



REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA

AT NAIROBI

JUDICIAL REVIEW NO. 55 OF 2016

IN THE MATTER OF: ARTICLE 165(6) OF THE CONSTITUTION OF KENYA

AND

**IN THE MATTER OF: AN APPLICATION BY T L FOR LEAVE TO COMMENCE JUDICIAL
REVIEW PROCEEDINGS**

AND

**IN THE MATTER OF: SECTIONS 8 AND 9 OF THE LAW REFORM ACT, CAP 26 LAWS OF
KENYA**

AND

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

BETWEEN

T L.....APPLICANT

VERSUS

THE KADHIS COURT NAIROBI.....1ST RESPONDENT

THE HON. ATTORNEY GENERAL.....2ND RESPONDENT

M A A.....INTERESTED PARTY

RULING

The Exparte applicant in this matter is M/S T L professing the Islamic religion, and so is the interested party Mr M A A. The respondents are the Kadhi's court Nairobi and the Attorney General.

The Exparte applicant's application dated 19th February 2016 seek from this court Judicial Review Order of Certiorari to bring into this court the orders of the Kadhi's court, Nairobi issued on 3rd February 2016 for purposes of quashing and to quash the said orders that relate to custody, care and control of A M A A (minor).

The Exparte applicant also seeks for Judicial Review Orders of prohibition to prohibit the Kadhi's court Nairobi from proceeding with case No. 14/2016 M A A Vs T L in so far as those proceedings relate to custody, care and control of the minor(issue) subject.

The grounds upon which that application is predicated are that the Kadhi's court is not vested with jurisdiction to hear and determine the dispute relating to custody, care and or control of children and that the Kadhi's jurisdiction is limited to the jurisdiction conferred by Article 170(5) of the Constitution.

The interested party by his counsel's oral application in court on 27th July 2016 made by Mr Ali seeks for orders that this matter be referred to the office of the Chief Justice to constitute a bigger bench of the High Court to hear and determine the Judicial Review matter. Counsel submitted that the matter raises serious constitutional issues of infringement of rights of the interested party who is a Muslim and who should not be subjected to proceedings before any other court other than the Kadhi's court. Further, that the issue of the Kadhi's jurisdiction to hear and determine disputes relating to custody, care, and control of children has been a subject of contradictory pronouncements by the High Court hence the need to constitute a bigger bench to hear this matter to resolve the contradictions .

Mr Omari counsel for the exparte applicant was of the contrary view and submitted that this court is being asked to sit and review the so called contradictory decisions of the High Court on the subject, which jurisdiction it does not have. That the matter herein is challenging the jurisdiction of the Kadhi's court which jurisdiction this court is vested with by Article 165 of the Constitution and that this court is not dealing with rights of the interested party but about rights and interests of the minor child. Further, that there are specific statutes dealing with marriage and children's issues and the fact that the interested party is a Muslim does not mean that every dispute must be heard by the Kadhi's court even when the Kadhi's court has no jurisdiction but that this is a matter for the High Court.

I have carefully considered the submissions by both parties' advocates on the oral application for reference of this matter to the office of the Chief Justice to constitute a bigger bench to hear it.

Article 165(4) of the Constitution of Kenya empowers this court to certify a matter that is raising substantial questions of law under clause 3(b) and (d) of Article 165 of the Constitution to be heard by an uneven number of judges being not less than three, assigned by the Chief Justice. That is, where this court in the exercise of its jurisdiction to determine the question whether a right on fundamental freedom on the bill of rights has been denied, violated, infringed or threatened; and any question respecting the interpretation of the Constitution including the determination of:

- i. The question whether any law is inconsistent with or in contravention of the constitution;
- ii. The question whether anything said to be done under the authority of the Constitution or of any law is inconsistent with, or in contravention of, the Constitution;
- iii. Any matter relating to constitutional powers of state organs in respect of county governments and any matter relating to the constitutional relationship between the levels of government; and
- iv. A question relating to conflict of laws under Article 191;

From the reading of Article 165(4) of the Constitution it is the court seized of the matter that is vested with the power to certify that matter as raising serious or substantial questions of law, as envisaged in Article 165(3) b and (d) of the constitution and that it shall be heard by uneven number of judges to be assigned by the Chief Justice.

Before me is a Judicial Review application challenging the jurisdiction of the Kadhi's Court in hearing and determining matters relating to custody and care of children; in a dispute between the applicant and interested party who were married under Islamic law. Is that a matter raising a

substantial questions of law under Clause 3 (b) or (d) of Article 165 of the Constitution? I find not. The reason being that this court is vested with supervisory jurisdiction over the subordinate courts and over any person, body or authority exercising a judicial or quasi judicial function, but not over a superior court(See Article 165(6) of the Constitution. Kadhi's court is a subordinate court as established under Article 170 of the Constitution (Part 3).

In my humble view, it does not require a bigger bench to determine the question of the jurisdiction of the Kadhi's court since jurisdiction is conferred by statutes and the Constitution not by parties.

In addition, albeit it has been submitted by the interested party that there have been conflicting decisions of the High Court on the jurisdiction of the Kadhi's Court, that conflict cannot be resolved by the High Court's bigger bench but by an appellate court. The High Court is a court of record yes, and a superior court, with unlimited original civil and criminal jurisdiction. However, Article 165(6) of the Constitution is clear that the High Court shall not exercise supervisory jurisdiction over a superior court.

To ask for a bigger bench so as to resolve the issue of the two schools of thought propounded by two different decisions of the High Court would, in my humble view, be asking the High Court to sit on appeal of the judgments of a superior court and its own judgment at that. In addition, the High Court is fully constituted when presided over by one judge. A three or more bench is not bound by a decision of a court of competent jurisdiction and neither can it overturn that decision.

Furthermore, it is not every allegation of infringement of a fundamental right under the Bill of Rights that will raise substantial question(s) of law which must be certified by the court as such.

Having examined the application by the exparte applicant and the issue raised by the interested party, I am not persuaded that this is a matter raising a substantial question of law as envisaged in Article 165(4) requiring the constitution of a three or more judge bench to hear and determine. Accordingly, I decline to certify the matter as such and direct that the Judicial Review matter herein shall be heard by one judge of the High Court.

Orders accordingly.

Dated, signed and delivered at Nairobi this 28th day of July 2016.

R.E. ABURILI

JUDGE

FURTHER ORDERS

The 1st respondent is granted 10 days to file and serve a response if any. All parties to file written submissions. Mention on 14th September 2016 to fix a hearing date.

R.E. ABURILI

JUDGE

28.7.2016