



REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA

AT KIAMBU

JUDICIAL REVIEW DIVISION

MISC. CIVIL APPLICATION NO. 5 OF 2019

IN THE MATTER OF A JUDICIAL REVIEW APPLICATION

IN THE MATTER OF THE CONSTITUTION OF KENYA 2010

IN THE MATTER OF THE JUDICATURE ACT CAP 8 LAWS OF KENYA

IN THE MATTER OF SECTION 8 & 9 THE LAW REFORM ACT CAP 23 LAWS OF KENYA

IN THE MATTER OF ORDER 53 OF THE CIVIL PROCEDURE RULES 2010

IN THE MATTER OF SECTION 10 OF THE MAGISTRATE'S COURT ACT

IN THE MATTER OF AN APPLICATION BY GEOFFREY ORAO OBURA FOR ORDERS OF CERTIORARI AND PROHIBITION

BETWEEN

REPUBLIC.....APPLICANT

VERSUS

SENIOR PRINCIPAL MAGISTRATES COURT AT LIMURU.....RESPONDENT

AND

GEOFFREY ORAO OBURA.....EXPARTE APPLICANT

JUDGMENT

1. The ex parte Applicant in this case is **Geoffrey Orao Obura**, a long-standing legal practitioner in the firm of **Obura Mbeche & Co. Advocates**. The facts disclosed in the motion filed on 14th April, 2019 are as follows. The firm of Obura Mbeche & Co. Advocates had been retained by the defendants to act for them in **Limuru SPMCC NO. 20 of 2018. Nashon Orinda Omoro v. Bata Shoe Company Ltd.** The suit had been fixed for mention on 19/03/2019 for pretrial directions. The counsel in the firm of Obura Mbeche & Co. Advocates, seized of the matter was **Ivy Onundo Okeyo**, who being engaged elsewhere, had instructed a pupil in the firm, one **Javan Omondi** to proceed to court and procure an advocate to hold her brief.
2. From the record of proceedings annexed to the Applicant's affidavit as annexure "**GOO4**" it appears that when the matter was called out before the trial magistrate, Ogot, **SRM**, the pupil sought to address the court. Noting his attire, the court questioned the pupil and having established that he was a pupil in the firm of Obura Mbeche & Co. Advocates, declined to further deal with the matter. The court issued summons for the pupil master **Geoffrey Orao Obura** to appear before it on 26/03/2019 to explain "**why his student is masquerading as an advocate**".
3. The Applicant did honour the summons by appearing in court on the appointed date. The Applicant addressed the conduct of the pupil and sought the court's indulgence. The court however proceeded to find that the behavior of a pupil was contemptuous in the face of the court and that the pupil master was liable. The court imposed a fine of Kshs. 30,000/- in default 7 days imprisonment against the pupil master.

These orders prompted this application.

4. As I understand it, the application raises issues of illegality based on the procedure adopted by the court and challenges the alleged attribution of vicarious criminal liability and consequent sentence imposed against the Applicant. That is the gist of the Applicant's verifying affidavit.

5. The Respondent's answer to the motion is contained in the grounds of opposition and is to the effect that the application is an appeal disguised as a judicial review application; that the Applicant has not exhausted all the internal dispute resolution mechanisms as provided in Section 9(2) of the Fair Administrative Action Act; that the application is an attempt to curtail the statutory obligations and duties of the Senior Principal Magistrate's Court Limuru being the Respondent herein; and that the Applicant is seeking that the court directs a public officer to exercise her statutory discretion in a particular manner thus usurping the said officer's authority.

6. The court directed the parties to file skeletal submissions which were orally highlighted subsequently. The gist of the Applicant's submission is that this was not a proper case for appeal as the record of the lower court is too scanty and moreover, the Applicant's challenge of the lower court's decision relates to the decision-making process which allegedly violated the principles of natural justice.

7. It was further contended that the lower court's decision is *ultra-vires* given the provisions of Section 10(3) and (6) of the Magistrate's Court Act, Section 31 and Section 121 of the Penal Code all stipulating the procedure for dealing with contempt in the face of the court. Several authorities were relied on, including **Mohamed Ashraf Sadique & Another v. Mathew Oseko t/a Oseko and Co. Advocates [2009] eKLR; Jairo v R [1972] E A 434; Lockhart v United Republic [1965] EA 211; and Patel v R [1969] E A 545.**

8. The Applicant takes issue with the failure by the trial court to comply with the summary procedure for dealing with contempt in the face of the court and asserts that the finding that the Applicant as a pupil master was liable or culpable for acts of the pupil amounted to a misdirection that a master-servant relationship existed between the two. The Applicant further submitted that Section 9(2) of the Fair Administrative Action Act has no application in this instance. He urged the court to grant the orders sought in the motion.

9. On behalf of the Respondent, it was argued that what the Applicant is seeking is to correct the decision of the trial court and therefore, an appeal, rather than a judicial review motion was more appropriate. It was submitted that the Applicant was heard by the trial magistrate who had jurisdiction and no illegality, irrationality or impropriety has been made out. Hence the judicial review remedies of prohibition and *certiorari* cannot issue in favour of the Applicant. Regarding the jurisdiction of the High Court in judicial review, the Respondent relied on Section 8 of the Law Reform Act and on several decisions including **Pastoli v Kabale District Local Government Council & Others [2008] 2 EA 300; R v Kenya Revenue Authority Ex parte Yaya Towers Ltd. [2008] eKLR** and **Municipal Council of Mombasa v R & Another [2002] e KLR** as to the purview of the judicial review jurisdiction and circumstances in which the court could issue the judicial review orders of mandamus, *certiorari* and prohibition.

10. The court has considered the material canvassed in respect of the Applicant's motion. The facts forming the background thereto are not in dispute. It is however pertinent to set out in full the proceedings of 26th March, 2019 in order to contextualize the motion. On that date, the Applicant had attended court in obedience to summons issued to him on 19/03/2019 the stated purpose being that the Applicant was required to explain **"why his student is masquerading as an advocate."**

11. The proceedings of 26/03/2019 read in part:

"26/03/2019

Before: Hon. S. A Ogot SRM

Court Assistant: Munene

In chambers at request of counsel at 8.45am

MR. OBURA:

[The Court] Summoned me because I'm told my pupil misbehaved. I have served the country as an advocate for over 30 years and I have had pupils training in my firm and I have never had one misbehaving like this one during that entire tenure. I admit they are under my tenure... I can't know what they are doing all the times. They are out there. I have reprimanded him and I ask that we be excused for that is the first time this has occurred.

COURT:

It may be the first time it has occurred... but it ought not to have occurred at all. This is a tenet of our professional practice as members of the bar and the bench. Further in as much as he states that he can't keep an eye on all that his students do away from him, the buck ultimately stops with him, and in this instance the behavior of a student under his tutelage was contemptuous on the face of the court. For this unfortunately, I feel that punishment must be meted out so that such an occurrence never arises.

Consequently, his pupil master is hereby fined Kshs. 30,000/= in default 7 days imprisonment.

S. A. OGOT

SRM

26/03/2019” (sic. Emphasis added)

12. Section 31 of the Advocates Act provides as follows:

“Unqualified person not to act as advocate

(1) Subject to section 83, no unqualified person shall act as an advocate, or as such cause any summons or other process to issue, or institute, carry on or defend any suit or other proceedings in the name of any other person in any court of civil or criminal jurisdiction.

(2) Any person who contravenes subsection (1) shall—

(a) be deemed to be in contempt of the court in which he so acts or in which the suit or matter in relation to which he so acts is brought or taken, and may be punished accordingly; and

(b) be incapable of maintaining any suit for any costs in respect of anything done by him in the course of so acting; and

(c) in addition, be guilty of an offence. [Act No. 2 of 2002, Sch.]

13. And section 33 of the Advocates Act provides that:

“Penalty for pretending to be advocate Any unqualified person who wilfully pretends to be, or takes or uses any name, title, addition or description implying that he is, qualified or recognized by law as qualified to act as an advocate shall be guilty of an offence”.

14. It is clear from Section 31 (2)(a) of the Advocates Act that a person who contravenes subsection (1) may be deemed to be in contempt of the court in which he acts as advocate and is liable to be punished accordingly. There can be no dispute that by dint of these provisions and of Section 121 of the Penal Code as well as Section 10 of the Magistrates Court Act that the Magistrate’s Court is empowered to take cognizance of and to punish contempt of the court committed before it by a person, who being an unqualified person purports to act as an advocate. The assertion by the Applicant that the decision of the lower court was *ultra vires* is difficult to comprehend except perhaps in so far as the contemnor is not the person directly punished.

15. In this instance, it can be deduced from the wording of the court’s finding and order that the court was probably proceeding under the provisions of Section 31(2) (a) of the Advocates Act as read with Section 121(1) (a) or (l) of the Penal Code which provides for a summary procedure for dealing with contempt in the face of the court.

16. The Applicant’s motion invokes Sections 8 and 9 of the Law Reforms Act and Order 53 Rule 3 of the Civil Procedure Rules. The question that has exercised the court’s mind is whether a party aggrieved with orders made in the course of the summary procedure for dealing with contempt of the court ought to appeal therefrom or to invoke the judicial review procedure. The Applicant’s twin complaints relate firstly to the alleged non-compliance with the proper procedure of dealing with contempt in the face of the court, but secondly to the correctness of the finding and sentence imposed by the lower court.

17. Contempt of court is a criminal offence under the Advocates Act, the Magistrate’s Court Act and the Penal Code. Section 10(7) of the Magistrate’s Court Act provides that:

“A person may appeal against an order of the court made by way of punishment for contempt of court as if it were a conviction and sentence made in the exercise of the ordinary original criminal jurisdiction of the court”.

The Applicant’s stated justification for filing a judicial review application rather than preferring an appeal are not persuasive. Firstly, he asserts that the events he complains of **“do not provide facts that are for the appeal”** and that, the record of the lower court is scanty. Secondly, that the objective of these proceedings is to challenge the procedure adopted by the court concerning violations committed by the Applicant’s pupil.

18. These reasons are unconvincing and erroneous as the record of the lower court tendered by the Applicant adequately captures the relevant portions of the proceedings and, secondly the Applicant’s own authorities, notably **Jairo v R; Lockhart Smith v R; and Patel v R** are all appeals to the High Court by persons convicted and sentenced in the cause of court proceedings in the lower court and challenged the procedure adopted, finding and sentence. In exercising its judicial review jurisdiction, the High Court does not act as an appellate court exercising its civil or criminal jurisdiction. The Applicant’s motion is as concerned with the procedure adopted as the merits of the final orders of the lower court: He is questioning the fact that the court did not invoke the summary produce envisaged in Section 121(2) of the Penal Code and affirmed in **Patel v R**. But over and above that, the Applicant has challenged the legality of apparent vicarious imputation of the alleged criminal culpability of the pupil upon the pupil master.

19. In Cortec Mining (K) Ltd v Cabinet Secretary, Attorney General & 8 Others [2015] e KLR, the Court of Appeal had this to say about the nature and scope of the judicial review jurisdiction: -

“There is considerable merit in the argument that judicial review proceedings are *sui generis*; that they are not criminal or civil in nature, and that they are not intended to deal with private rights. In general, where a matter of public law as opposed to private law is directly involved, proceedings for certiorari, mandamus and prohibition may be resorted to. It is important to appreciate that these are public law remedies. They issue against public officers or public bodies performing public duties. Certiorari issues to quash decisions for errors of law in making such decisions is far failure to act fairly towards the person who may be adversely affected by such decision. Prohibition is directed to an inferior tribunal or body and forbids such tribunal or body from continuing proceedings in excess of its jurisdiction or in contravention of the laws of the land. It lies not only for lack of jurisdiction or excess of it, but also for departure from rules of natural justice. The order of mandamus compels the performance of a public duty imposed by statute where the person or body in whom the duty is imposed fails or refuses to perform the same.”

20. Judicial review is not concerned with reviewing the merits of a decision which is the subject of an application but rather the review of the process by which the decision was arrived at. In exercising its jurisdiction, the court does not function as an appellate court and cannot substitute the impugned decision of the statutory body with its own decision. See **Municipal Council of Mombasa v Republic & Umoja Consultants Ltd. Civil Appeal No. 185 of 2001**, and **Republic v Kenya Revenue Authority Ex parte Yaya Towers Limited [2008] e KLR**.

21. As stated in **R v Attorney General & 4 Others ex parte Diamond Hashim Lalji and Ahmed Lalji [2014]**:

“Judicial review applications do not deal with merits of a case but only with the process. In other words, judicial review only determines whether the decision maker had 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. It follows that where an Applicant brings judicial review proceedings with a view to determining contested matters of fact and in effect urges the court to determine the merits of two or some different versions presented by the parties, the court would not have jurisdiction in judicial review proceedings to determine such a matter and will leave the parties to resort to normal forums where such matters ought to be resolved.”

22. Both the Magistrate’s Court Act (Section 10) and the Criminal Procedure Code (Section 347) expressly provide that an appeal from a conviction and or sentence in the lower court is to be filed in the High Court. The Criminal Procedure Code (CPC) stipulates the procedure for filing and dealing with appeals. No good reason has been demonstrated by the Applicant for eschewing the procedure provided in these express provisions or indeed the provision for criminal revision under Section 362 of the CPC.

23. The court therefore finds that notwithstanding the potential merit in the Applicant’s grievances, which this court has not dealt with, the proper recourse ought to have been to file an appeal or a revision application to the High Court concerning the impugned orders of the lower court. Judicial review is therefore not available in the circumstances of this case. For the foregoing reasons, the motion filed on 14th April 2019 is hereby dismissed.

Dated and signed electronically this 16th day of March 2021.

C. MEOLI

JUDGE

DELIVERED AND SIGNED AT KIAMBU ON THIS 23RD DAY OF MARCH 2021

M. KASANGO

JUDGE

In the presence of:

.....for the Applicant

.....for the Respondent

CA: