REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT MOMBASA

CONSTITUTIONAL & JUDICIAL REVIEW DIVISION

JUDICIAL REVIEW NO. 5 OF 2020

IN THE MATTER OF: CHILDREN ACT SECTIN 4(2), 97 AND 101 OF THE CHILDREN ACT NO. 8 OF 2001

AND

IN THE MATTER OF: TONONOKA CHILDREN CASE NO. 255 OF 2018

AND

IN THE MATTER OF: SECTION 8 AND 9 OF THE KENYA LAW REFORM ACT CAP 26 LAWS OF KENYA

AND

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

BETWEEN

REPUBLIC.....APPLICANT

SENIOR RESIDENT MAGISTRATE

COURT TONONOKA.....1ST RESPONDENT

NKG.....1ST INTERESTED PARTY

EX-PARTE APPLICANT.....SGB

JUDGMENT

Introduction

1. Pursuant to leave granted on the 14/2/2020, by Notice of Motion dated 25/2/2020, the *ex parte* Applicant herein, seeks the following orders:

> *1. **An order of certiorari to bring before this Honourable court for purposes of quashing and to quash the 1st Respondent's order made on 11th November 2019 in Tononoka Children Case No. 255 of 2018, NKG –VERSUS- SGB.***
>
> *2. **An order of certiorari to bring before this Honourable court for purposes of quashing and to quash the 1st Respondent's order made on 3rd February, 2020 in Tononoka Children Case No. 255 of 2018, NKG –VERSUS- SGB.***
>
> *3. **An order of certiorari to bring before this Honourable court for purposes of quashing and to quash the 1st Respondent's order made on 13th February 2020 in Tononoka Children Case No. 255 of 2018, NKG –VERSUS- SGB.***
>
> *4. **Costs of this Application be provided for.***

Ex Parte Applicants' Case

2. The Application is premised on the grounds set out in the Statement dated 14/2/2020, the accompanying Supporting Affidavit sworn on 25/2/2020, and the Further Affidavit sworn on 5/6/2020 by ex-parte Applicant. The ex-parte Applicant states that on the 17/9/2018, the 1st Respondent issued ex-parte orders directing the Applicant to pay the Interested Party a sum of Kshs. 100,000/= monthly for the maintenance and upkeep of KS (hereinafter "the minor"). However, the said orders were only served upon the ex-parte Applicant on 15/1/2019 in Court while attending **Mombasa Chief Magistrate Criminal Case No. 2204 of 2018, Republic vs. SGB** where the Interested Party in a complainant.

3. The ex-parte Applicant states that attempts to settle the matter out of Court came to a cropper, prompting him to file an Application seeking review of the orders issued ex-parte. However, on the 9/5/2019, the 1st Respondent issued an order directing the ex-parte Applicant to pay a total sum of Kshs. 600,000/= and in default warrants of arrest to issue. Further, on the 20/5/2019, the 1st Respondent issued another order directing the ex-parte Applicant to pay a sum of Kshs 150,000/= on or before 10/6/2019. The aforementioned orders were compiled with and the ex-parte Applicant even filed submissions to Application for review and the said Application was listed for mention on 7/10/2019 to confirm compliance by the Interested Party.

4. The ex-parte Applicant states that through his counsel, an Application was granted for an inquiry on his financial position to be conducted by the Children's Officers Mvita and Nyali. The matter was listed for mention on the 11/11/2019. However,on the 11/11/2019, the 1st Respondent issued a drastic order dispensing all the Applicant's Applications including the Application for review, and instead ordered the ex-parte Applicant to pay a sum of Kshs. 700,000/= by the 27/1/2020, and the matter was listed for mention on 3/2/2020. The ex-parte Applicant was not able to comply because of a huge loan he had borrowed to comply with the order issued on 9/5/2019 and because of another maintenance order issued by the same Tononoka Children Case No. 302 of 2017 **ZOH vs. SGB,** where he was ordered to pay Kshs. 150,000/ every month. He appeared before the 1st Respondent on the 3/2/2020 and explained the non-compliance. However, the 1st Respondent denied the ex-parte Applicant audience and ordered that warrant do issue to the Officer Commanding Makupa Police Station to explain why he had not executed the warrants of arrest against the ex-parte Applicant as ordered on 13/1/2020.

5. The ex-parte Applicant states that on 13/2/2020 the 1st Respondent proceeded to commit the ex-parte Applicant to one month in jail until a sum of Kshs. 900,000/= was settled. The ex-parte Applicant was immediately committed at Kingorani Prisons, notwithstanding that the proceeding before the 1st Respondent were not contempt proceedings.

6. It is the ex-parte Applicant's case that the 1st Respondent was unreasonable, acted ultra vires, and illegally denied the ex-parte Applicant audience before it and committing him for one calendar month as opposed to a period not exceeding four weeks as provided in Section 101(7) of the Children Act.

7. It is also the ex-parte Applicant's case that the 1st Respondent was unreasonable, acted ultra vires and violated Section 101(4) of the Children Act by committing the ex-parte Applicant before receipt of the report of inquiry on financial positions of the parties as ordered on the 7/10/2019.

8. It is the ex-parte Applicant's case that the 1st Respondent expressed bias in favour of the Interested Party by denying the ex-parte Applicant the right to be heard before committal against the provision of Article 47 and 50 of the Constitution.

The Response

9. In opposition to the application, the 1st Respondent filed the following grounds of opposition:

1. ***That the application is based on a misconception of the law, vexatious and an abuse of the court process.***

2. ***That the Application offends Article 160 (1), (5) of the Constitution.***

3. ***That the ex-parte Applicant ought to have challenged the merits of the decision of the 1st respondent through an Appeal and not through judicial review.***

4. ***That the Application offends Section 80 of the Children's Act.***

5. ***That the ex-parte Applicant will not suffer any prejudice as he still has his right of Appeal, which he is yet to exercise.***

Interested Party's Case

10. On the part of the Interested Party, she opposed the Application vide Replying Affidavit sworn on the 16/3/2020 and a Supplementary Affidavit sworn on 4/6/2020. She stated that the ex-parte Applicant has on several occasions tried to frustrate the Court process by refusing to accept service. However, the Court vide ruling delivered on 9/5/2019, held that the service upon the ex-parte Applicant was proper.

11. It is averred that the ex-parte Applicant rushed to Court under Miscellaneous Civil Application No. 13 of 2019 in which he sought stay of execution pending hearing and determination of his Appeal. The said Application was heard, and the ex-parte Applicant was ordered to pay Kshs 200,000/= by the close of business on 17/6/2019 pending determination of the said Application. However, the 1st Respondent's orders were never stayed and on the 27/9/2019, the High Court dismissed the ex-parte Applicant's Application dated 10/5/2019 with costs.

12. It is averred that by consent of both parties, the ex-parte Applicant's Application dated 9/5/2019 seeking to vary and/or set aside the orders issued on the 24/9/2018 was dispensed with; save for the Notice to show cause in the interest of the minor; that the parties would go

straight to the main hearing set for the 3/2/2020, and the ex-parte Applicant would clear the outstanding amount via instalments. However, when the matter came up for hearing, the ex-parte Applicant had not made any payment towards the outstanding balances despite being a man of means. Consequently, the Interested Party's Counsel raised the issue of contempt orally, and as a result, the Court ordered the appearance of the **OCS Makupa** to explain why he had not arrested the Applicant despite having been served with warrants.

13. It is further averred that the ex-parte Applicant having failed to comply with the orders of 11/11/2019, the ex-parte Applicant left the 1st Respondent with no option but to enforce the order issued on the 11/11/2019 as the said orders had not been appealed against, reviewed and/or set aside.

14. It is the Interested Party's case that the ex-parte Applicant is oblivious of the fact that in a children's matter, the Court has to consider what is in the best interest of the child as stipulated under Article 53 of the Constitution, and Section 4 of the Children's Act. Further, as provided under Section 76 of the Children's Act, parties agreed by consent to expedite the hearing of the matter. Therefore, in committing the ex-parte Applicant, the Court followed Section 101(7) of the Children's Act, and was satisfied on the willful and deliberate refusal by the ex-parte Applicant to make any payment despite the Court order.

15. It is the Interested Party's case that this being a children's matter, the file ought to be sent back to the family division for hearing of the current Application and there is nothing raised therein that meets the threshold of a judicial review. Further, the issues raised in the Application for stay dated 10/5/2019 and the issues raised in the instant Application are the same. Consequently, this Court should dismiss this instant Application.

The Rejoinder

16. The ex-parte Applicant in response to the Interested Party's Replying Affidavit filed a further Affidavit sworn on the 5/6/2020. He stated that there was no consent order and the that orders issued by the 1st Respondent on the 11/11/2019, though made in the presence of both Counsel, the same was not by consent of parties.

Submissions

17. On the 2/6/2020, this Court directed that the Application herein be dispensed with via written submissions. The ex-parte Applicant filed his submission on the 5/6/2020; the Respondents filed their submissions on the 16/6/2020; while the Interested Party filed her submissions on the 5/6/2020 and the submissions were highlighted on the 18/6/2020. Both Counsel for the ex-parte Applicant and the Interested Party reiterated the contents of their respective affidavits in support of their case, while Counsel for the Respondent reiterated the content of their grounds of opposition.

18. **Mr. Muliro** Learned Counsel for the ex-parte Applicant submitted that the instant Application before Court is not ***resjudicata***, reason being that the Application before **Thande J** was purely an application for stay of execution and the order that the ex-parte Applicant sought to stay is different from what is being sought currently. Further, the Application before **Thande J** was not accompanied by an Appeal and it is for that reason that the said Application was dismissed.

19. **Mr. Muliro** further submitted that the availability of an alternative dispute resolution mechanism should not be a bar to judicial review, and in this case, there are sufficient grounds to warrant judicial review order as the ex-parte Applicant is challenging the procedure applied by the 1st Respondent to arrive at its decisions. For authority, Counsel cited the Court of Appeal in **Kenya Revenue Authority & 2 others vs. Darasa Investment Limited [2018] eKLR,** where the Court held that the availability of an alternative dispute resolution mechanism should not be a bar to judicial review proceedings where such alternative remedies are not exhausted.

20. **Mr. Muliro** submitted that the 1st Respondent acted ultra vires as it did not have the power to commit the ex-parte Applicant for a period of more than four weeks, and without giving the ex-parte Applicant the right to be heard before committal and without making an enquiry into the cause of the default and being satisfied that such default was due to the ex-parte Applicant's willful refusal or culpable neglect as required under Section 101(7) of the Children's Act.

21. **Mr. Muliro** further submitted that ex-parte Applicant is not challenging the merits of the 1st Respondent's decision. Therefore, forcing the ex-parte Applicant to Appeal the 1st Respondent's decision would be impeding the ex-parte Applicant's right to access to Justice as guaranteed under Article 48 of the Constitution.

22. **Mr. Mwandeje** Learned Counsel for the Respondents submitted that under Article 160(5) of the Constitution, a member of the judiciary is not liable in an action or suit in respect of anything done or omitted to be done in good faith in lawful performance of a judicial function.

23. **Mr. Siminyu** Learned Counsel for the Interested Party submitted that the instant Application did not meet the threshold of judicial review as the Applicant unsuccessfully tried to stay the orders of 17/9/2018 and he is circumventing the law to get a favorable decision via the instant Application.

24. Counsel further submitted that Court orders are never issued in vain; they are supposed to be respected by everybody, and while the right to be heard under Article 25 of the Constitution is one of the non–derogable rights, there may be instances where due to risk of the rule of law being deliberately undermined, such right may be denied and the hearing of an Application for stay denied until there is full compliance with the orders of the Court as was held in **AB & ANOTHER VS. RB [2016]eKLR.**

Determination

25. I have taken into account the foregoing as well as the submissions filled herein. In my view the following issues arise for determination:

1. Whether the Application is res judicata.

2. ***Whether the 1st Respondent followed the due process in arriving at the orders issued on 11/11/2019, 3/2/2020 and 13/2/2020.***

1. **Whether the Application is res judicata.**

26. On the issue of *res judicata*, I find that the Miscellaneous Application No. 13 of 2019 sought to stay the order issued by the 1st Respondent on 9/5/2019, while the present Application seeks to quash the orders made on the 11/11/2019, 3/2/2020 and 13/2/2020 by the 1st Respondent. Consequently, I find and hold that the instant Application is not res judicata.

2. **Whether the 1st Respondent followed the due process in arriving at the orders issued on 11/11/2019, 3/2/2020 and 13/2/2020.**

27. In the case of **Cortec Mining Kenya Limited vs. Cabinet Secretary, Attorney General & 8 others [2015] eKLR** the Court of Appeal discussed the judicial review remedies as follows:

> **"…certiorari issues to quash decisions for errors of law in making such decisions or for failure to act fairly towards the person who may be adversely affected by such decision. Prohibition is directed to an inferior tribunal or body from continuing proceedings in excess of its jurisdiction or in contravention of the laws of the land. The order of mandamus compels the performance of a public duty imposed by statute where the person or body on whom the duty is imposed fails or refuses to perform the same."**

28. In the instant case, the ex-parte Applicant is seeking the remedy of certiorari, to quash the decision of the 1st Respondent contained in the orders issued on **11/11/2019, 3/2/2020 and 13/2/2020**.

The order issued on the 11/11/2019.

29. The ex-parte Applicant averred that his Application for review dated 9/5/2019 was unilaterally dispensed with by the 1st Respondent. Consequently, there was violation of his right guaranteed under Article 47 and 50 of the Constitution. On the part of the Interested Party, it was averred that the order issued on the 11/11/2019 was issued pursuant to a consent entered into by Counsel for both parties. I have carefully looked at the Court order issued on the 11/11/2019 and I note that it is not captured that the said order was made by consent of parties. In fact, it is not controverted that both the ex-parte Applicant and the Interested Party had filed written submissions to the Application for review dated 9/5/2019 and they were awaiting for the 1st Respondent's directions.

30. Article 47 of the Constitution provides:

> ***1. Every person has the right to administrative action that is expeditious, efficient lawful, reasonable and procedurally fair.***
>
> ***2. If a right or fundamental freedom of a person has been or is likely to be adversely affected by administrative action, the person has the right to be given written reasons for the action.***
>
> ***3. Parliament shall enact legislation to give effect to the rights in clause (1) and that legislation shall –***
>
> > ***a. Provide for the review of administrative action by a court or, if appropriate, an independent and impartial tribunal; and***
> >
> > ***b. Promote efficient administration.***

31. Article 50 (1) of the Constitution provides that

> **"every person has the right to have any dispute that can be resolved by the application of law decided in a fair and public hearing before a court of law or, if appropriate, another independent and impartial tribunal or body"**

32. While, Section 4 of the Fair Administrative Action Act provides as follows:

> **1. Every person has the right to administrative action which is expeditious, efficient, lawful, reasonable and procedurally fair.**
>
> **2. Every person has the right to be given written reasons for any administrative action that is taken against him.**
>
> **3. Where an administrative action is likely to adversely affect the rights or fundamental freedoms of any person, the administrator shall give the person affected by the decision-**
>
> > **a. Prior and adequate notice of the nature and reason for the proposed administrative action;**

b. An opportunity to be heard and to make representations in that regard;

c. Notice of a right of review or internal appeal against an administrative decision, where applicable

d. Statement of reasons pursuant to Section 6

e.

f. –

g. Information, materials and evidence to be relied upon in making the decision or taking the administrative action."

33. Consequently, I find and hold the 1st Respondent denied the ex-parte Applicant an opportunity to be heard on its Application for review, which is against the provisions of Articles 47 (2) and 50 (1) of the Constitution of Kenya, Section 4 of the Fair Administrative Action Act, and the rules of natural justice. The 1st Respondent was obliged to afford the ex-parte Applicant a hearing before it made its decision which decision was, undoubtedly bound to adversely affect the rights and interests of the ex-parte Applicant. See **Onyango Oloo –v- Attorney General (1989) EA 456,** where the Court of Appeal held that:

> "**The principle of natural justice applies where ordinary people would reasonably expect those making decisions which will affect others to act fairly, and they cannot act fairly and be seen to have acted fairly without giving an opportunity to be heard… There is a presumption in the interpretation of statutes that rules of natural justice will apply and therefore the authority is required to act fairly and so to apply the principles of natural justice…. A decision in breach of the rules of natural justice is not cured by holding that the decision would otherwise have been right since if the principle of natural justice is violated, it matters not that the same decisions would have been arrived at…..**"

34. This Court finds and holds that the decision of dispensing with the ex-parte Applicant's Application for review without him being heard was a decision made in breach of the rules of natural justice and the same was null and void *ab initio.*

Order issued on the 3/2/2020

35. On the issue of the ex-parte being denied audience by the Court vide ruling issued on the 3/2/2020, it is noteworthy that this Court is confronted with two competing principles of constitutional moment pitting, on the one hand, the need to uphold the constitutional right to a fair hearing, and on the other the need to protect and uphold the rule of law without which civilized society is in peril. This Court is in consonance with the finding In **Republic vs. Governor, Nairobi City County & 2 others Ex Parte Salima Enterprises Limited; Co-operative Bank of Kenya Limited (Interested Party) [2019] eKLR** where the Court stated as follows:

> "**As was correctly held by the court of Appeal in A.B & another v R.B[19] under our constitutional framework, there is no general rule that a court cannot hear a person(s) in contempt of court before they have purged their contempt. The importance of the right to fair hearing which is expressly underpinned by Article 50(1) of the Constitution, and in particular the right to access the court for purposes of ventilating a grievance cannot be gainsaid. A general rule curtailing those rights in all and sundry cases of contempt of court would not easily pass constitutional muster.[20]**
>
> **36. Way back in 1952, Lord Denning, LJ articulated the balancing act that is required when a court is confronted with two contending principles of great legal and constitutional moment pitting, on the one hand the need to uphold the constitutional right to a fair hearing, and on the other the need to protect and uphold the rule of law without which civilized society is in peril.[21] In Hadkinson vs. Hadkinson,[22] the eminent Law Lord stated:-**
>
> > **"I am of the opinion that the fact that a party to a cause has disobeyed an order of the court is not of itself a bar to his being heard, but if his disobedience is such that, so long as it continues, it impedes the course of justice in the cause by making it more difficult for the court to ascertain the truth or to enforce the orders which it may make, then the court may in its discretion refuse to hear him until the impediment is removed or good reason is shown why it should not be removed."**
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> 37. **In Rose Detho v. Ratilal Automobiles Ltd & 6 Others,[23]the Court of Appeal emphasized the sacrosanct nature of the right to be heard in the context of contempt of court applications. Speaking for the majority, Githinji, JA expressed himself as follows:-**
>
> > **"Has the contemnor a right to be heard. This is indeed an everyday question in all our courts. While the general rule is that a court will not hear an application for his own benefit by a person in contempt unless and until he has first purged his contempt, there is an established exception to the general rule where the purpose of the application is to appeal against, or have set aside, on whatever ground or grounds, the very order disobedience of which has put the person concerned in contempt"(Emphasis added)**
> >
> > **The reason why, depending on the circumstances of each case, the court must retain the discretion, albeit to be exercised sparingly, to decline to hear a contemnor is because our entire constitutional edifice is predicated on respect for the rule of law. In exercising the discretion the court will have to satisfy itself on the question "whether, taking into account all the circumstances of the case, it is in the interests of justice to hear or not to hear the**

contemnor." Refusing to hear a contemnor is a step that the court will only take where the contempt himself impedes the course of justice. What is meant by impeding the course of justice in this context comes from the judgment of Lord Denning in Hadkinson v Hadkinson[24] and means making it more difficult for the court to ascertain the truth or to enforce the orders which it may make."

36. **Section 101** of the Children's Act deals with enforcement of maintenance and contribution orders. The section in its entirety lays emphasis on the involvement of the party claiming and the one owing and investigations before a decision is arrived at. In this instance the court did not make any enquiry as to the inability of the respondent to pay the sums ordered before finding the ex-parte was in contempt of the orders issued by the 1st Respondent. Section 101(4) stipulates that:

"101 (4) Prior to the making of an order under this section, the court may hold an enquiry as to the means of the respondent who shall, whenever possible, be present and where such enquiry is held the court may direct that-

(a) enquiries be made as to the means of the respondent by such person as the court may direct; or

(b) the respondent's income, assets and liabilities be searched to establish such information as the court may require to make an order under this section; or

(c) a statement of means from the respondent's employer, or auditors or from such other person as the court shall direct, be availed to court.

(5) where the court is satisfied that the respondent has failed to make payment of any financial provision under a maintenance order or contribution order, the court may-

(a) order that any arrears in respect of any maintenance monies or contribution monies as the case may be, be paid forthwith, or by instalments or within such other period as shall be specified by the court;

36. From the foregoing, it is noteworthy that initially, the ex-parte Applicant through his Counsel had made an oral Application for an inquiry on the parties' financial position to be conducted by the Children's Officers Mvita and Nyali. The said Application for inquiry into the parties' financial position was allowed by the 1st Respondent. However, on the 3/2/2020, the 1st Respondent arrived at the finding that the ex-parte Applicant had willful disregarded and disobeyed the Court order issued on the 9/5/2019 yet a report on the ex-parte Applicants financial position had not yet been furnished to the 1st Respondent by the Children officers for the 1st Respondent to make a well informed decision. Consequently, having found that the ex-parte Applicant's right to review the decision of the 1st Respondent had initially been denied, I find that any order that followed the order issued on the 3/2/2020 was null and void. Nevertheless, I also find and hold that though denying a person alleged to be in contempt of Court the right to be heard is at the discretion of the trial Court, in this case, the 1st Respondent's discretion was exercised unreasonably, irregularly and undertaken to the detriment of the ex-parte Applicant's right to be heard as the Court had initially unreasonably dispensed with the ex-parte Applicant's Application for review.

Order issued on 13/2/2020 committing the ex-parte Applicant.

37. On committing a person, section 101(7) of the ***Children Act*** provides:

"The court shall have power under this section to issue a warrant committing the respondent to imprisonment for a period of not less than five days nor more than four weeks.

Provided that the court shall not issue a warrant for imprisonment unless it is satisfied that

(a) the respondent has persistently and willfully refused or neglected to make payment of all or part of the monies to be paid under a maintenance order or a contribution order without reasonable cause;

(b) the respondent is present at the hearing

(c) an order of attachment of earning would not be appropriate;

(d) it has inquired into the cause of the default and is satisfied that such default was due to the respondent's willful or culpable neglect"

38. In this case, the period of committal was a calendar month, which is more than the four weeks stipulated under Section 101(7) of the children's Act. Although the 1st Respondent had the jurisdiction to commit the ex-parte Applicant, the 1st Respondent acted ultra vires in excess of her jurisdiction by committing the ex-parte Applicant for one month. Further, whereas **Section 101(7)** of the **Children Act** empowers the court to issue a warrant for imprisonment against a Respondent, the section further provides that such warrant shall not issue unless, it is satisfied that the Respondent has persistently and willfully refused and neglected to comply with the orders which is not the case herein, as this Court has already held that the 1st Respondent decision was arrived at before the 1st Respondent had the opportunity to examine the report of the parties financial position. Consequently, the said committal was marred with procedural irregularity and was unreasonable.

39. Having considered the issues raised herein, I hereby quash the decisions made by the 1st Respondent via orders issued on 11/11/2019,

3/2/2020 and 13/2/2020.

40. Since both parties had filed their submission to the ex-parte Applicant's Application dated 9/5/2019, I direct that in the best interest of the child, a ruling on the Application for review be expedited and be made by any other magistrate other than Hon. V. J Yator. The Children's Court in Children's Case No. 255 of 2018 shall conduct a proper inquiry and assessment into the financial ability of each parent to arrive at reasonable contributions from both parents without overburdening any of the parents.

41. I make no order for costs.

It is so ordered.

Dated, Signed & Delivered at Mombasa this 30th day of July 2020.

E. K. OGOLA

JUDGE

Judgement delivered via MS Teams in the presence of:

Mr. Muliro for Ex parte Applicant

Mr. Siminyu for Interested Party

Mr. Mwandeje for Respondent

Mr. Kaunda Court Assistant