



SSG v SGR (Divorce Cause E028 of 2021) [2022] KEKC 165 (KLR) (31 May 2022) (Ruling)

Neutral citation: [2022] KEKC 165 (KLR)

**REPUBLIC OF KENYA
IN THE KADHIS COURT AT ISIOLO
DIVORCE CAUSE E028 OF 2021
IA HUSSEIN, PK
MAY 31, 2022**

BETWEEN

SSG PLAINTIFF

AND

SGR DEFENDANT

RULING

1. This is an application for reviewing the orders of this court issued on October 18, 2020. It is brought under Rules 3,5,6 and 79 of the *Kadhis' Courts rules, 2020*. The grounds of the application are set out in the supporting affidavit of SGR, the applicant sworn on February 7, 2021 substantively as follows:
 - a. That this honorable court granted actual custody of the minors to Plaintiff and ordered Defendant to have access to the child during the weekends and holidays and also granted shared legal custody to both parties.
 - b. That the same is not complied with by Plaintiff and that the minor is being subjected to beatings and unfair treatment whenever he sleeps over at Defendant's place.
 - c. That the minor has been severally locked up in a toilet, pinched, stripped naked, made to crawl, forced to lie down on his stomach, and beaten using a pipe.
 - d. That as a result of mistreatment the minor ran away from the Plaintiff's house and sought refuge at the Defendant's home.
 - e. That the Defendant reported the matter to Isiolo Police Station *vide* OB No. xx/xx/xx/xxxx and was referred to the Department of Children Service and further advised to file a current application for consideration.
 - f. That it's based on the welfare of the minor that this application should be allowed and the judgment is reviewed.



2. The application was not objected to by Plaintiff and thus proceeded undefended. I have given due consideration to the submissions by the party and the issue that falls the determination is:
 - a. Whether there are grounds for the court to grant an order for review/vary.
3. It is a trite law that just like the right to appeal, an order for review/vary is a creature of statute, which must be provided for expressly. In considering an application for review, the court exercises its discretion judicially as was held in the case of *CNK & 2 others v Commercial Bank of Africa Limited* (2015) eKLR.
4. Article 53(2) of the Constitution on the child's best interest being of paramount importance in every matter concerning the child. It is not in dispute that the circumstances of the parents and that of the children change as they grow and attain the age of majority, the stringent rules for review of orders and judgment under the Civil Procedure Rules do not strictly bind the Children's matters before Kadhis' courts and that Order 162(1) of the Kadhis' Courts Rules 2020 gives the Kadhi's court lawful and wide discretion to make and vary orders in the best interest of the child. The Order states as follows;
 - “(1) The Court may at any time on an application and for sufficient reasons from time to time, revoke, review, suspend or vary any order where the order is in respect the status of children and/or any financial provisions for the spouse or children.
 - (2) Any order made under this part of these Rules may be rescinded or varied upon the application of any person interested thereunder and upon proof of a change of material circumstances.”
5. Reliance must be placed on Rule 79(d) of the Kadhis' Courts Rules 2020 where the rule underscored the power of the court to review the judgment. From the above provisions, no doubt, the trial court has the power to vary or make further orders in the proceedings relating to children.
6. The relevant law on custody is as contained in Article 53 (1) & (2) Constitution of Kenya and Section 4 (3) of the Children Act 2001 focuses on the best interest of the child as paramount in any matter regarding a child [ren]. The principles applied in awarding custody orders are contained in Sections 82, 83, 84 & 85 of the Children Act 2001.
7. The above principles have been corroborated by Sharia, see Ibn Qudama; Al Mughni pg. 613-14, which state that;

' Principles of custody have been introduced given the welfare of the children. Hence their enforcement shall not be proper in a way that shall put in jeopardy the person and faith of the children.
8. At the International level, the legal instruments on the rights of the Child, the International Convention on Rights of the Child (UNCRC), and the African Charter on Rights and Welfare of the Child (ACRWC) focus on the child's best interests, welfare and considerations as paramount. All these provisions confirm that the prevailing issue is what is in the best interest of the child. Who is best placed to ensure the best interests of the child?
9. While I agree that the welfare principle is the paramount consideration in deciding the custody of the minor. I am also of the view that the welfare of the minor, ideally would be served better where both parents are involved in the upbringing on a complimentary basis, but where one parent is shown to lack the interest of the minor at heart, the complementary view cannot be upheld.



10. After all, that has been said I am of the view that defendant is not an unsuitable parent to have custody of the minor of the marriage. Further, as corroborated by the expert report granting custody to the plaintiff will not be in the best interest of the child of the marriage.
11. Consequently, I find that the application is merited. On the upshot:
 - I. That this Honorable court be and is hereby pleased to review and vary the judgment delivered on October 18, 2020 by allowing the defendant/applicant to have actual custody of GSG (minor).

DELIVERED, DATED AND SIGNED AT NAIROBI THIS 31ST DAY OF MAY 2022.

AJ ISHAQ HUSSEIN

PK

