29. The orders made by this court and the Children's Court are in the child's best interests. The child has travelled to Kenya 4 times since their relocation to the USA and he has always organized for her air tickets and made security arrangements with the respective airlines.



30. That June was using the child as a decoy to avoid facing the penalty for being in contempt of court orders. She has written to the American Embassy forbidding any travel authorization or permission for the child to enter USA with her father. He has never used force and has no intention of using force against his own daughter.
31. The Appellant, JNM, has filed written submission on all the applications above, dated 22nd October, 2024. She has placed reliance on the following:-
- a) Setton on Judgments and Orders (7th edition), vol 1, P 124 where it is stated, “Prima facie, any order made in the presence and with the consent of counsel is binding on all parties to the proceedings or action, and on those claiming under them... and cannot be varied or discharged unless obtained by fraud or collusion, or by an agreement contrary to the policy of the court...; or if the consent was given without sufficient material facts, or in general for a reason which would enable the court to set aside an agreement.”
 - b) Brooke Bond Liebig Ltd v Mallya [1975] EA 266 at 269 where the court stated, “A court cannot interfere with a consent judgment except in such circumstances as would afford good ground for varying or rescinding a contract between the parties.”
32. The Respondent, BPW, has filed written submissions dated 22nd October, 2024 on all the applications above. He has placed reliance on the following:-
- a) Samuel M. N. Mweru & Others vs The National Land Commission & 2 Others Misc [*CA No. 443 of 2017*](#) [2020] eKLR where the court laid out the four elements that are essential and that must be proved to make a case for civil contempt as follows: “...(a) the terms of the order must be clear, unambiguous and binding on the party, (b) the party has knowledge of or proper notice of the terms of the order, (c) the party has acted in breach of the order and (d) the party’s conduct is deliberate.” “...Compliance with a court order is an issue of fundamental concern for a society that seeks to base itself on the rule of law. [*The constitution*](#) states that the rule of law and supremacy of [*the constitution*](#) are foundational values of society. It vests the judicial authority of the state in the courts and requires other organs of the state to assist and authority of the state in the courts and requires other organs of the state to assist and protect the courts. It gives everyone the right to have legal disputes resolved in the courts or other independent and important tribunals. Failure to enforce court orders effectively has the potential to undermine confidence in recourse to law as an instrument to resolve civil disputes and may thus impact negatively on the rule of law.”
 - b) MN vs TAN and PAS, Civil Appeal No. 11 of 2014 [2015] eKLR where the court stated, “A valid court order has to be obeyed or complied with regardless of how aggrieved a party is about it. The order has the force of the law. It is not a mere wish or proposition disobedience or non-compliance with it attracts severe consequences. It would appear to me that the appellant believes that the orders of 3th July, 2013 are not valid, and has explained why he has chosen to disregard or disobey them. Yet he is bound to obey the orders for as long as they are still in force. He has no choice, he cannot decide when and how to obey or comply with them.”
33. The child, MZW, has filed written submissions dated 22nd October, 2024, on all the applications above. She has placed reliance on the following:-
- a) Gatirau Peter Munya v Dickson Mwenda Kithinji & 2 Others [2014] eKLR where the supreme court held that conservatory orders should be granted on the inherent merit of a case bearing in mind the public interest, the constitutional values and the proportionate magnitudes and priority levels attributed to the relevant causes.



- b) Willy Kibet & another v Ethics & Anti – Corruption Commission & another; James Nganga Gachathi & another (Interested Parties) [2021] eKLR where the court laid out the principles of granting conservatory orders as follows: “1. First, an Applicant must demonstrate an arguable prima facie case with a likelihood of success to show that in the absence of the conservatory orders, he/she is likely to suffer prejudice. 2. The second principle is whether the grant of conservatory relief will enhance the constitutional values and objects of a specific right of freedom in the Bill of Rights. 3. Thirdly, the court should consider whether, if an interim conservatory order is not granted, the petition or its substratum will be rendered nugatory. 4. The final principle for consideration is whether the public interest will be served or prejudiced by a decision to exercise discretion to grant or deny a conservatory order.”
- b. Mrao Ltd v First American bank of Kenya Ltd & 2 others [2003] KLR 125 where the court stated, “... a prima facie case is a case in which on the material presented to the court, a tribunal properly directing itself will conclude that there exists a right which has apparently been infringed by the opposite party to call for an explanation or rebuttal from the latter. A prima facie case is more than an arguable case. It is not sufficient to raise issues but the evidence must show an infringement of a right and the probability of success of the appellant’s case upon trial. That is clearly a standard, which is higher than an arguable case.”

Analysis and Determination

- 34. The court on its own motion on 14th November 2024 directed that the child be brought to court so that the court can have the chance of interviewing her.
- 35. Indeed, on 21st November 2024 she appeared before this court and the court had about 20 minutes with her and the court was able to make the following deductions from the private interview:-
 - (a) that she was an intelligent minor who understood her environment well especially after some few minutes of settling her.
 - (b) that she loved both her parents as she did not accuse either of them of any wrong doing.
 - (c) that she was more interested to study in Kenya as she had many friends as opposed to the United States where she did not make friends.
 - (d) she was clear that she did not wish to go and study in United States for now but may be in the future.
- 36. I have carefully considered the applications before the court, the replies filed in response thereto and the rival submissions. In view of the said applications the court shall make an omnibus ruling which shall generally answer all the issues raised by the parties. In any case the substantive issue is the interest of the minor, whether she should remain in Kenya with the mother or travel to United States of America to be reunited with the father.
- 37. The best place to start with is the Consent Judgment delivered by Hon. H. M. Mbatia (Mrs.) Senior Resident Magistrate on 22nd October, 2015 in NAIROBI CHIEF MAGISTRATE’S CASE NO. 1213 OF 2011: IN THE MATTER OF MZW (MINOR): JNM VERSUS BPW where it was ordered as follows (I quote verbatim):
 - 1. “THAT Consent adopted as a judgment of the court. Matter marked as settled.
 - 2. That the Application dated 19th June, 2015 is compromised in the following terms:-
 - a. Joint legal custody of the minor Miriam Watkins be vested in both parents.



3. That living arrangements of the minor will be as follows:
 - a. The minor will be enrolled at Pembroke School as per the Plaintiff's request.
 - b. During the school terms, she will be with the mother.
 - c. During the holidays, she will be with the father.
 - d. During special holidays, she will be with either party in alternating turns.
 - e. Father is at liberty to travel abroad with the minor during school holidays and he will return the child to Kenya within reasonable time before schools open.
 - f. Both parties shall cooperate and facilitate the minor's travel out of the country during her access time with the father.
4. That maintenance – both parties recognize that this is a joint responsibility and have agreed as follows:-
 - a. Father will cater for all educational needs of the minor at Pembroke school till such a time when the mother will be able to contribute.
 - b. Father will take care of the minor's medical cover for both inpatient and outpatient.
 - c. Father will provide Kshs. 50,000/= monthly for food and upkeep of the minor.
 - d. Father will provide KBE xxxE to the mother for school transport for the minor and shall be used strictly for the minor.
5. That all communication lines shall be open including skype and phones to enable the minor communicate with both parties.
6. That parties are at liberty to apply.
7. That there shall be a review after 3 months to confirm the comfort of the child in the given arrangements.”
38. This consent judgement still stands to date. The same gave a comprehensive road map of how to handle the entire issue of the minor between the parents.
39. It appears that after the consent the parties entered into other arrangements including visa application for the mother through the green card process and the minor to relocate and study in the USA.
40. Everything went well until the green card issue hit a snag and the mother was unable to get her stay in the USA. Meanwhile the minor had been enrolled at some school courtesy of her step mother's diplomatic visa.
41. The minor got a chance to come back to Kenya and refused to go back to the United States and that is the time everything went south hence the multiplicity of the applications before this court including a constitutional petition.
42. In my considered view and having now gotten all the material concerning the minor, I think the parties must find their bearing from the consent judgement cited above. To the extent that the same is still alive they cannot run away from it. None of them has applied to set it aside.



43. In the often-cited case of *Flora N. Wasike v Destimo Wamboko* [1988] eKLR the court 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.”

44. The applications for now are premature because the only avenue to this court is through impugning the consent order at the trial court which decision can thereafter be appealed against.

45. Ground six of the said consent clearly permits either of the parties to apply. I doubt if any of the parties has sought to apply in the manner they agreed. This position is buttressed by the provisions of Section 120 of the Children’s [Act No. 29 of 2022](#) provides that:

“Where the parents, guardians or custodians of a child enter into an agreement, whether orally or in writing, in respect of the maintenance of the child, the Court may, upon application, vary the terms of the agreement if the Court is satisfied that such variation is reasonable and in the best interests of the child.”

46. Removing the child from [Particulars Withheld] school for instance was at the agreement of both parents in light of her travel and study in the United States of America. If that is the case then whether the child should stay in Kenya or not must be discussed in terms of the said consent.

47. I think I have said much to show that the starting point is the consent and to the extent that the same is alive I doubt whether the court more so this court can touch the issues raised in the applications. As a matter of fact, it becomes necessary to review the orders given on 21st August 2024 by this court.

48. The said orders must be reviewed because of the new and important matter which was not within the knowledge of the court namely the afore-cited consent. Had it been brought to the attention of the court perhaps the orders would have been otherwise.

49. That goes with the petition filed by LWM on behalf of the minor. In view of the consent the said petition becomes only academic as the owners of the consent have not set it aside.

50. Looking at it wholesomely therefore the court makes the following orders:-

- (a) The orders of this court dated 21st August 2024 are hereby reviewed and set aside for all intend and purposes.
- (b) The applications dated 27th September 2024, 1st October 2024 and 8th October 2024 are hereby disallowed.
- (c) Parties are hereby directed to comply with the consent judgement dated 22nd October 2015.
- (d) Any interim orders are hereby set aside.

DATED SIGNED AND DELIVERED AT NAIROBI VIA VIDEO LINK THIS 16TH DAY OF DECEMBER 2024.

H K CHEMITEI
JUDGE

