THE REPUBLIC OF UGANDA

IN THE HIGH COURT OF UGANDA AT KAMPALA

(FAMILY DIVISION)

MISC. APPLICATION NO.53 OF 2018

ARISING FROM DIVORCE CAUSE NO. 53 OF 2017

ESTERI AKANDWANAHO NDIZEYE:: APPLICANT

VERSUS

ROLAND NDIZEYE SEKAZIGA :: RESPONDENT

BEFORE: HON. DR. JUSTICE FLAVIAN ZEIJA

RULING

1.0 Introduction

The applicant brought the instant application under Section 33 of Judicature Act Cap 13, Sections 29 & 30 of the Divorce Act Cap. 249, Section 82, 98 of the Civil Procedure Act Cap 71 and Order 46 rule 1(b) and Rule 8 CPR seeking this Court to review the joint custody order issued in a divorce settlement and grant the applicant sole custody of the children and the respondent be granted a right of access to the children. The application further seeks a restraining order against the respondent from further communication to the petitioner other than on the agreed forms of communication regarding the welfare of the children. It further seeks that costs of the application be granted to the applicant.

The grounds of the application are set out in the applicant's affidavit in support of the application and supplementary affidavit but briefly are that;

1. ***The applicant and respondent are now divorced***
2. ***This honorable court granted joint custody of the children to both parties***
3. ***The respondent has on several occasions contravened the agreed terms of joint custody by creating ill will towards the applicant and it has had distressing effects on the children hence posing a challenge to joint custody of the children.***
4. ***The children are all girls and are of tender age aged 7 years, 4 years and 2 years respectively, and it would be in their best interest to have consistency in care and sense of home. The applicant/petitioner being their mother is capable and ready to provide for their well being.***
5. ***It is in the interest of the welfare of the children that the order of joint custody of the children be reviewed.***
6. ***The respondent's unreasonable conduct towards the applicant towards their children and the adverse effects of the constant movement between homes were not expected or even contemplated at the time of the consent judgement***
7. ***The children be granted to the applicant with a right of reasonable access to the respondent.***

The applicant avers under paragraph 7 of her affidavit in support of the application that whereas court had issued an arrangement for the joint custody of the children the respondent has on several occasions violated and abused the agreed terms and failed to confer respect to the children by using unbefitting language towards the applicant in their presence. Further that there is always unnecessary tension and fights during the transition of the children from one parent to another. The applicant further demonstrated in her supplementary affidavit that she obtained an interim order on the 21st March 2018 from court which vested custody of the children with her and the respondent having a right of access to the children during the weekend at his father's home in Bugolobi. That when she went to pick the children in the evening after dropping them off the respondent who had refused to greet her, approached her and waved his phone which was playing music over her face and encircled her in the presence

of the children calling her names like *"Majesty'* and *"law breaker"*. Further that when the applicant instructed the children to go in the car he violently protested and roughly grabbed their eldest daughter by the elbows telling her that they will do what the court says. The applicant avers that the incident was stopped by the intervention of the respondent's mother and was able to drive the children home. Due to the respondent's behavior towards the children when they visit him, the applicant is placed in the difficult position of trying to rehabilitate them after every visit. The applicant further avers that the respondent has threatened the registrar who issued the interim order and even attacked her lawyer in court. The respondent is unreliable, unstable in character, deceitful and always changing positions to the detriment of the children. The respondent had implied that he was not going to oppose this application and sent out their consent to the application laying out the terms of the settlement. The applicant sent a counter offer to the respondent and has not received any response to date. The applicant prayed that the respondent should be permitted a single supervised visit to the children in the month to avoid unbecoming conflicts.

In response to the supplementary affidavit the respondent denied all the applicant's allegations and stated that he loves and cares for his children deeply and has not and would never hurt them as alleged by the applicant. That he has been left at the mercy of the applicant to see his children whenever she chooses to comply with the court directives. Further that his lawyers did not draft the proposed consent orders complying with the application but it was in fact the applicant and her lawyers who did so. That the respondent declined the applicant's proposed consent which gave her over 353 days out of 365 days *(97%)* in a year and gave the respondent only 12 days out of 365 days *(3%)* in a year. Respondent stated that it is highly likely and probable that if the applicant is granted sole custody he will be deliberately denied any kind of access and opportunity to take part in the children's lives. The respondent prayed for the application to be denied and court maintains the joint custody order issued on the 6th July 2017 so that each parent spends at least 50% of the time with the children during each of the children's holiday.

2.0 Background

The applicant and respondent were legally married on the 8th August 2009. They were blessed with three daughters all currently under the age of 10 years. On the 3rd April 2017 the applicant filed a divorce petition(Divorce Cause No 36 of 2017) on grounds, *inter-alia*, that the marriage had irretrievably broken down. After several meetings, mediation sessions and consultations, the applicant obtained a decree nisi on the 6th July 2017 and on the same day the parties entered into a consent judgment for the dissolution of their marriage. The consent judgment covered all matters of interest between the parties including property and most importantly custody of the three children. Matters of maintenance of the children were detailed in the agreement and the parties agreed therein to joint custody. On the 15th January 2018 the decree nisi was made absolute. On the 7th February 2018 the applicant filed the instant application seeking for review of the consent agreement and grant of sole custody of the children. The applicant had also filed **MA 54-2018** for an interim order of sole custody which had since being issued in her favor with condition that the respondent be granted access and visitation rights over the children. The respondent contends that since then the applicant has denied him access and visitation rights.

On the 18th September 2018 the applicant filed MA-423-2018 seeking the court to inquire into the soundness of the mind of the respondent. This application has since been dismissed. On the 23rd October 2018 the applicant filed yet another application **MA-511-2018** seeking for variation of the decree absolute by striking out clause 10 of the consent agreement. This application is yet to be determined by this court.

During the hearing of the current application court issued directions for filing submissions. However only counsel for the respondent adhered to the directives and filed their submissions. Nonetheless, as prayed by counsel for the applicant, this court will proceed under Order 17 rule 4 Civil Procedure Rules SI 71-1 and determine the matter in the absence of their submissions. Court orders are not made in vain.

3.0 Representation

The applicant was represented by Apio, Byabazaire, Musanase & Co. Advocates whereas the respondent was represented by Kashillingi, Rugaba & Co. Advocates.

4.0 Issues

1. ***Whether this application raises any grounds for review of the consent judgment?***
2. ***What remedies are available to the parties?***

5.0 Submissions

Counsel for the respondent submitted that a consent judgment can only be varied if it is obtained by; fraud, collusion, an agreement contrary to the policy of court, without material facts, misapprehension, ignorance of material facts or any reason which would enable court set it aside. **See: Ken Group of Companies Ltd Vs. Standard Chartered Bank & 2 ors HCMA 116 OF 2012 (Commercial Court) and A.G and ULC Vs James KAMOGA scca No. 8 of 2004.** Counsel submitted that the applicants' pleadings do not suggest any claims of fraud, collusion or any agreement contrary to the policy of court. Counsel stated that it was clear in the consent agreement that the parties went into extreme detail including but not limited to visitation rights, schedule of visitation of the children, physical custody of the children, nanny for the children, behavior in front of the children among others. That it was clear that the applicant, who was in her right state of mind and well represented by lawyers, who she sought guidance and consultation from, intended to have joint custody of the children and should now not be allowed to change her mind. Counsel submitted that the alleged mistreatment of the children, the alleged aggressive personality of the respondent *(which have not been proved)* are not grounds necessary for review/varying of consent judgments. Counsel stated that the applicant had failed to prove any grounds for review of the consent judgment and prayed for the application to be dismissed with costs and an order compelling the applicant to grant the respondent access to the children.

6.0 Resolution

The law governing setting aside consent judgments is well articulated in the case **Ismail Sunderji Hirani Vs. Noorali Esmail Kassam [1952] EACA 131** the Court of Appeal cited **Seaton on Judgments and Orders 7th Edition Vol 1** where it was held that;

> ***" Prima facie any order made in the presence and with the consent of counsel is binding on all parties 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 misapprehension or in ignorance of material facts or in general for a reason which would enable the court to set aside an agreement"***

See also: Ken Group of Companies Ltd Vs. Standard Chartered Bank & 2 ors HCMA 116 OF 2012 (Commercial Court) and A.G and ULC Vs James KAMOGA SCCA No. 8 of 2004

Consent judgment can only be set aside if it was obtained fraud, collusion, an agreement contrary to the policy of court, or if consent was given without sufficient material facts or in ignorance of material facts.

Counsel for the respondent submitted that all these grounds were not satisfied by the applicant in her pleadings and as such the application lacks merit.

I have read the applicant's pleadings and studied all her documents in evidence. The applicant is not alleging any of the factors which would ordinarily vitiate a consent agreement like the one she entered into. All that the applicant is stating is that since the grant of the order of joint custody, which she reasonably consented to, the respondent's behavior towards her and the children has drastically changed for the worst which has warranted her to bring this application seeking sole custody of the children. The applicant's contention is that due to the respondent's ill behavior towards her during the drop offs and picks ups of the children, it has become difficult to adhere to the agreed arrangements in the consent. In essence the applicant is seeking to vary the

consent agreement on ground of change of circumstances. It is my view that change in circumstances can also be a ground to vary a consent agreement relating to the welfare of children.

The applicant alleges that the respondent has been verbally abusive not only towards her but also to her lawyers. On record is a letter from the applicant's lawyers detailing the circumstances under which the respondent allegedly shouted at her violently in the children's presence. The respondent denies the allegations. He states that the applicant has denied him access to his children for three years now and has not been complying with the court orders. Both parties attached numerous email correspondences between themselves and their respect lawyers. I have studied them. I noted that the biggest concern in these communications is with regard to the time when the applicant was supposed to drop and pick up the children. The respondent alleges that the applicant would drop the children late and pick them up early evening and would not allow them to sleep over at his parent's place or would not drop them off at all. That this limited his time to spend with his children and the applicant deliberately defying the court orders. Assumedly it is through this frustration that the respondent had a verbal exchange with the applicant.

It is trite law that in matters of custody of children court is governed by the welfare principle. This is because there is considerable evidence that parental divorce adversely affects the children's lives hence emphasis is placed on the children's need to maintain a relationship with each parent and to reduce conflict. In applying the welfare principle, the court must act in the child's best interests. However, this may put an unduly sanguine gloss on the court's functions. It should be appreciated that the court is not dealing with what is ideal for the child but simply with what is the best that can be done in the circumstances. In the instant case, what is ideal for the children is living and spending time with both of their parents but considering that the parties are divorced and separated, with no hope of reconciliation, court has to find an amicable solution on what can be best done in the circumstances.

Section 3 of the Children Act Cap 59 *(as amended)* provides that;

> *"The welfare of the child shall be of paramount consideration whenever the state, a court, a tribunal, a local authority or any person determines any question in respect to the upbringing of a child, the administration of a child's property, or the application of any income arising from that administration.*
>
> *(2) In all matters relating to a child, whether before a court of law or before any other person, regard shall be had to the general principle that any delay in determining the matter is likely to be prejudicial to the welfare of the child.*
>
> *(3) In determining any question under subsection (1), court or any other person shall have regard to—*
>
> *(a)the ascertainable wishes and feelings of the child concerned, with due regard to his or her age and understanding;*
>
> *(b)the child's physical, emotional and educational needs;*
>
> *(c)the likely effects of any change in the child's circumstances;*
>
> *(d)the child's sex, age, background and any other circumstances relevant in the matter;*
>
> *(e)any harm that the child has suffered or is at the risk of suffering; and*
>
> *(f)where relevant, the capacity of the child's parents, guardian or any other person involved in the care of the child, and in meeting the needs of the child."*

The *locus classicus* on the application of the welfare principle was established in the case of **J Vs. C [1970] AC 668,710**. The significance of **J Vs. C** cannot be over emphasized. It unequivocally established that a child's welfare is so overwhelming important that it can outweigh the interests of even unimpeachable parents in seeking to look after their own child against a stranger.

The parties herein had agreed to jointly take care of their children. It is evident that after the divorce was finalized the parties have, for obvious reasons, developed animosity towards each other. The numerous correspondences on record from the respondent to her lawyers whenever the applicant would not drop the children at the agreed place on time is evidence of a caring and desperate father who desires to spend quality bonding time with his children. The respondent always wrote to his lawyers who in turn communicated to the applicant about the issue of time management. The applicant in her pleadings makes reference to the one incident where the respondent allegedly became verbally violent to her when she went to pick the children. As much as this court strictly arbores such behavior, assuming it is true, the applicant omitted to state precisely what led to that incident. From what is on record the parties' grievance lays on the time arrangement of the pickups and drop-offs. What should be settled is a clear defined layout schedule of time when the children should be dropped off and picked up. Communication between the parties is dead, to state the least. It is impossible for them to agree on anything. I have studied the consent judgment. I appreciate the length and depth at which it went on all the matters relating to the children's maintenance and welfare. However, the consent agreement did not make clear provisions of time but of days. As a matter of fact, in the judgment, the applicant had a superior bargaining position than the respondent. The applicant, as a mother, was given more time to spend with the children than the respondent. Considering that by nature and in a society where men and women engage in different activities on the basis of their gender, children, especially girls like in the instant case, spend more time with their mothers than fathers, it would be quite unfair and unreasonable to grant the applicant's prayer to have the respondent a single supervised visit in a month.

Even if this court was to accede with the applicant's allegations *(which is not the case here)* that the respondent contravened clause *2 (q)* of the consent agreement, is it enough to take away his custodial rights as a father? At this point it is immaterial who drafted the consent to admit this application since both parties are denying the same. What this court is focused on is whether the respondent is responsible enough to be granted custody of this three young daughters. The answer is in the affirmative. The applicant's allegations that the respondent took

the children to a cult church is not backed by any evidence. Even the attached receipts of the school payments by the applicant showing that she was solely catering for the school fees is to me, insufficient to alter the joint custody. They are just receipts from the school with her name indicated as the payer. That would be cured by an application to court to compel respondent to meet part of his responsibility. As a matter of fact, paragraph 4 of the consent judgment reads;

> *"The school fees and other scholastic expenses for the children will be shared equally between the parties.*
>
> *a) The money will be made available before the particular deadlines*

The applicant has not shown how the respondent has not paid his share of the school fees. She only availed what she paid on her part.

I have found no evidence to warrant review of the custody orders. The children in this matter are young girls who need their father to guide and shape them into responsible women in future. An object of the modern law is to encourage the parties to put the past behind them and to begin a new life which is not overshadowed by the relationship which has broken down. In the case of **Minton Vs Minton [1979] 1 ALLER 79 at page 87**, Lord Scarman discussing the *"clean break"* principle held;

> *" The law now encourages spouses to avoid bitterness after family break down and to settle their property and money problems".*

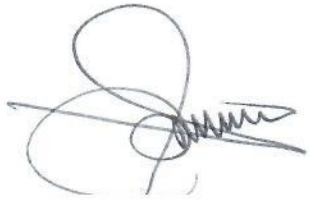
The parties herein are parents to three young girls who need both their love, care and support in their lives. The parties should avoid unnecessary wrangles and conflicts and bear in mind that the children, especially at their tender age, are particularly observant of their surroundings and their parents' behaviors towards each other and this has a long term effect in their future lives. They can easily develop negative attitudes towards the institution of marriage.

At the hearing of this application, counsel for the applicant Hussein Kashillingi did mention that there was an application before the Chief Magistrate of Nakawa seeking for inquiry into the mental state of the respondent. I have since

established that the said application (Misc. Appl. No 423 of 2018) has since been dismissed by the Chief Magistrate. Counsel for the applicant's assertion that I called for the file to be managed in the High Court is unfounded. I have never called for such a file and it would be surprising that I would want to hear a matter before the chief magistrate. Interestingly, it was dismissed in the presence of one of the counsel for the applicant and it is surprising that counsel was not aware.

That said, let us assume that the respondent was actually insane. I do not think that children whose parents are insane do not desire to see their parents. A parent remains a parent whether sick, insane or normal. We cannot love our parents only when they are in good health. Besides, the parties had agreed that the children should be dropped at their paternal grandfather's home where the respondent was meeting them. From the narrative of the applicant, while she accuses the respondent of being rude, she at the same time praises her former mother in law for intervening when the applicant was intent at quarrelling. This cannot be a family where she would fear to drop the kids to be able to see their father. Her former mother in-law passes as a good and caring woman (grandmother) in whose presence the children feel secure. This information is derived from the pleadings of the applicant. In any case, declaring the children's father insane would be detrimental to their future. Very few people would want to marry from a family that has a history of insanity. I do not think that it is in the best interest of the children to pursue that line of litigation. A distinction should be drawn between ordinary outbursts/rage and insanity. Throughout the applicant's divorce pleadings and proceedings, the inquiry into the state of mind of the respondent was never an issue. It appears to me that this was an afterthought and a justification to breach the terms of the consent agreement. The applicant could not have failed to realise that when she was staying with the respondent and only saw that behavior when they were apart.

While each parent would want to manipulate the children to his/her side when they are young, as they grow up, they will congruence on both parents especially when they become adults. When they are getting married, the presence of both



parents is inevitable. It is foolhardy to attempt to make them prefer one parent over the other. In-laws would want to meet both parents together.

In the result, I find no merit in the application and it is accordingly dismissed with the following orders;

1. ***The terms in the consent judgment are upheld***
2. ***The drop off time of the children is not later than 9:00 am and pick time is 6pm***
3. ***The timelines should be strictly adhered to and any party who fails to adhere to them shall be held in contempt.***
4. ***In a bid to avoid confrontation the party dropping the children shall remain at the gate and the nanny accompanying the children escort the children in the house. The same procedure applies during the pick ups.***
5. ***The respondent is hereby granted access to the children without any interference or resistance from the applicant.***
6. ***Due to the nature of the matter I shall make no orders as to costs.***

I so order

Dated this 21st **day of** April **2021**

Flavian Zeija (PhD)

Principal Judge