



REPUBLIC OF KENYA



**Republic v Senior Resident Magistrate, Malindi; AP (Exparte); MWK (Interested Party) (Judicial Review Application 4 of 2021) [2023] KEHC 22655 (KLR) (27 September 2023) (Ruling)**

Neutral citation: [2023] KEHC 22655 (KLR)

**REPUBLIC OF KENYA  
IN THE HIGH COURT AT MALINDI  
JUDICIAL REVIEW APPLICATION 4 OF 2021**

**SM GITHINJI, J**

**SEPTEMBER 27, 2023**

**IN THE MATTER OF: AN APPLICATION BY AP FOR LEAVE TO APPLY FOR AN ORDER OF PROHIBITION AGAINST THE SENIOR RESIDENT MAGISTRATE, MALINDI, PROHIBITING HER FROM HEARING OR DETERMINATION THE NOTICE TO SHOW CAUSE GIVEN ON 14.9.2021 AND FROM HEARING THE MAIN SUIT OR ENFORCING ANY ORDER FOR PAYMENT OF ANY MONEY IN MALINDI CHILDREN'S COURT CASE NO. E2 OF 2020 (MWK VS. AP) AND FOR LEAVE TO APPLY FOR AN ORDER OF CERTIORARI TO BRING TO THIS COURT AND QUASH THE NOTICE TO SHOW CAUSE GIVEN ON 14.9.2021 IN THAT SUIT**

**AND**

**IN THE MATTER OF: ARTICLES 25 (C), 27, 47 & 50 (1) OF THE CONSTITUTION OF KENYA, 2010**

**AND**

**IN THE MATTER OF: SECTION 25 & ORDERS 21 RULE 1 & 3 AND 53 OF THE CIVIL PROCEDURE**

**ACT AND RULES.**

**AND**

**IN THE MATTER OF: SECTIONS 3, 4, 7, 8, 9,10, 11 & 12 OF THE FAIR ADMINISTRATIVE ACTION ACT NO. 4 OF 2015 AND SECTIONS 8 & 9 OF THE LAW REFORM ACT**

**AND**

**IN THE MATTER OF: PK A (MINOR)  
IN THE MATTER OF: MALINDI CHIEF MAGISTRATES  
CHILDREN'S CASE NO. E2 OF 2020  
(MWK VS -AP)**



**BETWEEN**

**REPUBLIC ..... APPLICANT**

**AND**

**SENIOR RESIDENT MAGISTRATE, MALINDI ..... RESPONDENT**

**AND**

**AP ..... EXPARTE**

**AND**

**MWK ..... INTERESTED PARTY**

**RULING**

1. For determination is the application dated 30<sup>th</sup> September, 2021 brought under Articles 10, 23, 25 (c), 40, 47, 48 & 50(1) of the Constitution, Section 8 (2) of the Law Reform Act, Sections 7,8, 9, 11 & 12 of the Fair Administrative Action Act and Order 53 rules 1 and 2 of the Civil Procedure Rules seeking the following orders;
  - a. The Senior Resident Magistrate, Malindi be prohibited from enforcing or continuing to enforce any order or taking any further proceedings in Malindi Chief Magistrate’s Children’s case No. E2 of 2020 (MK v AP).
  - b. An order of Certiorari be issued to bring to this court and to quash the Notice to show Cause given on 14.9.2021 and the Ruling purporting to have been delivered by Hon. D. Wasike, Senior Resident Magistrate on 6.4.2021 in Malindi Chief Magistrate’s Children’s Case No. E2 of 2020.
  - c. Costs of this application and of the application for leave be provided for.
2. In response to the application, the Attorney General filed Grounds of Opposition dated 20<sup>th</sup> January, 2022. The counsel stated that the application is unmerited as the trial court considered the provisions of Article 53 (2) of Constitution in deciding the application affecting the child. That staying the proceedings in the lower court would not be in the best interest of the child. Further, that the application is a sham and is only intended to derail the cause of justice for the child.
3. The Interested Party also opposed the Ex parte Applicant’s Notice of Motion *vide* grounds of opposition dated 25<sup>th</sup> January, 2022. The grounds alluded to are that the application violates the mandatory rules of Regulations made under the Children Act and Article 53 (1) (a)-(e) of the Kenyan Constitution. That the application does not raise any objective nor procedural flaws warranting this honourable court to exercise its supervisory powers and that the trial court rightly applied the provisions of the Children’s Act and Constitution in deciding on the best interests of the child.



## Submissions

### The Ex Parte Applicant's Submissions

4. The *Ex parte* applicant filed submissions on the 16<sup>th</sup> September, 2022 through the firm of Kinyua Muyaa & Co. Advocates.
5. Counsel submitted that the genesis of the matter was the suit filed on 16.9.2020 by the Interested Party in Malindi Children's Case No. E2 of 2022 seeking temporary custody of the child, release of some items, a phone, clothes, utensils, warrants of arrest against the *Exparte* Applicant and seizure of his passport as security and the Child's maintenance at Kshs. 100,000.00 per month.
6. Counsel contended that on 16.12.2020 the Interested Party informed the Respondent that the results of the DNA samples from South Africa were still awaited whereupon the Respondent directed that the matter proceeds for hearing of the main suit on 17.2.2021 and that the DNA results from the Government Chemist be filed. According to counsel, the *Exparte* Applicant brought up many legitimate issues challenging the results both from the Government Chemist and Lancet South Africa.
7. In the substantive motion, counsel addressed the court on two issues;
  1. Whether the *Exparte* Applicant has met the test in Section 7 (2) of the *Fair Administrative Actions Act* and Order 53 of the *Civil Procedure Rules*;
  2. Whether the *Exparte* Applicant has justified the grant of the remedies sought under Sections 11 and 12 of the *Fair Administrative Actions Act* as read with Order 52 of the *Civil Procedure Rules*.
8. On the 1<sup>st</sup> issue, counsel submitted that it was most unreasonable, oppressive, unfair, disproportionate and grossly unprocedural for the Respondent to hear and determine the Notice of Motion application after it had been spent and abandoned in favour of hearing and determining the main suit and in particular determining paternity. It is his submission that the Respondent without hearing any party on the issue of paternity held that the DNA results from the Government Chemist Mombasa and the purported DNA report from Lancet South Africa are conclusive on the issue of paternity. Counsel went ahead to submit that even though the interests of the child are supreme they are subordinate to the inviolable right to a fair trial under Article 25 (C) and fair hearing under Article 50 (1) of *Constitution*.
9. He submitted that proof beyond any reasonable doubt that the Respondent was biased and dealt with the mater in absolute bad faith is seen in the manner in which she subjected the *Exparte* Applicant to a higher standard of proof, thereby demonstrating her bias, favoritism, discrimination and bad faith.
10. On the 2<sup>nd</sup> issue for determination, counsel submitted that the Respondent refused to consider the *Exparte* applicant's case and that she violated the rules of natural justice and that an order of certiorari is well merited. Further that the decision of the Respondent is unprocedural, biased and unreasonable.

### The Interested Party's Submissions

11. The firm of Komora & Associates Advocates on behalf of the Interested Party filed submissions on the 20<sup>th</sup> day of December, 2022.
12. Counsel submitted that staying, quashing and or continuing to prolong the matter shall not be in the best interest of the minor and in fact shall be in violation of the child rights as provided for under Article 53 of *Constitution*. Counsel identified two issues for determination; whether the provisions of Section 9 (2) (3) (4) of the *Fair Administrative Action Act* are inconsistent with Articles 10, 19, 22,



23, 25, 27, 47, 48, 50, 159 and 160 of Constitution and whether the suit against the 1<sup>st</sup> Respondent is sustainable in law.

13. On the 1<sup>st</sup> issue, he relied on Section 6 of the Judicature Act submitting that the only remedy that was available was an appeal and not judicial review. According to him, the *Exparte* applicant was accorded a chance to safeguard the interest of justice and the minor's best interest. In conclusion, he submitted that the Respondent in delivering her ruling did put all factors into consideration and that the Applicant was fully accommodated in participating of the case and as such, counsel urged the court to dismiss the motion dated 30<sup>th</sup> September, 2021.

### **The Respondent's Submissions**

14. Counsel submitted that the present application before this court was unnecessary as the applicant being dissatisfied with the orders of the trial court ought to have appealed against the said orders. He relied on the case of Republic v Principal Magistrate, Voi Law Court; Mwakina (Exparte); Kishamba B Group Ranch & 2 others (Interested parties) (Judicial Review Application 7 of 2021) (2022) KEELC 3001 KLR.
15. PCounsel also relied on the case of Republic v University of Nairobi Ex Parte Jackan Mwanyika Mwasi (2018) eKLR submitting that having perused the applicant's application and submissions they did not come across any wrong doing on the part of the Respondent and that some issues have been raised in an attempt to mislead the court that the trial court was biased.

### **Analysis and Determination**

16. This court has considered the instant application which seeks to challenge the Ruling of the Children's court delivered on 6.4.2021 and the Notice to show cause in execution of the said orders.
17. Having considered the nature of the application, the responses as well as the submissions by the parties, the issues that emerges for determination are:
  - a. Whether the Respondent exercised her statutory duties as envisaged in the law?
  - b. Whether the orders of Judicial Review are available to the applicant?
18. Judicial Review is a special supervisory jurisdiction which is different from both the ordinary (adversarial) litigation between private parties and an appeal (rehearing) on the merits. The question is not whether the Judge disagrees with what the public body has done, but whether there is some recognizable public law wrong that has been committed. A Judicial Review court cannot set aside a decision merely because it believes that the decision was wrong on merits but is only concerned with the lawfulness of the process by which the decision was arrived at and can set it aside only if that process was flawed with illegalities in certain and limited respects.
19. In the case of Municipal Council of Mombasa Vs Republic & Umoja Consultants Ltd (2002) eKLR, the Court of Appeal held that: -

"Judicial review is concerned with the decision making process, not with the merits of the decision itself: the Court would concern itself with such issues as to whether the decision makers had the jurisdiction, whether the persons affected by the decision were heard before it was made and whether in making the decision the decision maker took into account relevant matters or did take into account irrelevant matters...The court should not act as a Court of Appeal over the decider which would involve going into the merits of the decision itself- such as whether there was or there was not sufficient evidence to support the decision."



- 20. In this case, the Applicant has submitted that there is proof beyond any reasonable doubt that the Respondent was biased and dealt with the matter in absolute bad faith as seen in the manner in which she subjected the Ex parte Applicant to a higher standard of proof thereby demonstrating her bias, favoritism, discrimination and bad faith, but I have found no evidence in support of such allegations. In such a case, what the applicant ought to have demonstrated is that the decision violates or threatens to violate the Bill of Rights or other provisions of *Constitution*. In my view, orders of Judicial Review are discretionary and the court would look with disfavor at a party who comes to court in a manner that suggest he is attempting to circumvent clear provisions of the law.
- 21. It then follows that an applicant who brings judicial review proceedings with a view to determining contested matters of facts as is the case here and in effect urges the court to determine the merits of the different versions presented would not have jurisdiction in a judicial review proceeding. The applicant’s submissions address the merits of the decision rendered by the Respondent which clearly demonstrate that the applicant has an issue with the merits and not the decision-making process. It is my view that the applicant has levelled various allegations that concerns facts of the case, which vividly shows that the issue here is about the decision and not the process.
- 22. Going by the material placed before me, it is evident that all parties, including the ex parte applicant were afforded an opportunity by the Respondent to present their respective cases. In my considered view, the process followed by the respondent throughout the proceedings, as well as the making of the decision were fair, objective and procedural. There is no evidence of foul play and bias disclosed as submitted by the applicant. As already stated, judicial review remedy is concerned with the process and not the merits of the decision in respect of which the application for judicial review is herein made. The role of the court in judicial review is supervisory, not an appeal. It has not been shown that the impugned decision herein was made contrary to the law or that the rules of Natural justice were violated.
- 23. In the end, I find no merit in the Notice of Motion Application dated 30<sup>th</sup> September, 2021 and the same is hereby dismissed with costs to the Interested Party.

**RULING READ, SIGNED AND DELIVERED VIRTUALLY AT MALINDI THIS 27<sup>TH</sup> DAY OF SEPTEMBER, 2023.**

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**S.M. GITHINJI**

**JUDGE**

In the Presence of the Interested Party and absence of the rest.

Absent parties be informed of the outcome or served with the Ruling.

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**S.M. GITHINJI**

**JUDGE**

**27/9/2023**

