



REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA

AT NAKURU

JUDICIAL REVIEW APPLICATION NO. E014 OF 2021

REPUBLIC.....APPLICANT

VERSUS

HON. LIMO BYSON BENJAMIN.....1ST RESPONDENT

SKM.....2ND RESPONDENT

EX PARTE.....BMN

RULING

1. In an application dated 20/08/2021, BM (the Applicant) is seeking the following prayers:

1) This Application be and is certified urgent for ex parte hearing and the service of the Application be dispensed with in the first instance.

2) The Application be heard during this Vacation in accordance with the High Court (Practice and Procedure) rules with subsequent ORDERS THAT:

a. Leave be and is hereby granted to the Applicant to remove into this Honourable Court to apply for an Order of Certiorari to quash the decisions and orders issued pursuant to the irregular proceedings conducted on the 10th August, 2021 before the Hon Limo Byson Benjamin in the Nakuru Children's Case No. E031 of 2020 (SKM Vs LO) in their entirety.

b. Leave be and is hereby granted to the Applicant to remove into this Honourable Court to apply for an order of Certiorari and forthwith quash all subsequent decisions, directions and orders pursuant to and emanating from the irregular proceedings of the 10th August 2021 before the Hon Limo Byson Benjamin in the Nakuru Children's Case No. E0xx of 2020 (SKM Vs LO) in their entirety.

c. Leave be and is hereby granted to the Applicant to remove into this Honourable Court to apply and Order of Prohibition directed to the 1st Respondent or any other Subordinate Court and their subordinates or agents whatsoever from further hearing and/or determining and/or giving any further orders and/or implementing the orders emanating from the pursuant to the proceedings of the 10th August, 2021 before the Hon. Limo Byson Benjamin in the Nakuru Children's Case No. E0xx of 2020 (SKM Vs LO) in their entirety.

3) Costs be provided for in the cause.

4) That the leave so granted, does operate as stay restraining the Respondents from further implementing and/or executing all further and subsequent directions, orders granted and issued by the Hon. Limo Byson Benjamin on the 10th August 2021 in the Nakuru Children's Case No. E0xx of 2020 (SKM Vs LO), pending hearing and determination of the main motion.

2. The singular question at this stage is whether leave should be granted to bring a substantive Judicial Review Application. The question whether any leave so granted should operate as stay is moot because when the parties appeared before the Court, it was brought to the attention of the Court that the Applicant had been released by the Magistrate's Court on a personal bond of Kshs. 100,000/-. The purpose of the stay was to protect the Applicant from immediate arrest or to compel her release from custody. With the bond already issued and posted and the Applicant released, the stay has been overtaken by events.

3. The task is to determine if, assuming the facts presented in the Statement of Facts are true, leave should be granted for the Applicant to bring substantive Judicial Review Application. The purpose of leave was explained felicitously by Waki J. (as he then was) **in Republic v County Council of Kwale & Another Ex Parte Kondo & 57 Others** in the following terms:

The purpose of the application for leave to apply for judicial review is firstly to eliminate at an early stage any applications for judicial review which are either frivolous, vexatious or hopeless and secondly to ensure that the applicant is only allowed to proceed to substantive hearing if the court is satisfied that there is a case fit for further consideration. As was pointed out by Lord Diplock in Republic -vs- Inland Revenue Commissioners ex p National Federation of Self Employed and Small Businesses Ltd [1982] AC 617, the requirement that leave must be obtained before making an application for judicial review is designed to:

“Prevent the time of the court being wasted by busy bodies with misguided or trivial complaints or administrative error, and to remove the uncertainty in which public officers and authorities might be left as to whether they could safely proceed with administrative action while proceedings for judicial review of it were actually pending even though is conceived.” Leave may only be granted therefore if on the material available the court is of the view, without going into the matter in depth, that there is an arguable case for granting the relief claimed by the applicant the test being whether there is a case fit for further investigation at a full inter partes hearing of the substantive application for judicial review. It is an exercise of the courts discretion but as always is has to be exercised judicially. Has the applicant satisfied these principles.”

4. In the present case, the Applicant’s basic claim is that she is prejudiced by orders granted by a Court which she deems irrational and un-procedurally-issued. She says that they were irrational and un-procedural because the orders for her arrest were issued in a case in which she is not a party and one which she had not been given a chance to be heard and present her case.

5. One of the factors the Court considers when determining whether leave is deserved to bring Judicial Review proceedings, or indeed, grant any orders once proceedings have been commenced is whether there are alternative means of redressing the administrative or other action or decision an applicant is aggrieved by. In the present case, the Honourable Attorney General did not respond to the submissions of the Applicant that she has put enough material on the table to allow the case to go forward. The response on record is one provided by the person named as the second Respondent in the suit. That is SKM. The 2nd Respondent was the Plaintiff in the original suit filed in the Chief Magistrate’s Court. To that extent, the orders issued by the Learned Magistrate were in her favour. She has devoted her entire submissions litigating the substantive issue whether the orders she was granted were deserved. She has also questioned whether it is procedural to drag her to the present suit as a Respondent. She is probably right on the second issue: at most, the 2nd Respondent can only be an Interested Party in the present suit. She did not make the orders complained against. Her only role was to apply for the orders. She would be entitled to support the issuance of the orders in these proceedings – but only as an interested party.

6. The basic question presented in the present proceedings is whether a person who is aggrieved by orders issued in a Magistrate’s Court has recourse in Judicial Review Proceedings or whether they should appeal or seek a review of the impugned orders in the High Court. In light of section 9 of the Fair Administrative Actions Act which requires exhaustion of remedies before a judicial review application can be brought, it is good practice that a litigant who is aggrieved by an order or ruling from a magistrate’s Court uses the appeal and/or review procedures to overturn such an order or ruling.

7. However, the present case is unique because the Applicant is not a party in the suit below. Yet, orders have been issued against her. There are times where a third party who is not a party to a suit is given audience before a Court through special procedures to challenge any decisions made by the Court. An example is provided by Objection proceedings when execution orders have been issued against a person who claims his or her goods were proclaimed illegally pursuant to execution orders in a case in which he or she is not a party. In the present case, however, no such special procedures exist. One can, therefore, fairly say that there is no alternative avenue provided by our procedures for the Applicant to approach the Court. To this extent, I would hold that leave is merited in the present case for the Applicant to challenge the orders granted by the Magistrate’s Court which she feels were illegally or irrationally granted.

8. The orders, then, will be as follows:

- a. **The Applicant is granted leave to apply for orders of Judicial Review as per Prayer 2(i); 2(ii) and 2(iii) in the Chamber Summons dated 20/08/2021.**
- b. **The costs of the Applicant’s Chamber Summons application dated 20/08/2021 shall be in the cause.**
- c. **The prayer for the leave granted to operate as stay is hereby declined.**
- d. **The Applicant shall file and serve the Respondents and Interested Party with the substantive Notice of Motion within twenty-one (21) days from the date of this ruling.**
- e. **Further directions on the Applicant’s substantive Notice of Motion shall be given on 02/12/2021.**

Dated and delivered at Nakuru this 21st day of October, 2021

.....

JOEL NGUGI

JUDGE

NOTE: This judgment was delivered by video-conference pursuant to various Practice Directives by the Honourable Chief Justice authorizing the appropriate use of technology to conduct proceedings and deliver judgments in response to the COVID-19 Pandemic.