



**NM v MWW (Civil Appeal E013 of 2022)  
[2024] KEHC 7651 (KLR) (Family) (27 June 2024) (Judgment)**

Neutral citation: [2024] KEHC 7651 (KLR)

**REPUBLIC OF KENYA  
IN THE HIGH COURT AT NAIROBI (MILIMANI LAW COURTS)  
FAMILY  
CIVIL APPEAL E013 OF 2022  
HK CHEMITEI, J  
JUNE 27, 2024**

**BETWEEN**

**NM ..... APPELLANT**

**AND**

**MWW ..... RESPONDENT**

**JUDGMENT**

1. This judgement relates to the appeal dated 16<sup>th</sup> December, 2022 filed by NM the Appellant based on the following grounds as contained in the memorandum of appeal:-
  - (a) The Learned Magistrate erred in law and in fact by dismissing the Appellant’s Application dated 28<sup>th</sup> September, 2018 under Certificate of Urgency seeking orders to compel the Respondent to transfer the minor to a school agreeable and affordable between the Parties, alternatively order the Respondent to pay the school fees and school related expenses at [particulars withheld] School until Parties agree on a mutual school.
  - (b) The Learned Magistrate erred in law and fact in contradicting the facts in issue in the Children’s Cause No. 1527 of 2018 Nairobi and/ or madereference to different matter when delivering the Ruling thus the said Ruling is erroneous and/ or defective in its entirety.
  - (c) The Learned Magistrate erred in law and in fact in failing to address issues related to the Children Cause No. 1527 of 2018 Nairobi at all or the legal principles relating to the said Application and the said suit.
  - (d) The Learned Magistrate erred in law and in fact in not taking into consideration the Appellant’s pertinent issues raised in the Supporting and Supplementary Affidavit or his submissions or at all.



- (e) The Learned Magistrate erred in law and in fact by failing to consider the Appellant’s evidence and/ or the urgency of the matter while fully accepting the Respondent’s evidence.
  - (f) The Learned Magistrate erred in law and in fact by failing to give basis for the award made in respect of costs and damages.
2. When the matter came up for directions the court directed that the same be heard by way of written submissions.
  3. Both parties have filed their submissions and as usual pulling on the opposite directions. The emphasis that runs across the same is the paramount interest of the child.
  4. The emphasis in particular is on Article 53(2) of the Constitution as well as section 8(1) and (2) of the Children’s Act which states;

“A child’s best interests are of paramount importance in every matter concerning the child.”

and

Section 8 (1) and (2) of the Children’s Act, 2022 which provide as follows:

- (1) In all actions concerning children, whether undertaken by public or private social welfare institutions, court 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.
- (2) All judicial and administrative institutions, and all persons acting in the name of such institutions, when exercising any powers conferred under this Act or any other written law, shall treat the interests of the child as the first and paramount consideration to the extent that this is consistent with adopting a course of action calculated to-
  - (a) safeguard and promote the rights and welfare of the child;
  - (b) conserve and promote the welfare of the child; and
  - (c) secure for child such guidance and correction as is necessary for the welfare of the child, and in the public interest.”

## Background

5. This matter relates to the ruling delivered on 17<sup>th</sup> December, 2021 by Hon. C. C. Oluoch (CM) in Nairobi Children’s Case No. 1527 of 2018 where it was determined as follows:

“(5) I have considered the rival arguments of counsel of the parties. A perusal of the record shows that the parties reached a compromise that culminated in recording a consent on 5<sup>th</sup> December, 2019. One of the responsibilities bestowed upon the Applicant was payment of school fees at a school to be agreed upon by the parties. Court then set down the main suit for hearing on 30<sup>th</sup> January, 2020. The matter was adjourned to 20<sup>th</sup> February, 2020 but it did not proceed. It was again set down for hearing on 26<sup>th</sup> March, 2020. On



26<sup>th</sup> February, 2020, the Respondent moved the court for a Notice to Show Cause due to non – payment of school fees. There was a further consent on 12<sup>th</sup> November, 2020 when the parties recorded a further consent to settle the entire suit. The parties consented to among other things, payment of school fees and school related expenses. The school that the child was attending then was not in issue and there was no condition that the parties agree on one or transfer of the child at any given time. The consent was adopted as a judgment of the court and in my considered view, overrides any other orders that were in force pending determination of the case. It is therefore not correct, as the Applicant averred in paragraph 3 of the supporting affidavit, that the school was to be agreed on by the parties. If he wished to have the child transferred at any given time, he should have ensured that such a clause was included in the consent judgment.

- (6) I note that in this application, the Applicant spoke of transferring the child pending the hearing and determination of the suit. To set the record straight, this suit was determined when the consent was adopted as a judgment of the court on 12<sup>th</sup> November, 2020. What is left is enforcement of the resultant decree. I have no basis whatsoever to rewrite the consent and include any condition. The only option available for the Applicant is an application for variation of the orders under Section 100 of the *Children’s Act*.
- (7) In sum, I find no merit in the application and I dismiss it with no order as to costs. The Applicant shall continue to pay school fees for the minor at [particulars withheld] School.”

### **Analysis and Determination**

6. I have carefully considered the appeal dated 17<sup>th</sup> December, 2021 and rival written submissions by both parties.
7. I think in my view the main contention in this appeal has to do with the terms of the said consent. In *Cheruiyot v Korir* (Civil Appeal 131 of 2017) [2021] KECA 222 (KLR) (5 November 2021) (Judgment) the court stated as follows regarding consents:

“Did the Appellant’s application meet the threshold for setting aside a consent order/ judgment to entitle us to interfere with the learned Judge’s orders? We revisit our earlier decisions on this point. This Court in *Kuwinda Rurinja Co. Limited v Kuwinda Holdings Limited & 13 others* [2019] eKLR, Civil Appeal No. 8 of 2003, reiterated and buttressed the law as set out earlier as follows:- In the seminal case of *Flora N. Wasike v. Destino Wamboko* [1988] eKLR this 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: see the decision of this Court in *J M Mwakio v. Kenya Commercial Bank Ltd* Civil Appeals 28 of 1982 and 69 of 1983.

In *Purcell v. FC Trigell Ltd* [1970] 2 All ER 671, 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...”In *Kenya Commercial Bank Ltd v. Specialised Engineering Co. Ltd* [1982] KLR 485, Harris, J correctly held, *inter alia*, that -

“ 1. A consent order entered into by counsel is binding on all parties to the proceedings and cannot be set aside or varied unless it is proved that it was obtained by fraud or collusion or by an agreement contrary to the policy of the court or where the consent was given without sufficient material facts or in misapprehension or ignorance of such facts in general for a reason which would enable the court to set aside an agreement.

2. A duly instructed advocate has an implied general authority to compromise and settle the action and the client cannot avail himself of any limitation by him of the implied authority to his advocate unless such limitation was brought to the notice of the other side.” (Emphasis supplied) See also *Contractors Ltd v. Margaret Oparanya* [2004] eKLR.

30. In a more recent decision in *Intercountries Importers and Exporters Limited v. Teleposta Pension Scheme Registered Trustees & 5 others* [2019] eKLR, this Court pronounced itself as follows:-

“ 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...” (Emphasis Ours)”

8. In light of the foregoing, I have relooked at the consent dated 10<sup>th</sup> August 2021 and the relevant paragraph 2 states that

“ That the defendant shall pay the minors school fees and related expenses including transport where necessary.”

9. Contrary to the findings by the trial court there was no indication in the consent of the school in which the minor was enrolled into. There was nothing in the consent which showed that the child was schooling at [particulars withheld] or [particulars withheld] school [particulars withheld] or any other school.

10. The application by the appellant in my view was therefore not necessarily altering the terms of the consent. If the child was to remain at [particulars withheld] school or kindergarten, then there was nothing difficult for the parties to have agreed.

11. Neither was it seeking to vary the terms of the consent under the provisions of Section 100 which is now Section 120 of the *Children’s Act* as submitted by the respondent. I state so because there was no indication of which school the child was to be enrolled.

12. The Applicant’s application was therefore merited only to the extent of where the child was to be enrolled but not shying away from paying the necessary fees or abrogating the terms of the consent.

13. I do not think that the application was in essence running away from the consent but was actually clarifying the terms of the consent and specifically giving effect to paragraph 2 of the consent.



14. It was therefore necessary as a parent who had agreed to meet the child's tuition to have a hand in the school in which the minor was to be and not for the respondent to take a unilateral decision.
15. I think also that the issues of whether he could afford or not the tuition at [particulars withheld] or [particulars withheld] schools Woodley was for both parties to agree and in the event of such disagreement the court would have been approached to intervene.
16. In light of my above observations I find that the Appellant's application was not touching the terms of the consent but instead giving effect to prayer (2). The minor's parents have every right to determine where he was to be schooled. It is a joint venture. The Respondent and by extension the court got it all wrong.
17. In the premises I find the appeal meritorious and direct as hereunder:-
  - (a) The Appellant and the Respondent shall jointly determine the school which the minor ought to attend and in the event of any disagreement they are at liberty to approach the trial court.
  - (b) costs shall be in the cause.

**DATED SIGNED AND DELIVERED AT NAIROBI VIA VIDEO LINK THIS 27<sup>TH</sup> DAY OF JUNE 2024**

**H K CHEMITEL.**

**JUDGE.**

