



REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA

AT NAIROBI

JUDICIAL REVIEW NO. 648 OF 2017

**IN THE MATTER OF AN APPLICATION FOR LEAVE TO APPLY FOR JUDICIAL REVIEW
ORDERS OF CERTIORARI, AND PROHIBITION**

AND

IN THE MATTER OF ARTICLES 27(1), 47, 48 OF THE CONSTITUTION OF KENYA 2010

AND

IN THE MATTER OF CHIEF MAGISTRATE'S COURT AT NAIROBI

BETWEEN

ALLOICE ODHIAMBO LIMUTUAPPLICANT

VERSUS

CHIEF MAGISTRATE'S COURT AT NAIROBI.....1ST RESPONDENT

JUDITH AWUOR NYAWADE2ND RESPONDENT

RULING ON LEAVE AND STAY

1. The exparte applicant **Aloice Odhiambo Lumutu** seeks vide his application dated 9th November 2017 leave of court to institute Judicial Review proceedings for orders of **Certiorari** directed at the Chief Magistrate's Court, Nairobi quashing its decision and order dated 15th June 2017 in Judicial Separation No.8 of 2017; **Prohibition** directed at the said Chief Magistrate's Court or any other subordinate court whatsoever from hearing or determining and or any further orders(sic) in Judicial Separation No. 8 of 2017; That leave so granted do operate as stay of the orders granted by the said Chief Magistrate's Court in Judicial Separation No. 8 of 2017; and costs.
2. The applicant relies on his statutory statement and verifying affidavit and exhibits all filed on 9th November 2017 and dated the same day.
3. The application is opposed by the 2nd respondent **Judith Awour Nyawade** through her replying affidavit sworn on 14th June 2017 and filed on 15th November 2017.

4. According to the *exparte* applicant, he is legally married to the 2nd respondent as per the annexed marriage certificate and that on 14th June 2017 the 2nd respondent filed petition for Judicial Separation in the Chief Magistrate's Court simultaneous with an application seeking for an exclusion order, to bar the applicant from visiting her, entering, staying and remaining in their matrimonial home being Nairobi/Block/140/287/40 in Nyayo Estate Embakasi Nairobi.
5. That the 2nd Respondent obtained *exparte* orders and the matter was set for *interpartes* hearing on 28th June 2017 and the applicant herein was served on 15th June 2017. That because the *exparte* applicant was deficient of time and resources, he instructed an advocate on the eve of the *interpartes* hearing and that his advocate filed an application to vacate or review the *exparte* orders of 15th June 2017 and the trial magistrate directed the matter to be heard on 29th June 2017.
6. It is claimed that the matter has deliberately never been heard despite the prejudice and hardship the *exparte* order is occasioning to the *exparte* applicant herein as he was excluded from his own house which he bought through Tenant Purchase Scheme.
7. That the orders as issued were final yet such orders of exclusion ought not to have been issued *exparte* without according the *exparte* applicant an opportunity to be heard as their marriage with the 2nd respondent is still subsisting.
8. That he has since lost his employment and has no income hence the 2nd respondent is taking advantage of the applicant's economic status.
9. That if the exclusion orders are not vacated, the minor children of the marriage who still depend on the *exparte* applicant will be subjected to destitute and denied their fatherly love. The applicant claims that the orders issued were not justified and that the said house risks being sold for nonpayment of the loan.
10. That the court did not have jurisdiction to issue the exclusion orders as such orders are not available in Judicial Separation and that such orders can only be issued by the Family Division of the High Court.
11. In the replying affidavit sworn by the 2nd respondent **Judith Awuor Nyawade** on 14th November 2017, she contends that the application is frivolous, incompetent, premature and an outright abuse of the court process, that there is no demonstration of illegality, irrationality or procedural impropriety on the part of the Magistrate's Court in granting the impugned orders. That the said orders were issued in accordance with Section 12(3) of the Matrimonial Property Act, 2013; that there is nondisclosure of material facts to the effect that the lower court is yet to make a final decision in that there is a pending application the applicant filed seeking to set aside the *exparte* orders of Judicial Separation; that the applicant has not complied with Section 9(1) (2) and (3) of the Fair Administrative Action Act on exhaustion of all available remedies; that these proceedings seek to challenge the merits of the decision and not the decision making process by the Magistrate's Court.
12. The parties' advocates urged the application yesterday 15th November 2017 relying on their respective documentation and affidavits on record.
13. Miss Kioko Advocate for the applicant reiterated that the Magistrate's Court had no jurisdiction to grant execution orders in Judicial Separation matter and that the orders were final in nature and were made *exparte* without according the applicant an opportunity to be heard.
14. It was submitted that the applicant lost his job hence he has been rendered a vagabond which is a violation of his rights to the matrimonial home and to decent housing. Counsel for the applicant maintained that exclusion orders can only issue in divorce proceedings not in Judicial Separation Petition.
15. Mr Masaviru counsel for the 2nd respondent submitted in opposition relying on his client's replying

affidavit and contending that the applicant had not demonstrated that he has a prima facie arguable case; that he was challenging merits of the decision and not the decision making process; that the impugned order is amenable to challenge and that Judicial Review is a last resort forum but is being used as appeal against orders of the lower court; that the prayer for prohibition as framed is an injunction against the lower court to prohibit it from executing its judicial and constitutional mandate; that the orders issued were in accordance with the provisions of the Matrimonial Property Act, Section 12 (3) thereof.

16. That there is inordinate delay in bringing these proceedings and that the applicant should have exhausted alternative remedies under the Fair Administrative Action Act, Sections 9(2), (3),(4) before coming to this court. It was also argued that the applicant had not claimed any illegality, irrationality or procedural impropriety. Counsel relied on two decisions **HC Divorce cause No. 5/2007 SWN vs MKK at Nakuru** where the court held that the court had jurisdiction under the matrimonial causes Act to grant an exclusion order for protection of an applicant from threat of violence by her husband so that he is restrained from visiting the matrimonial home where there is a possibility that he would injure the petitioner.

17. Further reliance was placed on **JR 202/2013 Republic vs CM's Court Embu, Kenya Power and Lighting Company Ltd and 2 others** where the court held, inter alia that orders granted by a court *ex parte* could be reviewed or an appeal filed to challenge them but not through Judicial Review. The same principle was espoused in **Busia ELC JR 6/2012**.

18. Mr Masaviru also relied on this court's decision in **JR 61/2016 Republic vs Wellington Kihato Wamburu & 3 Others ex parte Kenyatta University & 3 others** on the Yardstick for grant of leave in Judicial Review proceedings, maintaining that the applicant herein had not met the test. He urged the court to dismiss the application for leave and stay.

19. In a rejoinder, Miss Kioko submitted that her client is concerned with how the exclusion order was made without first according him an opportunity to be heard which was in violation of his rights to a hearing and to housing. That although they had filed an application for setting aside the *ex parte* orders of exclusion, the magistrate had deliberately refused to hear and determine the application. She urged this court to grant her client the orders sought.

DETERMINATION

20. I have carefully considered the applicant's chamber summons as supported by statutory statement and verifying affidavit together with the exhibits annexed thereto. I have also considered the 2nd respondent's replying affidavit and both parties' counsels' oral submissions in court and the statutory case law and constitutional provisions relied on.

21. In my view, the only issue for determination is whether the applicant deserved leave to apply for Judicial Review orders of certiorari and prohibition and if so, whether leave if granted should operate as stay of the exclusion orders issued by the lower court in Separation Cause No. 8/2017.

22. Simply stated, the applicant is the husband to the 2nd respondent from 2007 as per the annexed marriage certificate. They have lived under one roof until the wife instituted the Judicial Separation proceedings alleging cruelty, desertion and infidelity among other grounds contained in the annexed pleadings before the Chief Magistrate's Court at Milimani Commercial Courts, Nairobi.

23. The two are blessed with three issues who are still minors. On 14th June 2017, simultaneous with the filing of the Judicial Separation cause, the 2nd respondent filed an application under certificate of urgency praying for of temporary exclusion of the applicant from visiting , entering, staying and remaining on the matrimonial home on title No Nairobi/Block 140/287/40 situate in Nyayo Estate, Embakasi, pending hearing and determination of the application and the petition for Judicial Separation.

24. The court heard the application *ex parte* under certificate of urgency and granted the prayer that:

“ In the interim pending the hearing and determination of this application, there be a temporal exclusion order excluding the 1st defendant from visiting, entering, staying and remaining on the matrimonial home being title number Nairobi/Block 140/287/40 situate in Nyayo Estate – Embakasi.

That the application to be served for interpartes hearing on 28th June 2017 this court(sic)”

25. The order which was issued by Honourable I. Orange (Mr) had a penal notice appended thereto. There are no proceedings of the lower court availed to this court to show how the trial magistrate has conducted himself as alleged that he has deliberately never heard and determined the application seeking to set aside that *ex parte* order of exclusion. What is however seriously impugned is that the magistrate had no jurisdiction to issue an exclusion order in Judicial Separation proceedings which order can only issue in Divorce proceedings in the High Court. It is further claimed that the applicant was condemned unheard by the exclusion order, which order has rendered him a vagabond as he had lost his job and with nowhere to go, his rights to housing have been violated yet the house belongs to him through a Tenant Purchase Scheme with National Social Security Fund (NSSF).

26. The purpose for leave is to filter and weed out hopeless or frivolous cases thereby saving pressure on the courts and needless expense for parties by allowing futile and malicious claims to be excluded or eliminated so as to prevent paralysis of public bodies, in execution of their mandate under the law. See **Matiba vs Attorney General Nairobi HC Miscellaneous Application 790/1993; Republic vs Permanent Secretary of Planning and National Development Ex parte Kaimenyi [2006] e KLR**

27. In Judicial Review, the court's role at leave stage is to do no more than decide whether there is an arguable case for Judicial Review investigation at a substance stage and not to determine any issue finally in favour of the applicant. On an *ex parte* application, leave may be refused, or deferred to the substantive hearing and this is what this court did – to accord an interpartes hearing.

28. The court therefore restricts itself to threshold issues of whether the applicant has an arguable case and if leave is granted, whether it should operate as stay(see **Re International SA Bureau Veritas[2005] EA 43.**

29. In this case, I find, without hesitation that there is no *prima facie* arguable case for indepth consideration at the substantive stage. The reasons are that the lower court clearly considered the *ex parte* application for exclusion orders and whether it rightly or wrongly exercised its discretion in so granting the orders is for the applicant to seek to set aside those orders first and where the court declines, then the applicant has an opportunity to file an appeal.

30. The orders granted by the subordinate court were injunctive in nature, though brought in Judicial Separation proceedings. The applicant even went ahead and filed an application to set aside/review the said *ex parte* orders after he was served with the orders. The court gave him a hearing date.

31. The trial magistrate had made it trite that the *ex parte* orders were temporary pending hearing of the application interpartes, ***not until the entire proceedings are heard and determined as alleged by the ex parte applicant herein.*** Therefore, there is no finality of the *ex parte* orders issued by the subordinate court.

32. In my humble view, the applicant herein has failed to demonstrate that the court in granting *ex parte* orders temporarily lacked jurisdiction to do so. As to whether the court should not have issued exclusion orders is still within the court's mandate to review or vacate the orders which were made *ex parte*, at the interpartes hearing or on application by the *ex parte* applicant who is aggrieved by those orders. It is not for this court to injunct the trial court by cutting its hands not to consider an application seeking to set aside the *ex parte* orders which orders are interim and not final.

33. The application for setting aside the ex parte orders is the appropriate remedy or relief for the applicant. It is effective and should a party be dissatisfied with the outcome, they are free to appeal the decision. That is the spirit of Section 9(2) (3) and (4) of the Fair Administrative Action Act, 2015 which mandates that an applicant for Judicial Review must first satisfy the court that they have exhausted the internal review or appeal mechanisms available or apply to be exempted from resorting to such internal review mechanisms, citing special circumstances.

34. No application for exemption from resorting to the alternative and efficacious review mechanisms has been placed before this court and no such special circumstances exist in this court to exclude the trial court from hearing and determining an application for setting aside of the ex parte orders.

35. The courts have held not once but severally that where there is a clear procedure for the redress of any particular grievances prescribed by law, that procedure should be strictly followed. (see Court of Appeal decisions in **Mutanga Tea & Coffee Company Ltd vs Shikara Ltd & Another [2015] e KLR [CA]** citing **Kones vs Republic & another ex parte Kimani Wanyoike & 4 Others[2008] e KLR**. See also **Samson Chemo Vuko vs Nelson Kilumo & 2 Others [2016] e KLR** where the Court of Appeal citing **Speaker of the National Assembly vs Karume [2008] 1 KLR 425** stated *inter alia*:

“.....where there is a clear procedure of the redress of any particular grievances prescribed in the Constitution or the Act of Parliament, that procedure should be strictly followed”

36. This court exercises supervisory jurisdiction over subordinate courts, bodies and authorities as contemplated in Article 165(6) of the Constitution. However, the role of this court is not to take over proceedings being regularly conducted by the trial courts and in the process interfere with due process especially where there is no demonstration of bias or breach of the rules of natural justice or any proof of procedural impropriety in the manner in which such proceedings are conducted.

37. I reiterate that there is no law that bars a court of competent jurisdiction to issue ex parte orders in the first instance for the preservation of the subject matter of a suit or matter under consideration. See Order 51 Rule 3 and 15 of the Civil Procedure Rule.

38. This court would not intervene in the circumstances of this case as described. To do so would be in effect sitting on appeal of the orders of the trial court yet this court is not sitting as an appellate court. The effect of the orders sought herein if granted would be to set aside the ex parte orders of the trial court and leave it with the entire suit to hear and determine which in my view would be interfering with judicial discretion of that court. There is no demonstration of abuse of legal process by the trial court, which only granted an interim order and directed the applicant therein to serve the other parties for inter partes hearing.

39. In my view, that process by the trial court cannot be considered to be an irrational decision of the court and if it was, the remedy lies in the applicant herein seeking to overturn that order before the same court. There is absolutely no demonstration that the magistrate has deliberately refused to hear the application seeking to set aside the ex parte orders issued on 14th June 2017 and at the hearing of this application, the court did not hesitate to caution counsel for the ex parte applicant against imputations on the trial magistrate when no proceedings were availed to show the alleged impropriety on the part of the trial court.

40. What the applicant has placed before this court is an appeal against the orders of Honourable I. Orange and not judicial review.

41. In the end, I find that this court is not the appropriate forum for challenging the impugned decision of the trial court, which decision can be challenged via review or setting aside of the impugned orders.

42. Consequently, I decline to grant leave and proceed to dismiss the application dated 9th November 2017.

43. As the parties are a couple who are feuding, I order that each party do bear their own costs of this application which is hereby dismissed.

Orders accordingly.

Dated, signed and delivered in open court at Nairobi this 16th day of November 2017.

R.E. ABURILI

JUDGE

In the presence of:

Miss Mathenge h/b for Mr Masaviru for the 2nd respondent

N/A for the exparte applicant

N/A for the 1st Respondent

Court Assistant: Mr Kombo