IN THE COURT OF APPEAL

AT NYERI

(CORAM: VISRAM, KOOME & ODEK, JJ.A)

CIVIL APPEAL NO. 25 OF 2014

BETWEEN

JOHN GITAHI KABUI ……..…… APPELLANT

AND

MERCY CATHERINE WANJIKU GIPTAHI

OLIVIA WANGU (suing thro' their guardian

JUDITH NYAKERU WANG'OMBE) ……..…..... RESPONDENTS

(*An appeal from the ruling of the High Court of Kenya at Nyeri (Sergon, J.)*

dated 21st February, 2014

in

H.C.C.A No. 38 of 2006)

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JUDGMENT OF THE COURT

1. The respondents' through their mother filed a suit in the Children's Court at Nyeri on 7th March, 2005 seeking *inter alia* :-

- ***An order that the defendant (appellant herein) takes up his parental responsibility towards the plaintiffs (respondents' herein).***

- ***An order that the defendant pays to the plaintiffs' guardian a monthly maintenance of Kshs. 11,700/= until the plaintiffs attain the age of majority or until further orders of the court.***

2. The appellant and the respondents' mother got married on 10th June, 2000 and subsequently separated in November, 2002. It was the respondents' case that since their parents separated, the appellant had abdicated his parental responsibility; their mother was not capable of single handedly meeting their needs from her monthly income of Kshs. 15,000/=. The respondents' mother testified that the appellant was a laboratory technician earning a monthly salary of Kshs.

13,000/= as at the year 2001. The appellant filed a statement of defence denying the averments in the Plaint.

3. After considering the suit on merit, the trial court entered judgment on 3rd May, 2006 in favour of the respondents. The appellant was directed to pay a monthly maintenance of Kshs. 11,700/= until the respondents attain the age of majority or further orders of the court. Dissatisfied with that decision, the appellant filed an appeal in the High Court wherein on 16th March, 2009 a consent order was entered in the following terms:-

- ***The appellant to pay the respondent a monthly stipend of Kshs. 8,000/= with effect from 1st April, 2009 until the minors attain the age of majority.***

4. Thereafter, the respondents filed a Notice of Motion dated 25th June, 2012 in the High Court seeking review of the monthly maintenance order upwards to Kshs. 21,350/=. The grounds in support of the application were that 3 ½ years had lapsed since the said order was made and the cost of living had gone up; the respondents' mother was not capable of meeting the needs of the two children singlehandedly.
5. In opposition, the appellant filed a replying affidavit. He deposed that firstly, the said application was *res-judicata* since the respondents had filed a similar application dated 21st January, 2011 in the Children's court which was dismissed. Secondly, the order dated 16th March, 2009 was made with consent of the parties; the terms of the consent order were clear in that the monthly maintenance of Kshs. 8,000/= was payable from 1st April, 2009 until the minors attained the age of majority. Thirdly, the consent order could not be set aside save if the same was obtained by fraud or misrepresentation.
6. In a ruling dated 21st February, 2014, the High Court (Sergon, J.) allowed the respondents' application and ordered the appellant to pay a monthly maintenance of Kshs. 21,350/= with effect from 1st March, 2014. That decision is the one that has provoked this appeal based on the following grounds:-

- ***The learned Judge erred in law in not holding and finding that the consent orders dated 16th March, 2009 could not be set aside unless proved that it was procured through fraud or misrepresentation.***

- ***The learned Judge erred in law in holding that Section 100 of the Children's Act applied to the consent order entered in court on 16th March, 2009 whereas the same applied to parental care agreements.***

- ***The learned Judge erred in not holding and finding that the High Court was functus officio having rendered itself to finality in the consent judgment dated 16th March, 2009.***

- ***The learned Judge erred in law in not holding and finding that the application by Notice of Motion dated 25th June, 2012 was res-judicata.***

- ***The learned Judge erred in law in reviewing the consent order dated 16th March, 2009 for the monthly stipend of Kshs. 8,000/= to Kshs. 21,350/= when there were no good grounds to justify the increase of the figure of Kshs. 21,350/= .***

- ***The learned Judge erred in law in ordering the appellant to pay a monthly stipend of Kshs. 21,350/= when he is a laboratory technician earning a monthly salary of Kshs. 13,000/= as of the year 2001 and who has another wife to maintain and other children to educate. sic***

- ***The learned Judge erred in law in not addressing himself at all to the statutory rule of the respondents' mother and her earnings before arriving at the figure of Kshs. 21,350/=. sic***

7. Mr. Gikonyo, learned counsel for the appellant, argued that a consent order could only be set aside

under the law by the parties. The High Court was *functus officio* and therefore could not reopen the appeal. According to Mr. Gikonyo, the learned Judge erred in relying on ***Section 100*** of the ***Children Act*** to re-open the appeal and vary the consent decree. This is because the said provision of law was limited to parental agreements and not decrees. He submitted that the application dated 25th June, 2012 was ***res-judicata.*** Mr. Gikonyo argued that the learned Judge failed to take into account the appellant's ability to pay the amount ordered. He urged this Court to allow the appeal.

8. Mr. Macharia, learned counsel for the respondents, in opposing the appeal, submitted that the appellant had not sought leave of the court before filing the appeal herein and this appeal is incompetent. Without prejudice to the aforementioned submission, he argued that ***Section 99*** of the ***Children Act*** grants the court jurisdiction to set aside and vary orders made under the Act. He also argued that the High Court had inherent powers to set aside the consent orders. According to Mr. Macharia, the application dated 25th June, 2012 was not *res-judicata* since the application in the Children court was struck out on a technicality. He submitted that the appellant never disclosed his income at the trial court; and the amount granted as maintenance was reasonable.
9. In response, Mr. Gikonyo, argued that the appeal was properly before this Court. The High Court was the court of first instance in respect of the ruling subject of this appeal thus under ***Order 43*** of the ***Civil Procedure Rules*** leave to appeal was not required.
10. We have considered the record, submissions by counsel and the law. At this juncture it is imperative to consider whether the appeal herein is properly before us. ***Regulation 21*** of the ***Children (Practice & Procedure Parental Responsibility) Regulations 2002 (L.N 74/2002)*** provides that all appeals in respect of parental responsibility (Part III of the Children Act) are governed by the provisions of the ***Civil Procedure Rules***. Pursuant to ***Order 43*** of the ***Civil Procedure Rules*** the appeal herein lies as of right being an appeal against a ruling on an application for review. Consequently, we find that the appeal herein is properly before us.
11. It is not in dispute that the respondents had filed an application dated 21st January, 2011 in the Children Court seeking review of the orders granted by the said court on 3rd May, 2006. The said application was subsequently struck out by the subordinate court. It is that application which forms the basis of the appellant's contention that the application for review dated 25th June, 2012 in the High Court was *res-judicata*. This Court in ***Kenya Hotel Properties Ltd. –vs- Willisden Investments Ltd. – Civil Application No. 24 of 2012*** expressed itself as follows:-

> ***"Res-judicata is a doctrine of law founded on public policy and aimed at ensuring two objectives, namely, there must be finality to litigation and that the parties who have gone through litigation should not be subjected to the same tests."***

This Court further stated,

> ***" …See also Willie –vs- Michuki & 2 others (2004) KLR 357 wherein the court reiterated the afore set out principles and stressed that for the doctrine of res-judicata to apply three basic conditions must be satisfied namely, that there was a former proceeding in which the same parties as in the subsequent suit litigated, the matter in issue in the subsequent suit must have been directly and substantially in issue in the former suit and lastly, that a court competent to try it had heard and finally decided the matter in controversy between the parties in the former suit."***

12. In this case, the respondents filed the application dated 21st January, 2011 in the Children Court seeking review of the order dated 3rd May, 2006 wherein the appellant had been directed to pay a monthly maintenance of Kshs. 11,700/= . The subsequent application in the High Court sought review of the consent order dated 16th March, 2009. Therefore, the matter in issue in the application in the Children's court was the Order dated 3rd May, 2006 while the subject in the High Court application was the order dated 16th March, 2009.
13. Further, the Children Court struck out the application for review on the ground that the order dated 3rd May, 2006 had ceased to exist following the consent order in the High Court. We are of the considered view that determination of the said application was not based on merit. In

Wanguhu –vs- Kania (1987) KLR 54, this Court observed that:-

> ***" …the first application was not decided upon its merits. It was dismissed after an application for adjournment was refused and neither side was heard upon the merits. It was therefore not res-judicata. A matter is not res-judicata if it was not decided upon its merit."***

Based on the foregoing, we find that the application dated 25th June, 2012 for review filed in the High Court was not *res judicata.*

14. The main issue in this appeal was whether the High Court had jurisdiction to review the consent order. In ***Samuel Wambugu Mwangi –vs- Othaya Boys' High School – Civil Appeal No. 7 of 2014,*** this Court held,

> ***Circumstances under which a consent judgment may be interfered with were considered in the case of Brooke Bond Liebig (T) Limited – vs- Maliya (1975) E.A. 266. It was stated that 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 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 misapprehension or ignorance of material facts or in general for a reason which would enable the court to set aside an agreement. Emphasis added***

15. Besides fraud or misrepresentation, a consent order can be reviewed on grounds which the court deems reasonable. This position is also reiterated under ***Section 100*** of the ***Children Act*** which provides:-

> ***"Where the parents, guardians or custodians of a child have entered into an agreement whether oral or written in respect of the maintenance of the child the court may, upon application, vary the terms of the agreement if it is satisfied that such variation is reasonable and in the best interest of the child."***

Contrary to the appellant's position, we find that ***Section 100*** of the ***Children Act*** is not limited to parental agreements but also relates to all agreements by parties on maintenance of a child made in and out of court.

16. We concur with the following findings of the learned Judge:-

> ***"In my view, the entire case was compromised by consent. In an ideal situation and in other cases, the court becomes functus officio upon adopting the order as its decision. The law does not permit the court to re-open the matter. However, in respect of maintenance and provision for children, the court does not become functus officio."***

Pursuant to ***Article 53(2)*** of the ***Constitution*** and ***Section 4 (2)*** of the ***Children Act*** all Courts are enjoined before making any decision to treat the interests of the child as first and paramount.

17. The consent order was made on 16th March, 2009 and the application dated 25th June, 2012 was made 3 years later. We take judicial notice that the cost of living has been going up every year and in our view what was sufficient to maintain the child three years ago could not possibly suffice when the application for review was made. We find that it would be in violation of the respondents rights to parental care under ***Article 53 (1) (e)*** of the ***Constitution*** if the consent order of a monthly maintenance of Kshs. 8,000/= was maintained until they attained the age of majority.
18. We cannot help but note that the monthly expenditure of the respondents as set out in the application was not disputed by the appellant nor did the appellant provide an affidavit of means.

We concur with the following observations by the learned Judge:-

> ***"In paragraph 10 of the applicant's supporting affidavit, sworn on 25th June, 2012 the applicant gave a figure of Kshs. 42,700/= as the monthly expenditure on the children. I think the variation of the monthly expenditure provided in the year 2006 then 2011 and 2012 appear to be reasonable. I find the figure suggested to be a fair representation of the changing trend in the cost of living."***

By virtue ***Section 24(1)*** of the ***Children Act*** both the appellant and the respondents' mother have a joint parental responsibility over the minor respondents. Consequently, they both have to contribute towards the maintenance of the respondents. On the issue of the appellant's ability to pay, we concur with the learned Judge that the appellant neither filed an affidavit of means nor disclosed his income. We are also of the considered view that the appellant was not earning the income of Kshs. 13,000/= when the application for review was made. There is uncontroverted evidence from the record that the appellant was a laboratory technician earning an income of Kshs. 13,000/= in 2001. The appellant's income is bound to have gone up up substantially as he was promoted to the rank of a senior technician over the years. We find that the learned Judge correctly apportioned the respondents expenditure between the appellant and their mother by ordering the appellant pay a monthly maintenance of Kshs. 21,350/=.

19. The upshot of the foregoing is that we see no reason to interfere with the review of the maintenance order and dismiss the appeal. The appellant shall pay the costs of this appeal.

Dated and delivered at Nyeri this 1st day of October, 2014.

ALNASHIR VISRAM

JUDGE OF APPEAL

MARTHA KOOME

JUDGE OF APPEAL

J. OTIENO- ODEK

JUDGE OF APPEAL

I certify that this is a

true copy of the original.

DEPUTY REGISTRAR