REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT NAIROBI

CONSTITUTIONAL AND JUDICIAL REVIEW DIVISION

MISCELLANEOUS CIVIL APPLICATION NO. 54 OF 2015

IN THE MATTER OF CONSTITUTION OF KENYA

AND

IN THE MATTER OF CHILDREN ACT, ACT NUMBER 8 OF 2001

AND

IN THE MATTER OF THE LAW REFORM ACT, CHAPTER 26 OF THE LAWS OF KENYA

APPLICATION TO THE HIGH COURT FOR JUDICIAL REVIEW ORDERS OF CERTIORARI AND PROHIBITION

BETWEEN

REPUBLIC…….....…….....….APPLICANT

AND

THE PRINCIPAL MAGISTRATE, CHILDRENS COURT, NAIROBI....1ST RESPONDENT

THE COMMISSIONER OF PRISONS.....2ND RESPONDENT

HON. ATTORNEY GENERAL.....3RD RESPONDENT

AND

MWI (ON BEHALF OF AN AND A N)….....……1ST INTERESTED PARTY

M O…….....……2ND INTERESTED PARTY

EX-PARTE:

1. **E A**
2. **S K M**

JUDGEMENT

Introduction

1. By a Notice of Motion dated 23rd February, 2015 the *ex parte* applicants herein, **E A** and **S K M** seek the following orders:

1. **That Honourable court be pleased to issue an order of certiorari to remove into the High Court and quash the decisions or orders of the 1st Respondent made on 2nd and 6th February 2015 to hold the 1st and 2nd Ex Parte Applicants in Civil jail for periods of 60 days and 30 days respectively under Section 101 (7) of the Children Act, which periods exceed the statutory defined maximum period of 28 days.**
2. **That the Honourable Court be pleased to issue an order of Prohibition to stop and/or refrain the Respondent, or their agents, servants and/or employees or any of them from continuing to hold the Ex parte Applicants in civil jail based on the decisions or orders made by the 1st Respondent on 2nd and 6th February 2015.**
3. **That the costs of this application be provided for.**

Ex Parte Applicants' Case

2. According to the 1st Applicant herein, **E A**, he is the Defendant in Nairobi Children Case No. 1522 of 2013 (Matilda Ongondi vs. Erickson Ayeni) in which a decree was issued against him in the sum of Kshs 57,780/=.

3. He averred that in execution of the said decree, **M O**, the Plaintiff therein applied for his committal to civil jail by the 1st Respondent.

4. The said applicant contended that the jurisdiction of the 1st Respondent in committing litigants to civil jail is defined in section 101(7) of the ***Children Act*** which provides that "a 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 that four weeks...". However, on 2nd February 2015, he was committed by the 1st Respondent to civil jail for a term of 2 months and was incarcerated at the Industrial Area Prison.

5. According to the said applicant the said order by the 1st Respondent to commit him to prison for a period exceeding the statutory jurisdiction was made without or in excess of jurisdiction, is *ultra vires,* unlawful and oppressive hence the 2nd Respondent was holding him in prison based on an order that was made without or in excess of jurisdiction.

Respondents' Case

6. In opposition to the application, the Respondents filed the following grounds of opposition:

1. **That the notice of motion application is defective has no merit and is based on a misconception of the law, vexatious and an abuse of the court process.**
2. **That the matter is not within the purview of judicial review court neither does not meet the basic tenets of judicial review application.**
3. **That the application is an attempt to challenge the merits of the decision of the 1st respondent and therefore an appeal through judicial review.**
4. **That the grant of orders of prohibition would under ordinary circumstances lead to curtailing of statutory powers of the 1st Respondent in accordance with the law.**
5. **That the application is an abuse of court process and lacks merit.**

Interested Parties' Case

7. On the part of the interested parties it was averred by the 1st interested party herein, **M W I**, that she was the Plaintiff in Nairobi Children Case No. 1056 of 2013, in which she sued 2nd Applicant for custody

care and control of the twin minors **A N** and **A N**.

8. She averred that warrants of arrest were issued way back in December 2014 against the 2nd Applicant in Nairobi Children's Case NO. 1056 of 2013 for failure to pay monthly maintenance costs to the tune of Kenya shillings Nine Hundred and Eighty one Thousand only (Kshs 981,000.00). Subsequently, the 2nd Applicant sought to have the decision of the 1st Respondent delivered on 9th December 2013 reviewed vide an application dated 16th December, 2013. The orders sought were for review of interim maintenance of Kshs. 100,000.00 to a lesser amount. However, in contempt of the maintenance order, the 2nd Applicant started paying the monthly maintenance costs of Kshs 7,000.00 for the two minors, translating into a monthly maintenance upkeep of Kshs 3,000.00 per child.

9. The said interested party averred that on or about 13th February 2014 the court delivered a ruling reviewing the monthly maintenance costs of Kshs.100,000.00 to Kshs. 60,000.00 but the applicant refused to be bound by the said ruling and being dissatisfied therewith, the 2nd Applicant preferred an appeal on 2nd April 2014 and sought an order staying any further proceedings in the lower court pending hearing and determination of the preferred appeal which application was however dismissed by the Judge.

10. It was averred that the said interested party's advocates took a notice to show cause why the 2nd Applicant should not be committed to civil jail and the 2nd Applicant was duly committed. The said interested party disclosed that at the time when the 2nd Applicant was being committed to civil jail, learned counsel for the 2nd Applicant did intimate to the learned magistrate that the 2nd Applicant can only be committed to civil jail for four weeks as is provided for by the ***Children's Act*** and the learned Magistrate gave a mention date of 5th March 2015 for further directions, which was 28 day after the 2nd applicant was committed to civil jail. To the interested party, the directions which were to be taken on 5th March 2015 before the learned Principal Magistrate at the lower court on 5th March 2015, which was exactly 28 days from the date when the 2nd applicant was committed to civil jail, was for purposes of confirmation of the 2nd applicant advocate's sentiments on the length of time a person can be committed to civil jail and further to confirm whether the 2nd applicant had paid any monies towards satisfaction of the decree.

11. It was therefore contended that this application is premature, an illegality, a mere waste of the courts precious time and otherwise an abuse of the court process. To her, the 2nd applicant is trying to hide this illegality through the 1st applicant's application in a blatant attempt to hoodwink this Honourable court into granting the orders sought by the 2nd applicant.

12. To the said interested party, the 1st Respondent had jurisdiction to commit the 2nd applicant to civil jail in accordance with section 101 (8) and (9) of the ***Children Act*** No. 8 of 2001 and to have the case mentioned on 5th March 2015. In her view, these legal gimmicks by the 2nd Applicant are actually not in the best interest of the minors herein as the 2nd Applicant is shielding himself from paying for the interim maintenance ordered by the lower court yet the he continues to live luxuriously ignoring parental responsibility where two DNA tests have confirmed that he is the father of the minor twins.

13. It was therefore contended that the 2nd applicant's application herein has no merit, is an abuse of court process and ought to be dismissed with costs to the 1st Interested Party.

Determination

14. I have taken into account the foregoing as well as the submissions filled herein.

15. Before going into the issues raised herein what raised this Court's concern is the manner in which these proceedings were instituted. These proceedings are meant to challenge decisions made in Nairobi Children Court Case Nos. 1522 of 2013 and 1056 of 2013 filed by different parties against different

defendants. There is no allegation that the said causes were consolidated. Section 9(3) of the ***Law Reform Act***, Cap 22 Laws of Kenya provides as follows:

> ***In the case of an application for an order of certiorari to remove any judgment, order, decree, conviction or other proceedings for the purpose of its being quashed, leave shall not be granted unless the application for leave is made not later than six months after the date of that judgment, order, decree, conviction or other proceeding or such shorter period as may be prescribed under any written law; and where that judgment, order, decree, conviction or other proceeding is subject to appeal, and a time is limited by law for the bringing of the appeal, the court or judge may adjourn the application for leave until the appeal is determined or the time for appealing has expired.***

16. In my view a strict reading of the aforesaid provision reveals that each judicial review application should be in respect of each set of proceedings unless proceedings are consolidated. Of course the Court is at liberty to consolidate two or more applications where the same can be conveniently dealt with as one cause. However to set out to institute one judicial review application in respect of different causes is a very inappropriate way of commencing judicial review as it would on occasion muddle up proceedings and confuse issues.

17. In this case, 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.***

18. In this case, it is clear that the respective period of committal was more than the said four weeks. This is not to say that the Court had no jurisdiction to commit the applicants herein to jail. It only means that the period was in excess of the period stipulated. In other words whereas the Court had jurisdiction to commit the applicants, to the extent that the period of committal was more than four weeks there was excess of jurisdiction.

19. As was held by **Ochieng, J** in **Sammy Likuyi Adiema vs. Charles Shamwati Shisikani Kakamega HCCA No. 144 Of 2003,** a Tribunal may have jurisdiction to hear and determine issues, but it may give orders, which were in excess of its powers. In effect, if a tribunal made orders beyond its powers, that is not necessarily synonymous with the tribunal lacking jurisdiction to entertain the dispute in the first place. Jurisdiction may, in my view, therefore be conferred at two levels. It may be that the Court lacks jurisdiction to entertain the dispute *ab initio*, in which case it ought to down its tools before taking one more step as was held in **Owners of The Motor Vessel "Lilian S" vs. Caltex Oil (K) Ltd [1989] KLR 1**. It may also be that though the Court has jurisdiction to enter into the inquiry concerned it lacks the jurisdiction to grant the relief sought. As I understand the ex parte applicants the challenge to jurisdiction falls within the second context. However, in **Uganda General Trading Co. Ltd vs. N T Patel Kampala HCCC No. 351 Of 1964 [1965] EA 149**, **Sir Udo Udoma, CJ** expressed himself as follows:

> **"The objection to the jurisdiction may be due to the tendency to confuse the issue of jurisdiction with the issue of the form of action and procedure. It does not necessarily mean that because the action is not maintainable in law therefore the Court before which the case has been brought would have no jurisdiction to try it. On the other hand the court may have full jurisdiction over an action and it may yet be held that the action is not maintainable in law... The objection in the instant case is that the action is not maintainable in law because it has not been properly instituted, since the proper form and procedure which ought to originate the proceedings has not been followed. That surely cannot be an objection to the jurisdiction of the court but merely an objection to the form and procedure by which the proceedings have been originated. The mere omission to follow a prescribed procedure in instituting proceedings would not necessarily oust the jurisdiction of the court where there is one as in the instant case. It may be considered incompetent for a court with jurisdiction to exercise such jurisdiction because the matter over which jurisdiction is sought to be exercised has not been brought properly before it in accordance with a prescribed**

procedure and in a prescribed form. In such a case the jurisdiction of the court is not exercised because it would be incompetent to do so. Incompetency or incapability to exercise jurisdiction already possessed must therefore be distinguished from a complete want of jurisdiction, which may be regarded as a question of incapacity."

20. Although it is true that section 101(9) of the said Act provides for review or variation of the order of committal, in this case it is not controverted that the issue of the period of committal was brought to the attention of the Court but the Court seemed not to have considered the same. In the circumstances, it is my view that the applicants cannot be faulted for instituting these proceedings.

21. With respect to the issue whether or not the Court ought to have considered other options before proceedings to commit, the applicants, the decision to do so was clearly an exercise of discretion. If in arriving at its decision the Court failed to consider the proviso to section 101(7), the challenge to the decision on that ground can only be by way of an appeal as that issue would go to the merits of the decision taken. Whether the decision to commit without considering the available options was right or not the best way of challenging such exercise of discretion was by way of an appeal which it seems the applicants did lodge. In judicial review proceedings the mere fact that the Tribunals decision was based on insufficient evidence, or misconstruing of the evidence which is what the applicant seems to be raising here or that in the course of the proceedings the Tribunal committed an error are not grounds for granting judicial review remedies. In reaching its determination, it must however, be recognised that a Tribunal or statutory body or authority has jurisdiction to err and the mere fact that in the course of its inquiry it errs on the merits is not a ground for quashing the decision by way of judicial review as opposed to an appeal. It is only an appellate Tribunal which is empowered and in fact enjoined in cases of the first appeal to re-evaluate the evidence presented at the first instance and arrive at its own decision on facts of course taking into account that it had no advantage of seeing the witnesses and hearing them testify. Whereas a decision may properly be overturned on an appeal it does not necessarily qualify as a candidate for judicial review. In **East African Railways Corp. vs. Anthony Sefu Dar-Es-Salaam HCCA No. 19 of 1971 [1973] EA 327,** it was held:

"It has been recognised for a long time past, that courts are empowered to look into the question whether the tribunal in question has not stepped outside the field of operation entrusted to it. The court may declare a tribunal's decision a nullity if (i) the tribunal did not follow the procedure laid down by a statute on arriving at a decision; (ii) breach of the principles of natural justice; (iii) if the actions were not done in good faith. Otherwise if none of these errors have been committed, the court cannot substitute its judgement for that of an authority, which has exercised a discretionary power, as the tribunal is entitled to decide a question wrongly as to decide it rightly..... And so have the courts repeatedly held that they have an inherent jurisdiction to supervise the working of inferior Courts or tribunals so that they may not act in excess of jurisdiction or without jurisdiction or contrary to law. But this admitted power of the Superior Court's to supervise inferior Courts or tribunals is necessarily delimited and its jurisdiction is to see that the inferior court has not exceeded its own, and for that very reason it is bound not to interfere in what has been done within that jurisdiction, for in so doing it would, itself, in turn transgress the limits within which its own jurisdiction of supervision, not of review, is confined. That supervision goes to two points: one is the area of the inferior jurisdiction and the qualifications and conditions of its exercise; the other is the observance of the law in the course of its exercise...Even if it were alleged that the Commission or authorised officer misconstrued the provision of the law or regulation, that would still not have entitled the court to question the decision reached. If a magistrate or other tribunal has jurisdiction to enter on the enquiry and to decide a particular issue, and there is irregularity in the procedure, he does not destroy his jurisdiction to go wrong. If he has jurisdiction to go right he has jurisdiction to go wrong. Neither an error in fact nor an error in law will destroy his jurisdiction...Where the proceedings are regular upon their face and the inferior tribunal had jurisdiction, the superior Courts will not grant the order of *certiorari* on the ground that the inferior tribunal misconceived a point of law. When the inferior tribunal has jurisdiction to decide a matter, it cannot (merely because it incidentally misconstrues a statute, or admits illegal evidence, or

rejects legal evidence, or convicts without evidence) be deemed to exceed or abuse its jurisdiction."

22. Having considered the issues raised herein it is my view that whereas the Court had jurisdiction to commit, in committing the applicants for a period of more than four weeks it exceeded its jurisdiction.

23. Section 11 of the ***Fair Administrative Action Act***, 2015 empowers this Court to grant any order that is just and equitable.

Order

24. Having considered the issues raised herein, I hereby quash the decisions made by the 1st Respondent herein committing the applicants for more than four weeks and substitute therefor an order committing them to four weeks each unless the said period is varied by the trial Court. The said period will of course be less any period served before the applicants were released.

25. As the manner in which these proceedings were instituted was clearly irregular, there will be no order as to costs.

Dated at Nairobi this 20th day of May, 2016

G V ODUNGA

JUDGE

Delivered in the presence of:

Miss Abutika for Mr. Macharia Nderitu for the Applicant

C Mutisya