**REPUBLIC OF KENYA**

**IN THE HIGH COURT OF KENYA AT NAIROBI**

**JUDICIAL REVIEW MISCELLANOUS APPLICATION NO. 106 OF 2017**

**AND**

**IN THE MATTER OF THE CONSTITUTION OF KENYA ARTICLES 23, 28, 45, 47, & 53**

**AND**

**IN THE MATTER OF THE CHILDREN'S ACT SECTIONS 3, 4,6, 11,22 & 24(1)**

**AND**

**IN THE MATTER OF M A AND M A (MINORS)**

**AND**

**IN THE MATTER OF AN APPLICATION BY LEAVE FOR ORDERS OF CERTIORARI AND MANDAMUS**

**BETWEEN**

**REPUBLIC.....APPLICANT**

**VERSUS**

**THE REGISTRAR OF DOCUMENTS.....1ST RESPONDENT**

**THE DIRECTORATE OF IMMIGRATION**

**AND REGISTRATION OF PERSONS.....2ND RESPONDENT**

**THE ATTORNEY GENERAL OF KENYA.....3RD RESPONDENT**

**AND**

**THE CABINET SECRETARY, FOREIGN AFFAIRS.....1ST INTERESTED PARTY**

**N S Y.....2ND INTERESTED PARTY**

**EX PARTE: A M A**

**JUDGMENT**

**The Application**

1. The ex-parte Applicant herein, A M A, (hereinafter "the Applicant"), is a Kenyan citizen currently residing in Mombasa, and he states that he is the biological father of two Minors, namely, M A A and M A A (hereinafter "the Minors"),. He further states that he had the Minors with one N S Y, the 2nd Interested Party herein. The Applicant and the 2nd Interested Party divorced in 2013, and had a pending custody case concerning the minors in the Children's Court at Milimani Courts in Nairobi, namely Children Case No. 1087 of 2015, at the time of

institution of these judicial review proceedings.

2. The Applicant has brought the instant proceedings against the Registrar of Documents, the 1st Respondent herein, for allowing and approving a change of names of the said Minors. He also sued the 2nd Respondent, the Directorate of Immigration and Registration of Persons, for issuing the said Minors with passports without his knowledge, and for allowing the children to be taken out of the Country. The Attorney General, who is the 3rd Respondent, is sued in his capacity as the legal advisor of the Kenya Government, while the Cabinet Secretary, Foreign Affairs is enjoined as the 1st Interested Party as the custodian of the relationship between Kenya and other countries.

3. On 9th March 2017, the Applicant filed an application by way of a Notice of Motion dated 2nd March 2017, seeking the following orders:

> **a. An order of Certiorari to remove into this Court and quash the decision of the 1st Respondent approving and gazetting change of names of minors M A A and M A A A to A A A and M E A respectively vide Gazette Notice Notices 8702 and 8703.**
>
> **b. An order of certiorari to remove into this Court and quash the decision of the 2nd Respondent issuing new passports to the subject minors herein.**
>
> **c. An Order of Mandamus to compel the 1st and 2nd Respondents and the Interested Party to return the minors back to Kenya and produce them before the Senior Resident Magistrate hearing Children Case Number 1087/2015 at the Children's Court in Milimani Nairobi.**
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> **d. A declaration that the ex parte Applicant's Rights to family as enshrined under Article 45 and the minors right to equal responsibility of the mother and the father as guaranteed under Article 53 of the Constitution of Kenya were violated by the 1st and 2nd Respondent.**
>
> **e. Costs be provided for.**
>
> **f. Any other order that the court may deem just fit and just in the circumstances.**

4. The application was supported by a statement dated 17th July 2017, and the verifying affidavit of the Applicant sworn on the same date. It is the Applicant's case that on the 6th October 2016 the 1st Respondent unconstitutionally illegally, unprocedurally, irrationally and without his knowledge and consent, approved and proceeded to gazette an application that sought to change the names of the minors from M A A and M A A to A A A and M A A respectively, through Gazette Notices 8702 and 8703 of 21st October 2016.

5. That in proceeding to approve the application, the 1st Respondent did not give regard to the fact that he is a parent to the Minors and has parental responsibility over them, although the birth certificates clearly indicated that he is their father. That despite his request for the 1st Respondent to cancel the registration of the change of names, the said 1st Respondent has refused to do the same.

6. Further, that between the 21st of October 2016 and the 2nd of November 2016, the 2nd Respondent proceeded to issue new passports to the Minors under their new names without his consent, in order to allow the Minors to be taken out of the country. Further, that the 2nd Respondent's acts were unfair and unconstitutional, as they infringed on his rights to family and the Minors' rights to equal parental responsibility as guaranteed under the constitution. It is the Applicant's case that he has made several visits and written requests to the 2nd Respondent to cancel the new passports issued under the new names, but to no avail.

7. The Applicant also contended that his right to fair administrative action had also been grossly violated by the 1st and 2nd Respondents. In addition, that as a result of the actions of the Respondents, he does not know the Minors whereabouts albeit that they left the country for Israel, and he is apprehensive that their lives might be in danger and that they may be indoctrinated in fundamentalism.

8. Njuguna Ng'anga & Associates, the Advocates for the Applicant, filed submissions dated 30th November 2017 and 4th May 2018, wherein the above arguments were reiterated with reliance being placed on the principles in Articles 45, 47 and 53 of the Constitution. it was urged that the 2nd Interested Party acted in excess of the interim orders in relation to the custody of the children, and that the actions of the 2nd Interested Party to deny access to the Minors, her unilateral change of the Minors' names and religion, and of taking the Minors out of jurisdiction without informing the Applicant and without his consent, is unprocedural and irregular. Further, that the rules are clear on the steps to take if the 2nd Interested Party felt the Applicant was not complying with court orders, and that instead she decided to flee the country.

9. The Applicant further submitted that the 1st and 2nd Respondents failed to exercise due diligence before effecting change of names of the Minors, and were obliged to interrogate the orders of the Children's Court and find out whether they were interim or fixed, and if they conferred upon the 2nd Interested Party the powers to change the names of the children herein without consulting with the Applicant.

10. Lastly, basing his submissions on Article 53 of the Constitution, the Applicant contended that a child's best interest are paramount in every matter concerning a child, and that the identity and personality of the Minors herein are at stake as they have been introduce to another father, another religion, and have been taken out of jurisdiction and given new names. That the net effect of these actions is that the Minors will develop an identity crisis.

**<u>The Response</u>**

11. The application was opposed by way of a replying affidavit by the 2nd Interested Party sworn on 13th June 2017 and submissions dated 23rd May 2018 filed by her Advocates, Rehema Parmena & Company Advocates. The Respondents did not file any response to, or submissions on the application. However, at the hearing of the application on 3rd July 2018, Mr. Munene, the counsel for the Respondents, indicated that the Respondents were not taking a position in this matter, and would abide by the Court's decision.

12. It was the 2nd Interested Party's case that the application is brought before court in a state of contempt, as the Applicant had completely defied the lower court's orders directing him to contribute Kshs 20,000/= per month towards the upkeep of the Minors from the month of November 2015, and he had instead only settled Kshs 40,000/= the said date. Further, that as the Applicant has not purged his contempt of the lower court orders, this Court should desist from rewarding a contemptuous litigant who has no regard for the rule of law and approaches the Court with unclean hands.

13. The 2nd Interested Party refuted the allegation that the 1st and 2nd Respondents acted unconstitutionally, illegally or irrationally in gazetting the application to change the names of the Minors. Further, that the 1st Respondent followed the ordinary process and procedures required, and in view of the fact that there was in place a valid court order granting sole custody to the 2nd Interested Party, and it was thus not legally necessary to obtain the consent of the Applicant to the said Gazettement. In addition, that the issuance of passports is the mandate of the 2nd Respondent who is not tasked to look behind clear, and valid existing court orders prior to carrying out such mandate.

14. Therefore, that the 1st and 2nd Respondents carried out their respective mandates in accordance with legal and procedural requirements, and having cognisance of validly existing court orders of legal custody issued to the 2nd Interested Party by the lower court on the 5th November 2015 and 9th August 2016. In addition, that the Applicant opted not to attend court in the hearing of the application which culminated in the issuance of the orders, and this Court cannot cancel the Respondents' decisions simply as a result of the Applicant expressing his displeasure with their decisions.

15. The 2nd Interested Party asserted that the issues being raised by the Applicant are still being adjudicated by the lower court, as they relate to the well-being and best interest of the Minors and the Applicant's application is frivolous, vexatious and in abuse of the court process. She therefore deposed that then Applicant is attempting to re hash issues that have already been determined in the interim period, therefore wasting this Courts time,and what he ought to do is either appeal against the said rulings or await the final judgment in the lower court and seek to appeal the same should he deem fit to do so.

16. She averred that legal custody pertains to such parental rights as the right to determine a child's name and to arrange or restrict the emigration of a child from Kenya. Further, that prior to travelling outside Kenya to Israel, there were no court orders restraining her from travelling outside the country with the Minors. The 2nd Interested Party also informed the Court that she has recently married, and her husband is an Israeli with whom she intends to build a life with; that she and the Applicant can no longer reside in the same country and under such circumstances; and that they may need to reorganise access arrangements, which issue is within the lower court's jurisdiction where judgement is pending. In addition, that her motivation for changing names of the Minors was rooted in the change in her marital status, and what she deems to be in the best interests of the Minors going forward.

17. She deponed that apart from harassing the children regarding religious matters, the Applicant neither partakes in their upkeep despite court orders, and neither does he inquire about matters relating to their upkeep in terms of health, academics, or general and social well-being even whilst they were in Kenya. That it had also come to her attention that the Applicant is keen to jeopardise her life and those of their children by broadcasting through various channels the issues in this case, and deliberately misrepresenting certain facts that may ultimately make it unsafe for herself and the children to return to Kenya, and that she is constantly receiving threatening messages some from people whom she does not know as a result.

18. It was the 2nd Interested Party's contention that as the custodial parent she is constantly making decisions regarding the Minors' health, general well-being and other matters having regard to their constantly evolving circumstances, and that the Applicant has not shown any interest in the day to day upbringing of the minors and in fact has even sought to have them placed in the custody of a third party through various applications in the lower court. She averred that the Court's primary consideration should be the best interests of the child as it deliberates and makes decision in the matter; that the Court has a duty to protect safeguard and maintain the welfare of the Minors particularly where the actions of the Applicant are likely to create risks to their lives.

19. These pleadings were reiterated in the 2nd Interested Party's submissions, wherein she sought to rely on Article 53(2) of the Constitution and section 4(3) of the Children's Act, that a child's best interests are of paramount importance in every matter concerning the child. In addition, that section 23(1) defines parental responsibility as all duties, rights, powers, responsibilities and authority which by a law a parent of a child has in relation to the child.

20. Based on the foregoing, it was the 2nd Interested Party's submission that as the mother of the Minors, she has not only enjoyed the rights accorded to her with regard to the children but has also discharged her responsibilities towards them and has sought to maintain their best interest throughout this case, and that the lower court in its wise discretion deemed it fit to grant sole legal custody to her. Therefore, that the change of names and the move to Israel were well within her rights.

21. The 2nd Interested Party also pointed to section 76(3) of the Act, which states that where the court is considering whether or not to make an order with regard to a child, it shall have particular regard to the ascertainable feelings and wishes of the child concerned with reference to the child's age and understanding, and the likely effect on the child of any change in circumstances.

22. It was her submission based on the foregoing that the children are well catered for and thriving, as is evident from the concluded lower court case. That the Minors themselves have already expressed their wishes to continue living with their mother, and a change in circumstances at this time would not be in their best interests. Lastly, that they have previously suffered both emotionally and physically while in the custody of the Applicant.

**The Determination**

23. I have considered the pleadings and submissions made herein, and find that the issues for determination are firstly, whether the Respondents' acted *ultra vires* and fairly, and secondly, whether the Applicant is deserved of the orders sought.

24. It is important and prudent in light of the myriad of issues that the parties herein have raised, to establish at the outset the purpose and reach of judicial review. In the case of **Municipal Council of Mombasa vs Republic & Umoja Consultants Limited, Nairobi Civil Appeal No. 185 of 2001, [2002] eKLR** the Court of Appeal stated that in judicial review:

> **"The court would only be concerned with the process leading to the making of the decision. How was the decision arrived at? Did those who made the decision have the power, i.e. the jurisdiction to make it? Were the persons affected by the decision heard before it was made? In making the decision, did the decision - maker take into account relevant matters or did he take into account irrelevant matters? These are the kind of questions a court hearing a matter by way of judicial review is concerned with, and such court is not entitled to act as a court of appeal over the decider; acting as an appeal court over the decider 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 – and that, as we have said, is not the province of judicial review."**

25. The circumstances under which orders of judicial review can issue were also elaborated upon in the in Ugandan case of **Pastoli vs Kabale District Local Government Council & Others, (2008) 2 EA 300** at pages 303 to 304 thus:

> **"In order to succeed in an application for Judicial Review, the applicant has to show that the decision or act complained of is tainted with illegality, irrationality and procedural impropriety: See *Council of Civil Service Union v Minister for the Civil Service* [1985] AC 2; and also *Francis Bahikirwe Muntu and others v Kyambogo University*, High Court, Kampala, miscellaneous application number 643 of 2005 (UR).**
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> **Illegality is when the decision making authority commits an error of law in the process of taking the decision or making the act, the subject of the complaint. Acting without Jurisdiction or *ultra vires*, or contrary to the provisions of a law or its principles are instances of illegality…..**
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> **Irrationality is when there is such gross unreasonableness in the decision taken or act done, that no reasonable authority, addressing itself to the facts and the law before it, would have made such a decision. Such a decision is usually in defiance of logic and acceptable moral standards: Re An Application by Bukoba Gymkhana Club [1963] EA 478 at page 479 paragraph "E".**
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> **Procedural impropriety is when there is failure to act fairly on the part of the decision making authority in the process of taking a decision. The unfairness may be in non-observance of the Rules of Natural Justice or to act with procedural fairness towards one to be affected by the decision. It may also involve failure to adhere and observe procedural rules expressly laid down in a statute or legislative Instrument by which such authority exercises jurisdiction to make a decision. (Al-Mehdawi v Secretary of State for the Home Department [1990] AC 876)."**

26. Having set out the parameters of judicial review, I will proceed to interrogate the arguments brought before this Court by the Applicant and the 2nd Interested Party. The Applicant has challenged a decision of the 1st Respondent to effect change on the Minors' names without notifying him and without his consent, thereby interfering with his parental rights and denying him the right to fair administrative action. He provided as evidence, copies of Gazette Notices Nos. 8702 and 8703 effecting the change of name, and of birth certificates of the Minors showing that he is their father. It is notable in this respect that the said Gazette Notices were prepared by and published by the Minors' Advocates, Masika & Koros Advocaates, and notify of a change of names by deed poll registered in the Registry of Documents.

27. On the alleged decision by the 2nd Respondent to issue the subject Minors with passports, no evidence was brought by the Applicant of such passports, nor of the date of issue, for this Court to confirm that indeed there was such a decision made by the 2nd Respondent. The Applicant also brought evidence of letters he wrote to the 1st and 2nd Respondents on the irregular change of name and issue of passports to the subject Minors.

28. It is not in contest that the Applicant has familial and parental rights under Articles 45 and 53 of the Constitution, and will be affected by any decisions made regarding the subject Minors. There is also a core duty placed upon decision makers to act fairly under Article 47 of the Constitution and the provisions of the Fair Administrative Action Act, and to ensure that a person affected by a decision has an effective opportunity to make representations and be heard and make representations before the decision is made.

29. However, in the present application this Court has faced a challenge in reaching a determination that the Respondents breached the Applicant's rights in this regard, or that they acted illegally and unfairly for various reasons. Firstly, as illustrated in the foregoing, there was a paucity of evidence availed by the Applicant on the decisions alleged to have been made by the Respondents, and the processes leading to the said decision. Secondly, there was also a paucity of argument on the applicable legal provisions as regards the making of the impugned decisions, and on the breach of the same by the Respondents. Specifically, no provisions of the Constitution or statutory law were cited by the Applicant to buttress his allegations of illegality on the part of the Respondents.

30. Under Section 107(1) of the *Evidence Act*, "whoever desires any court to give judgment as to any legal right or liability dependent on the existence of facts which he asserts must prove that those facts exist." In addition there is a presumption that official acts are presumed to be done properly and legally as illustrated in the legal maxim that omnia praesumuntur legitime facta donec probetur in contrarium (all things are presumed to have been legitimately done, until the contrary is proved). The presumption raised in favor of an official act is however rebuttable.

31. Accordingly, the burden is upon the party who challenges the administrative decision to bring enough evidence to show that the decision is invalid. The party must prove satisfactorily that the administrative action is unjust, unreasonable, unlawful, arbitrary, capricious, or an abuse of discretion. Once such proof is provided, the onus then moves to the respondent to show the legality of its actions.

32. It was held as follows in this regard in the Ugandan Case of **J K Patel vs. Spear Motors Ltd SCCA No. 4 of 1991 [1993] VI KALR 85**:

> **"As applied to judicial proceedings the phrase "burden of proof" has two distinct and frequently confused meanings, (1) the burden of proof as a matter of law and pleading – the burden, as it has been called, of establishing a case, whether by preponderance of evidence, or beyond reasonable doubt; and (2) the burden of proof in the sense of adducing evidence.... The *onus probandi* rests, before evidence is gone into, upon the party asserting the affirmative of the issue; and it rests, after evidence is gone into, upon the party against whom the tribunal, at the time the question arises, would give judgement if no further evidence were adduced."** See **Constantine Steamship Line Ltd vs. Imperial Smelting Corp [1914] 2 All ER 165 (H.L); Trevor Price vs. Kelsall [1975] EA 752 at 761; *Phippson on Evidence* 12th Ed Para 91; Phippson At Para 95".**
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> **This position was also reiterated by the Kenya Supreme Court in Raila Amolo Odinga & Another vs Independent Electoral and Boundaries Commission & 2 Others, SC Election Petition No.1 of 2017 .**

33. In the present application, the Applicant has not brought evidence to establish that the Respondents made the decisions that he sought to have quashed, and that they breached any applicable law in this regard. Therefore, no evidential duty and burden was placed on the Respondents to bring evidence to show the legality of their actions, and procedural steps taken to ensure fair action before the impugned decisions were made.

34. The Applicant in his supplementary submissions urged that the Respondents' failure to respond despite being served is an abdication of their duty as public officers , and he invited this Court to find against the said Respondents based on the principle of undefended claims. However, this Court on the contrary holds that in light of the findings made hereinabove, the Respondents' non-participation in these proceedings is inconsequential, and will not aid the Applicant in his case.

35. Lastly, the majority of the issues raised and arguments made by the Applicant in this application were as regards his merit to parental rights in relation to the subject Minors vis-à-vis the 2nd Interested Party. These are issues which are not amenable to resolution in judicial review proceedings, and which were also the subject of on-going separate judicial proceedings at the Children Court at Milimani, Nairobi in Children Case No. 1087 of 2015. The 2nd Interested Party in this respect also defended her actions of change of name of the Minors and of taking them out of the country, on the strength of Court orders of sole custody issued in the said case, and also in exercise of her parental rights.

36. Of relevance in this regard are the supplementary submissions by the Applicant dated 4th May 2018 , wherein he informed this Court that Children Case No. 1087 of 2015 had been determined between the Applicant and the 2nd Interested Party, with custody being granted to the 2nd Interested Party, and the Applicant granted access over the Minors via video call. Further, that the Applicant being dissatisfied, has embarked on appeal. I am of view that the appeal would be the proper forum to urge the issues that the Applicant has raised in his application, and where he is likely to get more efficacious remedies.

37. As regards the remedies the Applicant seeks in his present application, the Court of Appeal in the case in **Kenya National Examination Council vs Republic, Exparte Geoffrey Gathenji & 9 Others, Nairobi Civil Appeal No. 266 of 1996** held that an order of certiorari issues to quash a decision already made and if the decision is made without or in excess of jurisdiction, or where the rules of natural justice are not complied with.

38. As regards the grant of an order of mandamus, the said Court held as follows:

> **"…The order of *mandamus* is of a most extensive remedial nature, and is, in form, a command issuing from the High Court of Justice, directed to any person, corporation or inferior tribunal, requiring him or them to do some particular thing therein specified which appertains to his or their office and is in the nature of a public duty. Its purpose is to remedy the defects of justice and accordingly it will issue, to the end that justice may be done, in all cases where there is a specific legal right or no specific legal remedy for enforcing that right; and it may issue in cases where, although there is an alternative legal remedy, yet that mode of redress is less convenient, beneficial and effectual. The order must command no more than the party against whom the application is legally bound to perform. Where a general duty is imposed, a *mandamus* cannot require it to be done at once. Where a statute, which imposes a duty, leaves discretion as to the mode of performing the duty in the hands of the party on whom the obligation is laid, a *mandamus* cannot command the duty in question to be carried out in a specific way… These principles mean that an order of *mandamus* compel the performance of a public duty which is imposed on a person or body of persons by a statute and where that person or body of persons has failed to perform the duty to the detriment of a party who has a legal right to expect the duty to be performed. An order of *mandamus* compels the performance of a duty imposed by statute where the person or body on whom the duty is imposed fails or refuses to perform the same but if the complaint is that the duty has been wrongfully performed i.e. that the duty has not been performed according to the law, then *mandamus* is wrong remedy to apply for because, like an order of prohibition, an order of *mandamus* cannot quash what has already been done…**

39. This Court has found that the Applicant did not provide evidence that the decisions complained of were made by the Respondents, nor that the actions of the Respondent were *ultra vires* and/or that they did not act fairly. In addition no specific constitutional or statutory provisions were cited by the Applicant, that impose a duty on the Respondents to perform the actions on which he is seeking prayers.

40. This Court has thus reached the conclusion that the orders of Certiorari and Mandamus the Applicant seeks are not merited for the foregoing reasons. In addition, on the order of mandamus that is sought, it cannot issue to require the Respondents to exercise their discretion in the particular manner sought, especially in light of the Applicant's submissions that the proceedings in Children's Case Number 1087 of 2015 have since been concluded.

41. The Applicant also seeks a declaratory order as regards the violation of his rights. While declarations can issue in judicial review when it is just and convenient to do so, including to state authoritatively the rights of individuals, a Court will usually not grant a declaration if it has not heard contested argument on the issue to which the declaration relates, especially where the declaration will affect third parties who are not parties to the claim before the Court. See in this respect **HM (Iraq) vs Secretary of State for Home Department (2011) EWCA Civ 1536**.

42. This Court has made certain observations as regards the nature of the Applicant's claim in relation to the Minors, vis-à-vis the 2nd Interested Party. The declaration sought will not only affect the 2nd Interested Party's parental rights, and the orders made in her favour in other judicial proceedings, but also the Minors' rights in this respect..

43. In the premises, I find that the Applicant's Notice of Motion dated 2nd March 2017 is not merited, and it is accordingly dismissed with costs to the 2nd Interested Party.

44. Orders accordingly**.**

**DATED AND SIGNED AT NAIROBI THIS 24TH DAY OF JULY 2018**

**P. NYAMWEYA**

**JUDGE**