NKG v SGB (Family Appeal E035 of 2022)
[2024] KEHC 5658 (KLR) (22 March 2024) (Judgment)

Neutral citation: [2024] KEHC 5658 (KLR)

REPUBLIC OF KENYA

IN THE HIGH COURT AT MOMBASA

FAMILY APPEAL E035 OF 2022

G MUTAI, J

MARCH 22, 2024

BETWEEN

NKG ..... APPELLANT

AND

SGB ..... RESPONDENT

(Being an appeal from the ruling and order of the Hon. Lucy Khahendi Sindani delivered in Mombasa on 19th October 2022, in Tononoka Children Court Case No. MCCC.255 of 2018; NKG v SGB)

JUDGMENT

1. The Appellant herein moved the Children's Court Tononoka vide a plaint filed on 31st July 2018 seeking custody and maintenance orders for the minor herein against the Respondent and an injunction order restraining the Respondent from removing the minor from her custody. She cited cruelty and neglect on the part of the Respondent. In his defence, the Respondent denied the contents of the plaint.

2. The court issued interim orders on maintenance vide which the Respondent was required to pay Kes.100,000/- per month. The said amount was later scaled down to Kes.25,000/-. When the matter came for mention on 27th January 2021, the Respondent raised an objection to the choice of school the Appellant had made. The court found it best to have the Respondent pay school fees in the child's school pending the hearing and determination of the main suit when the type of school would be determined.

3. The trial court noted that the issue of school fee payment and the curriculum chosen by the Appellant was the bone of contention. On 29th January 2021, the Respondent raised the issue of the type of school chosen by the Appellant, stating that it was very expensive and sought to have the child transferred to a cheaper school. The same was denied as no formal application had been filed, and the Respondent had

school fees arrears. On 25th March 2021, the Respondent filed a formal application. The court directed that the same be served and dealt with in the main suit. The Appellant then testified. Due to several adjournments and also as a result of the failure by the Respondent to give evidence, the court directed the parties to go for court-annexed mediation, which resulted in the partial mediation agreement dated 9th June 2021. The Respondent filed an application dated 27th September 2022 vide which he sought to transfer the child to an affordable school and suggested MM Shah & MV Shah Academy.

4. In considering the issues raised, the trial relied on Section 119 of the Children's Act. It stated that it had jurisdiction to review, suspend, vary and discharge its own orders according to the circumstances of each case.

5. In determining the issue of the type of school and curriculum for the child, the court stated that in as much as there is a need for uniformity in the curriculum offered when changing schools, it is good to consider the capability of the parent paying school fees. It was noted by the Court that the Respondent had suggested MM Shah & MV Shah Academy, which is a considerably good and reputable school. However, it does not offer the same system as what the child gets at Mombasa Academy. The Court noted that the Respondent had shown that his other children attended the same school and that he was ready to pay school fees there.

6. The court then allowed the Respondent to transfer the child to MM Shah and MV Shah Academy and pay school fees and school-related expenses. If the Appellant insisted on the child remaining in Mombasa Academy, the Court directed that the Respondent would pay school fees equivalent to that of MM Shah and MV Shah Academy, while the Appellant would pay the rest.

7. Dissatisfied with the ruling of the trial court, the Appellant filed the appeal herein, which is based on 15 grounds, namely:-

    a. The learned magistrate had no jurisdiction or power to set aside or vary a consent contained in a mediation agreement that had been ordered by the court;

    b. The learned magistrate having directed the parties to file the mediation for adoption by the court erred in law and in fact by adopting only part of the agreement and setting aside or rejecting the other part;

    c. The learned magistrate having held on multiple occasions that the choice of the school and the curriculum for the minor will be determined upon the full hearing erred in law and in fact by determining both issues on her ruling appealed against;

    d. The learned magistrate erred in law and in fact by failing to consider the evidence and submissions by the Appellant;

    e. The learned magistrate erred in law and in fact by delivering a ruling that was biased against the Appellant and that favoured the Respondent against the weight of the evidence and the law.

    f. The learned magistrate erred in law and in fact by determining the application on the basis of what she referred to as "All Year Curriculum" (AYC)a curriculum that does not exist in Kenya and that had not been agreed upon by the parties;

    g. By basing her decision on what she refers to as AYC, the learned magistrate appears not to have read the mediation agreement;

    h. The learned magistrate erred in law and in fact by allowing the respondent to change the minor's school and curriculum mid-term;

i. The learned magistrate erred in law and in fact by violating the doctrine of res judicata by determining the issue of the school and curriculum that had been reserved for full hearing;

j. The learned magistrate erred in law and in fact in failing to consider that it would not be in the interest of the child to change the school and the curriculum at the same time and would be traumatic to the child and negatively impact his growth and development;

k. The learned magistrate in law and in fact by placing the interests of the Respondent above those of the child;

l. The learned magistrate erred in law and in fact in failing to consider that before the Respondent and his advocate signed the mediation agreement were aware of the fees chargeable under the early year foundation program;

m. The learned magistrate erred in law and in fact on basing her decision on the allegation of the respondent that he is paying school fees for other 8 children without evidence in that regard;

n. The learned magistrate erred in law and in fact in failing to consider that the Respondent has 4 revenue streams including a money lending business and his income as a member of County Assembly;

o. The learned magistrate erred in law and in fact by mis-construing the mediation agreement and mis-applying Section 119 of the Children's Act.

8. The appeal was canvassed by way of written submissions.

9. The Appellant, through her advocates Kinyua Muyaa & Co. Advocates, filed her written submissions dated 24th April 2023. Counsel submitted that mediation as a form of dispute resolution is provided for under Article 159 (2) of *the Constitution* and that it is a result of court-annexed mediation that parties voluntarily and willingly entered into a partial mediation agreement dated 9th June 2022 on the twin issues of the curriculum for the child and the respondent's access to the child.

10. Counsel referred to page 409 of the record of appeal and submitted that the learned trial magistrate amended the mediation agreement by imposing her own terms, something which was not within the jurisdiction of the court. The learned magistrate characterized the consent as her own decision and proceeded to purport to review, vary, and modify the mediation agreement under Section 119 of the Children's Act. It was urged that mediation agreement is not different from a consent and is subject to the same considerations and thus the ruling by the learned magistrate was null and void.

11. Counsel further referred the court to page 411 of the Record of Appeal, where the learned magistrate purported to vary the curriculum to CBC. It was urged that the learned magistrate allowed the child to be transferred to MM Shah & MV Shah Academy and for the Respondent to continue paying school fees and school-related expenses.

12. Counsel for the Appellant submitted that it would be traumatic to transfer the child from the school he has known to a new school with a wholly different curriculum and environment. Further, the magistrate determined the issue with finality before the conclusion of the main suit and without recalling the Appellant to comment on it. It was urged that there was a violation of Articles 2 5(c) and 50 (1) of *the Constitution*.

13. In conclusion counsel urged the court to set aside the ruling of the learned magistrate with costs to the Appellant.

14. The Respondent, through his advocates, Shabaan Associates LLP, filed his written submissions dated 30th May 2023. Counsel submitted that the trial court had jurisdiction to amend the mediation agreement under Section 119 of the Children's Act. Further, a consent judgement/order has a contractual effect and can only be set aside on grounds which would justify setting a contract aside, as stated in the case of Flora W.Wasike vs Destimo Wamboko (1982-88) 1 KAR 625. The delay by the Respondent in scouting a school for the child necessitated the upholding of the best interest of a child by the trial court, as the postponement of the same was posing a threat to the child's right to education. The court acted within its jurisdiction as provided for under Section 116 of the Children's Act and Section 119 of the said Act.

15. On whether the mediation agreement was varied, counsel submitted that the court did not deviate from it but upheld it to the extent of the best interest of a child.

16. On whether the orders were made in the best interest of the child, counsel submitted that the decision of the Court was in the best interest of the child as the child was in the verge of being expelled from school for lack of payment of school fees and the same could not wait for the determination of the main suit as it would have been prejudicial to the child and an infringement to his right to education.

17. Counsel further submitted that in making her decision, the learned magistrate considered the financial capacity of the Respondent to meet his obligation, which was also raised in the social inquiry reports of 14th February 2020 and 15th October 2020. To attain the best interest of the child, as held by the trial court, called for either the Respondent to transfer the child to MM Shah & MV Shah School or for the child to remain in Mombasa Academy and to have the Appellant top up the rest.

18. Counsel submitted that parental responsibility is a shared responsibility and that it should not be too much for one family provider to bear.

19. On whether the doctrine of res judicata applies in this case, counsel submitted that the Appellant did not satisfy the conditions set out in Section 7 of the *Civil Procedure Act*.

20. In conclusion counsel urged the court to dismiss the appeal with costs.

21. I have considered the appeal and the rival submissions by both counsels. In my view the issues that emerge for determination are:-

    a. Whether the learned magistrate erred in law and in fact by varying the mediation agreement; and

    b. Whether the learned magistrate erred in law and in fact by making a determination on the choice of school and type of curriculum for the child pending conclusion of the main suit.

22. Since the two issues are intertwined, I will deal with them together. I must be guided at all times by the mantra that the best interest of a child principle is paramount when dealing with children matters.

23. Article 53 (2) of *the Constitution* provides:

> " A child's best interests are of paramount importance in every matter concerning the child."

24. Section 8(1) of the Children's Act 2022 provides;

    a. In all actions concerning children, whether undertaken by public or private social welfare institutions, courts of law, administrative authorities or legislative bodies—

        a. the best interests of the child shall be the primary consideration;

b. the best interests of the child shall include, but shall not be limited to the considerations set out in the First Schedule.

25. The First Schedule of the Children's Act 2022 lists down the considerations to be taken into account when ascertaining what is in the best interest of a child:-

1. The age, maturity, stage of development, gender, background and any other relevant characteristic of the child.
2. Distinct special needs (if any) arising from chronic ailment or disability.
3. The relationship of the child with the child's parent(s) and/or guardian(s) and any other persons who may significantly affect the child's welfare.
4. The preference of the child, if old enough to express a meaningful preference.
5. The duration and adequacy of the child's current living arrangements and the desirability of maintaining continuity.
6. The stability of any proposed living arrangements for the child;
7. The motivation of the parties involved and their capacities to give the child love, affection and guidance.
8. The child's adjustment to the child's present home, school and community.
9. The capacity of each parent or guardian to allow and encourage frequent and continuing contact between the child and the other parent and/or guardian(s), including physical access.
10. The capacity of each parent and/or guardian(s) to cooperate or to learn to cooperate in child care.
11. Methods for assisting parental and/or guardian cooperation and resolving disputes and each parent's/guardian's willingness to use those methods.
12. The effect on the child if one parent/guardian has sole authority over the child's upbringing.
13. The existence of domestic abuse between the parents/guardian(s), in the past or currently, and how that abuse affects the emotional stability and physical safety of the child.
14. The existence of any history of child abuse by a parent and/or guardian(s); or anyone else residing in the same dwelling as the child.
15. Where the child is under one year of age, whether the child is being breast-fed.
16. The existence of a parent's or guardian(s) conviction for a sex offense or a sexually violent offense under the *Sexual Offences Act*.
17. Where there is a person residing with a parent or guardian, whether that person—
    a. been convicted of a crime under this Act, the *Sexual Offences Act*, the Penal Code, or any other legislation.
    b. has been adjudicated of a juvenile offence which, if the person had been an adult at the time of the offence, the person would have been convicted of a felony.
18. Any other factor which may have a direct or indirect effect on the physical and psychological well-being of the child.

26. The appellant's argument is that the court did not have the power to vary the mediation agreement by the parties. In their 1st partial mediation agreement dated 9th June 2022 parties agreed that;

    a. That the parties will obtain school fees structure in a cheaper school provided it has an early year foundation program curriculum which is in the child's current school. The outcome will be presented on 17th June 2022 during the next mediation session;

    b. That Samir Gulamabbass Baloo will have supervised visitation to the child every Saturday, commencing 2.30pm up to 4.30pm;

    c. That Noreen Gulam will ensure the child is dropped at City Mall for the supervised visitation;

    d. That the child will be accompanied by the mother, Noreen Kosar Gulam and/or her parents and siblings;

    e. That the father, Samir Gulamabbass Baloo will visit the child with his brother Imran Baloo.

27. In making her orders the learned magistrate relied on Section 119 of the Children's Act which provides;

    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.

    Section 116 provides;

    1. A maintenance order requiring financial provision to be made through periodic payments shall commence on the date of the application, or on such later date as the Court may direct.

    2. An order under subsection (1) shall remain in force until the child's eighteenth birthday subject to the provisions of section 111.

    3. The Court may review the order for periodic payment upon—

        a. the death of the person liable to make the periodic payment;

        b. significant change of circumstances of either parent or guardian, provided that the change is not detrimental to the best interest of the child.

28. The court in the case of SNI vs AOF [2020] eKLR quoted the case of Frank Phipps & Pearl Phipps v Harold Morrison SCCA 86 of 2008 where Harris JA stated:

    " As a general rule, an order obtained by the consent of the parties is binding. It remains valid and subsisting until set aside by fresh proceedings brought for that purpose. Kinch v Walcott and Others {1929} A.C. 482 "The bringing of fresh proceedings would normally be guided on the obtaining of the consent order by fraud, mistake or misrepresentation."

Wildung v Sanderson {1897} 2 CL 534:

> " A consent Judgment or order is meant to be the formal result and expression of an agreement already arrived at by the parties to the proceedings embodied in an order of the Court. The fact of its being so expressed puts the parties in a different position from the position of those who have simply entered into an ordinary agreement. It is of course, enforceable while it stands, and a party affected by it cannot if he concludes, he is entitled to relief, simply wait until it is sought to be enforced against him, and then raised by way of defence. The matters in respect of which he desires to be relieved. He must, when he has completed obey it, unless and until he can get it set aside in proceedings duly constituted for this purpose."

29. Further in the case of Intercountries Importers and Exporters Limited v Teleposta Pension Scheme Registered Trustees & 5 others [2019] eKLR the court stated,

> " The principles that appertain to setting aside of a consent orders are well established in a line of cases including Brooke Bond Liebig vs Mallya (1975) EA 266 where 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."

And in the case of Flora N. Wasike vs Destimo Wamboko [1988] eKLR Hancox JA cited Setton on Judgments and orders (7th edition) vol 1 page 124, and reiterated that;

> " 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 general for a reason which would enable a court set aside an agreement."

Essentially, the above cited authorities are clear that a consent Order will only be set aside if it can be demonstrated that it was procured through fraud, non-disclosure of material facts or mistake or for a reason which would enable a court set it aside."

30. My understanding of this matter, the relevant laws, and the case law is that the consent order was still valid at the time the ruling was delivered and that the learned magistrate did not have the power to vary it.

31. In my view, changing the curriculum that the child was studying would have a deleterious effect on the minor and wasn't a decision that could be made lightly as the trial court did. At worst it could only be done once the trial was concluded.

32. The sections that the learned magistrate relied upon, in her ruling, in any event, govern financial provisions.

33. Lastly it would appear to me that the trial court based its decision on the convenience of the Respondent and not that of the child. Insufficient heed was placed on the fact that the Respondent delayed the trial and made the conclusion of the case difficult.

34. Based on the foregoing it is my finding that the learned magistrate erred in law and in fact by varying the partial mediation agreement dated 9th June 2022 signed by the parties and their respective advocates.

35. The upshot of the foregoing is that the appeal has merit. The same is allowed. The ruling of the trial court dated 19th October 2022 permitting the Respondent to transfer the child to MM Shah & MV Shah Academy and for the child to study under the CBC Program is set aside. The child shall continue studying at Mombasa Academy pending the conclusion of the hearing of this matter. The cost of such education will be borne by the Respondent. The Appellant will, however, make up the difference between what is payable at MM Shah & MV Shah Academy and what is due at Mombasa Academy.

36. With a view to bringing this protracted matter to a close I order that the suit be heard and determined by the Children Court within 90 days of the date hereof.

37. This being a children's matter, I make no orders as to costs.

38. Orders accordingly.

DATED AND SIGNED AT MOMBASA THIS 22ND DAY OF MARCH 2024

GREGORY MUTAI

JUDGE

In the presence of:-

Mr. Muthuri, holding brief for Ms. Muyaa, for the Appellant;

Ms Odhiambo, holding brief for Mr Masake, for the Respondent; and

Arthur – Court Assistant.