



REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA

AT MARSABIT

JUDICIAL REVIEW NO.3 OF 2019

REPUBLIC.....APPLICANT

VERSUS

HON. COLLINS OMBIJA, RESIDENT

MAGISTRATE MARSABIT.....RESPONDENT

ISI.....INTERESTED PARTY

EX-PARTE AMD

R U L I N G

The applicant's notice of motion dated 25th July, 2019 seeks the following orders:-

1. That a writ of Prohibition to issue directed to the honourable Collins Ombija, Resident Magistrate at the Principal Magistrate's law courts at Marsabit prohibiting the honourable Collins Ombija or any other magistrate at the said law courts from hearing, determining, making or issuing any decrees, directions, or orders in relation to claims in Children's case No.7 of 2019 at the Principal Magistrate's Court at Marsabit.

2. That a writ of certiorari do issue directed to the Respondent to remove to the honorable Court the entire file of papers in children's case no.7 of 2019 at the said Principal Magistrate's Court consisting of:

(a) Summons to appear issued upon the Plant therein

(b) The interested party's plaint therein

(c) The verifying affidavit and certificate of urgency

(d) Notice of motion, supporting affidavit, exhibits annexed thereto, list of witnesses statement by witness and all documents filed with the plaint;

(e) Proceedings thereof and directions, ruling, judgments, orders, decrees and process of enforcement thereof and to quash the said summons to appear issued upon the interested party's claims in pleadings in the said suit and to quash the plaint, the verifying affidavit, the notice of motion and the affidavit by the interested party in support and to quash all pleadings thereupon and direction, rulings judgments, orders and decrees and any other incidental process of enforcement thereof.

3. That an injunction do issue.

(a) Restraining the interested party from howsoever removing or transferring HMI and HIS minor children from the custody care and control of the Ex-parte applicant or from howsoever disrupting the said minor children's education at [Particulars Withheld] Muslim Academy pending hearing and determination of the application.

(b) Compelling the interested party to meet educating related requirements expenses and fees, reasonable maintainance and upkeep, medicare, food and transport for HMI and HIS pending hearing and determination of the

application.

(c) Compelling the interested party to give the applicant and her minor children aforesaid access to and usage of the family residence at [Particulars Withheld] estate within the city of Nairobi and to their clothes and bedding without let or hindrance by the interested party pending hearing and determination of the application.

4. That the honourable court be pleaded to make such further or other orders within its inherent jurisdiction.

5. That the applicant be awarded costs of the application.

The application is supported by the applicant's affidavit sworn on 2nd June, 2019. The respondent filed a replying affidavit sworn on 28th October, 2019.

Mr. Wamalwa appeared for the applicant. Counsel submitted that the suit before the Marsabit Resident Magistrate's Court was before the Court on 2.5.2019 and was fixed for directions on the same date. There was no interlocutory application. The applicant was not served with a notice for directions. The case was fixed for the 30.5.2019 and no one appeared. The court on its own motion fixed it for mention on 20.6.2019. The matter was before Hon. Mbayaki on 12.6.2019 under certificate and was fixed for hearing on 20.6.2019. On 13.6.2019 Hon. Ombija called for the file and substantially dealt with the notice of motion which had been filed and dealt with the issue of custody in the absence of the respondent. There is an order for the OCS Lang'ata Police station to execute the court order yet there is no information that the applicant was living in Nairobi.

It is further submitted that the applicant and the children resides in Nairobi. The Nairobi court is the one with jurisdiction to handle the matter. The Resident Magistrate's court in Marsabit has no jurisdiction to handle the dispute. Article 48 of the Constitution guarantees the applicant the right of access to a Court. Article 10 enjoins the respondent as a court officer to observe the rule of law. Fair hearing cannot be achieved if the court behaves like the prosecutor. The court gave dates itself and altered them. The case proceeded before the fixed dates and without service of the application. The court lacked jurisdiction. The certification was spent as Mr. Mbayaki did not grant any orders. The children were kidnapped and taken to [Particulars Withheld] school. They stayed in that school for a couple of weeks.

Mr. Behailu appeared for the respondent. Counsel submitted that the children case was filed on 2.5.2019. The applicant herein was served on 3.5.2019. The trial court did not violate any law by giving a hearing date. The parties were married in Marsabit. There is no residence for the parties in Nairobi. Counsel could have filed an application for review of the orders of the trial court. The application is simply challenging the decision and not the procedure. The applicant was 18 years old when she got married and not 13 as alleged.

Counsel further contend that no adverse orders were granted on 13.6.2019. The hearing date of 20.6.2019 was maintained. It is only an order for the petitioner to appear before the court with the children on 20.6.2019. The respondent was residing with relatives in Nairobi and that is why the respondent sought the assistance of the Langata OCS to effect the order. The children were in school in Nanyuki. The children were not in school for half of the 2nd term and the 3rd term. The application does not serve the interest of the children.

It is further submitted that the applicant had an opportunity to present the children before the court. The children should be taken back to [Particulars Withheld] school in Nanyuki. The applicant filed other suits in Nairobi knowing very well there is a suit in Marsabit.

In the case of **Municipal Council of Mombasa –V- Republic & Umoja Consultants Ltd Mombasa Civil Appeal No.185 of 2001** the Court held:

Judicial review proceedings is concerned with the decision making process, not with the merits of the decision itself; the court would convert itself with such issues as to whether the decision makers had the jurisdiction, whether the person affected by the decision were heard before it was made and whether in making the decision. The decision maker took into account relevant matter or did take into account irrelevant matters The court should not act as Court of Appeal over the decider which would involve going into the merits of the decision itself

The suit which is the subject of this application was filed on 2.5.2019. There is an affidavit of service by Alex Kimeru who states that he served the applicant with the summons. The following day on 3.5.2019 at Al-Mubarak Estate, House number[...]. The registry listed the matter for directions on 30.5.2019. No one appeared on 30.5.2019 as it appears that no notices were served on the respective parties by the court. On 30.5.2019 the Court fixed the matter for mention on 12.6.2019. The matter appeared before Hon. Mbayaki Wafula who considered a notice of motion dated 11.6.2019 and listed it for hearing on 20.6.2019 with directions that applicant serve the respondent.

On 12th June, 2019 the applicant/plaintiff appointed an advocate. The notice of appointment was filed on 13.6.2019. The matter was placed before Hon. Ombija on 13.6.2019. The record of the Court for that day reads as follows:

13.6.2019

Before:- Hon. Collins Ombija A. RM

C.A:- Barako

Plaintiff: Present

Defendant: Absent

Mr. John Behailu for the plaintiff:- Application had come under certificate of urgency because of the issues/subject matter of the applicant. 2 minors who are currently at [Particulars Withheld] school in boarding.

Currently my children are no longer in school because the father – applicant had taken them out for holidays between 1st – 5th June 2019 and the children were with him for ID Fitri celebration. The defendant had access to where the children were, prior – there was a divorce proceeding. The divorce was effected on 13/05/2019.

The defendant took minors away from main residence 3rd June 2019 to an unknown location. The children were supposed to report back on 5th June 2019 see annexure marked “ISI 1” since the plaintiff never had custody he went to confirm if they had been returned to school.

On the 8th June the Principal wrote a letter confirming that the children were never brought back. See annexure marked “ISI I” concerned about the welfare of the children the plaintiff approached this court for orders for children to be released to him to be returned back to school.

Further that the respondent be restrained from transferring the issues to any other school.

Further that the applicant to have interim custody of the minors pending interparties.

The nearest police station to execute the order.

Court:- The plaintiff was served on 3rd May 2019 but neither filed a defence nor entered appearance. The plaint was filed on 2nd May at Marsabit Law courts. The Kadhi’s court matter was fixed on 27/05/2019 by the defendant. This court has noted that the defendant refused and/or ignored to enter appearance nor file a defence despite having been served by the plaintiff but proceeded to seek maintenance orders from the Kadhi’s court. Same orders were issued in her favour but vacated by the same court. – See attached copy of the orders.

This court is focused on the best interest of the children. The court note that the said issues are 8 and 9 years old. – children who are not so tender. These are children that are able to express themselves and correspond to what is going on. The court would therefore be reluctant to issue orders that are detrimental/ disadvantage the welfare of the said children.

However to ventilate on the matter that seems ... complex, this court makes the following orders.

- 1. The said minors HMI and HIS to be released to the plaintiff/applicant who shall present them before this honourable court on before 20/6/2019.**
- 2. The defendant AMD to appear before court on the 20/6/2019 without fail.**
- 3. The OCS Langata Police Station to execute this order.**

HON. COLLINS OMBIJA A. RM

13/06/2019

On 20.6.2019 the plaintiff and his advocate appeared. Counsel for the applicants requested to be granted the orders being sought. The Court listed the matter for judgment on 1.7.2019. Judgement was delivered on that date.

The application herein was initially filed in Nairobi. On 28.6.2019. Justice Mativo referred it to the Marsabit Court. The file was once again placed before Justice Mativo on 1.7.2019 under certificate and the Honourable Judge decided not to alter the earlier direction. On 1.7.2019 the Deputy Registrar, Nairobi High Court sent the file to this Court. On 15.7.2019 I granted leave to the ex-parte applicant to seek the Judicial Review orders. By that time the trial Court had delivered its judgement.

Counsel for the applicant discarded the prayer for orders of prohibition and sought orders of certiorari and injunction. I have noted that apart from the two suits, there is children’s case number 924 of 2019 filed before the Nairobi Children’s Court. The Court in Nairobi stayed that case vide its ruling delivered on 6.9.2019. The reason for that order is that the applicant herein had filed Judicial Review No.3 of 2019 before the Marsabit Court. The Nairobi court granted custody of the children to the applicant. In essence therefore the Nairobi case has been stayed.

There is Nairobi Kadhi’s case number 110 of 2019. It was filed around 28th May, 2019. Initial orders against the interested party herein were granted on 28th May, 2019. The orders were vacated on 4th June, 2019. There is also Marsabit Kadhi’s case number 22 of 2010 which granted divorce between the parties.

It is clear to me that whereas the ex-parte applicant prefers to have any legal dispute heard and determined in Nairobi, the interested party prefers to have the cases resolved in Marsabit. The ex-parte applicant filed case number 924/2019 before Nairobi Children’s court, case number 110/2019 before the Nairobi Kadhi and miscellaneous application number 211 of 2010 before the Nairobi High Court. There is also Marsabit Judicial Review 4/2019. On his part, the interested party filed Marsabit Kadhi’s case number 22 of 2019, and Marsabit Children Case No.7/2019 before the Principal Magistrate, Marsabit. There is therefore a total of six cases involving the same parties. Two judicial

review matters, two cases before the respective Kadhi's and two children cases. Whenever the applicant files a suit in Nairobi, the interested party will alledge that he resides in Marsabit and the same applies to cases filed by the interested party in Marsabit where the applicant vehemently contend that the Marsabit Magistrate's Court lacks jurisdiction.

Mr. Wamalwa raised the issue of Jurisdiction. Section 3(2) of the Magistrate's court Act, Chapter 10, provides that a Resident Magistrate's Court shall have jurisdiction throughout Kenya. Since the interested party lives in Marsabit as per his averments, it is clear that the Nairobi children case will have to be transferred to Marsabit where the defendant resides as per Section 15 of the Civil Procedure Act. Section 5 of the Civil Procedure Act empowers any Court to hear and determine all suits of civil nature. The Marsabit divorce case was filed on 2.5.2019 the same date the children case was filed. The applicant did not appear despite having been served and a divorce was granted on 17.5.2019. She opted to file her two cases in Nairobi after she was served with the Marsabit suit papers.

Given the nature of the dispute, it is clear to me that quashing the proceedings before the Marsabit Children court through an order of certiorari will not solve the dispute. The dispute involves two children whose education is being affected and need quick solution. When the petition came up for hearing I asked counsel for both parties to try and have the dispute resolved amicably out of court. One week later parties returned to court without any amicable settlement.

The two children are aged 9 and 10 years respectively. They are capable of making independent decision as to where they would like to go to school. I believe that is why Hon. Ombija called for their presence in court on 20.6.2019. Parties should not cling to the children to the detriment of their education which is intended to assist them in their future.

I do note that before Mr. Behailu came on record on 13.6.2019, the interested party was acting in person. I believe that is why counsel requested for the file to be placed before Hon Ombija. Before that date Hon. Ombija had not issued any orders. Similarly, on 13.06.2019, the only orders issued by the Court was to summon the defendant to appear in Court on 20.6.2019 together with the children. These orders were served upon the applicant who decided not to comply with them and quickly filed the miscellaneous application dated 28th June, 2019 before the Nairobi Court. There is need for some order. The applicant should not be seen to be benefiting from her own decision not to comply with the Court summons.

Since the children case in Nairobi was stayed and involves a defendant who lives in Marsabit, I do find that for the best interest of the children and for purposes of good case management the children case in Marsabit should not be quashed. Doing so will be tantamount to rewarding a party who willfully opted not to attend court. The Marsabit Court has jurisdiction to determine the dispute.

The application is also seeking orders of injunction against disrupting the children's education at [Particulars Withheld] Muslim Academy and that the interested party meets the fees as well as upkeep and maintainance. In my view such orders should not be granted in a Judicial review application. The best way forward for the parties is to appear before the Marsabit Magistrate's Court, have the dispute heard and determined and any party aggrieved by the trial Court's decision can come to this Court by way of appeal.

I have perused the file for children case number 7/2019 and noted that there is a judgement. I have observed that there was no entry of exparte judgment. The judgement indicate that the case proceeded by way of formal proof. When the interested party and his counsel appeared before the court on 20.6.2019, they sought the orders prayed for in the application dated 11th June, 2019. There is no prayer calling for the applicant herein to pay maintainance. The prayers for maintainance are contained in the main suit. It is therefore clear that there was no formal proof done and the judgment is premature. I do hereby exercise jurisdiction under Article 165(6) and (7) of the Constitution and set aside the judgement entered by the Magistrate's court on 1.7.2019.

In the end, I do find that the application dated 25th July 2019 lacks merit and is hereby dismissed.

In the interest of justice and noting that the children have about one month before schools are opened, I do make the following orders:-

- 1. The applicant herein to file her response to children case number 7 of 2019 within seven (7) days hereof.***
- 2. Children case No.7 of 2019 to proceed before Hon Mbayaki Wafula, Senior Resident Magistrate, Marsabit.***
- 3. Should the trial court call for the Children, the applicant to ensure that the children are brought before the court.***
- 4. Nairobi Children case number 924 of 2019 and Nairobi Kadhi's case No.110 of 2019 are hereby stayed.***
- 5. The trial Court shall deal with the issue of where the children shall pursue their education and shall ensure that the matter is determined expeditiously before the schools are opened next year so that they can know in advance where they will be continuing with their education.***
- 6. In the meantime, custody of the children is granted to the mother.***

This being a family dispute I do order that parties shall meet their own costs.

Dated, Signed and Delivered at Marsabit this 25th day of November, 2019

S. CHITEMBWE

JUDGE