REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT NAIROBI.

MISC. CIVIL APPLICATION NO. 134A OF 2015

IN THE MATTER OF AN APPLICATION FOR LEAVE TO INSTITUTE JUDICIAL REVIEW PROCEEDINGS IN THE NATURE OF ORDERS FOR PROHIBITION

AND

IN THE MATTER OF CHIEF MAGISTRATE'S COURT NAIROBI, MILIMANI CHILDREN'S CAUSE NO. 1812 OF 2013

AND

IN THE MATTER OF THE CHILDREN'S ACT 0F 2001

AND

IN THE MATTER OF NICOLE NJERI KAHONGE AND ABBY MURINGE KAHONGE (MINORS)

AND

IN THE MATTER OF N K K.....APPLICANT

VERSUS

CHIEF MAGISTRATES' COURT, MILIMANI.....1ST RESPONDENT

I E N W.....2ND RESPONDENT

THE HONOURABLE ATTORNEY GENERAL.....3RD RESPONDENT

RULING

Introduction

1. By a Notice of Motion dated 12th May, 2015 the *ex parte* applicant herein, **N K K,** seeks the following orders:

1. **That this honourable court do grant an order of prohibition barring the Chief Magistrate's court Nairobi, Milimani from entertaining any (further) proceedings and/or any further hearing or from making any further orders in Nairobi, Milimani Chief Magistrate's Court Children's Cause No. 1812 of 2013 in furtherance of execution of the court's order made on**

23rd December 2013.

2. **That the costs of this application be provided for.**

Ex Parte Applicants' Case

2. According to the Applicant, he is the Plaintiff in Nairobi Chief Magistrate's Court Children's Case No. 1812 of 2013 in which on 23rd December, 2013 the 1st Respondent ordered him to get a reasonable house for the 2nd Respondent near White Star Academy where their children go to school or pay her Ksh 25,000/= monthly over and above paying school fees and other school related expenses. According to the applicant this order was made when the matter had come up for mention and the 2nd Respondent was allowed to address the court without an application and without her being sworn.

3. It was averred that the 1st Respondent made an order in respect to prayers for which no application was before the court. Based on legal advice the applicant contended that no orders ought to be given by any court unless there is an application to that effect and after every party to the case has been afforded an opportunity to be heard. The applicant disclosed that he had no problem taking care of their children, a task which according to him, he had faithfully done in spite of being denied access to them.

4. It was further averred by the applicant that on 18th June, 2014, the 2nd Respondent once again issued a notice to show cause why the applicant should not be committed to civil jail for disobeying the order on 23rd December, 2013 without an application as is required by law. Thereafter, the Court issued an order that one-third of the applicant's salary be attached every month, without the same being sought.

5. It was averred that to date, the 2nd Respondent has never filed any pleadings in the said case (save execution applications) even after the court ordered her to do so. However, the applicant contended that the 1st Respondent has been extremely generous in granting her the orders not sought for.

6. It was the applicant's case that the court ought to ensure that justice cuts across like a two-edged sword by being applied equally and not always tilting towards one party. While appreciating the importance of the rights of children, including the ones the subject matter of the lower court, the applicant contended that that does not take away the requirement of natural justice that every should always be afforded the opportunity to be heard. He therefore sought for orders herein.

1st and 3rd Respondents' Case

7. In opposition to the application, the 1st and 3rd 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 Applicant's application dated 25/5/2015 is time barred pursuant to Order 53(2) of the Civil Procedure Rules.**
>
> **3. That the matter is not within the purview of judicial review court neither does it meet the basic tenets of judicial review application.**
>
> **4. That the application is an attempt to challenge the merits of the decision of the 1st Respondent and therefore an appeal through judicial review.**
>
> **5. 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.**
>
> **6. That the application is an abuse of court process and lacks merit.**

Determination

8. I have considered the issues raised before me in this application. In the grounds of opposition, the Respondents have raised the issue of limitation.

9. In judicial review proceedings, therefore, the provision relating to limitation is not a procedural provision. Rather it is a substantive provision. Accordingly, it cannot be treated as a mere technicality. This was the position adopted in **Tzamburakis and Another vs. Rodoussakis Civil Appeal No. 5 of 1957 (PC) [1958] EA 400** where it was held that:

> **"No procedural defect can relieve the Court of Appeal of its duty to give effect to the statute on an appeal from a Judgement given to a plaintiff in respect of a time barred cause of action… An abandonment of a plea of limitation cannot relieve the Court from taking notice of it."**

10. The same position was adopted by the Court of Appeal in **Pauline Wanjiru Thuo vs. David Mutegi Njuru Civil Appeal No. 278 of 1998** where it was held that:

> **"A preliminary objection based on limitation can be taken for the first time on appeal because it goes to jurisdiction."**

11. Being an issue going to jurisdiction, **Nyarangi, JA** held in **The Owners of Motor Vessel "Lillian S" vs. Caltex Oil Kenya Limited (1989) KLR 1** that:

> **"Jurisdiction is everything. Without it, a Court has no power to make one more step. Where a court has no jurisdiction there would be no basis for a continuation of proceedings pending other evidence. A Court of law downs its tools in respect of the matter before it the moment it holds the opinion that it is without jurisdiction".**

12. Similarly in **Owners and Masters of The Motor Vessel "Joey" vs. Owners and Masters of The Motor Tugs "Barbara" and "Steve B" [2008] 1 EA 367** the same Court expressed itself as follows:

> **"The question of jurisdiction is a threshold issue and must be determined by a judge at the threshold stage, using such evidence as may be placed before him by the parties. It is reasonably plain that a question of jurisdiction ought to be raised at the earliest opportunity and the court seized of the matter is then obliged to decide the issue right away on the material before it. Jurisdiction is everything and without it, a court has no power to make one more step. Where a court has no jurisdiction there would be no basis for a continuation of proceedings pending other evidence. A court of law downs tools in respect of the matter before it the moment it holds the opinion that it is without jurisdiction. It is for that reason that a question of jurisdiction once raised by a party or by a court on its own motion must be decided forthwith on the evidence before the court. It is immaterial whether the evidence is scanty or limited. Scanty or limited facts constitute the evidence before the court. A party who fails to question the jurisdiction of a court may not be heard to raise the issue after the matter is heard and determined. There is no reason why a question of jurisdiction could not be raised during the proceedings. As soon as that is done, the court should hear and dispose of that issue without further ado."**

13. Lastly, on the same issue, the Supreme Court in the case of **Samuel Kamau Macharia vs. Kenya Commercial Bank & 2 Others, Civil Appl. No. 2 of 2011**, observed that:

> **"A Court's jurisdiction flows from either the Constitution or legislation or both. Thus, a Court of law can only exercise jurisdiction as conferred by the Constitution or other written law. It cannot arrogate to itself jurisdiction exceeding that which is conferred upon it by law. We agree with counsel for the first and second respondents in his submission that the issue as to whether a Court of law has jurisdiction to entertain a matter before it, is not one**

of mere procedural technicality; it goes to the very heart of the matter, for without jurisdiction, the Court cannot entertain any proceedings… Where the Constitution exhaustively provides for the jurisdiction of a Court of law, the Court must operate within the constitutional limits. It cannot expand its jurisdiction through judicial craft or innovation."

14. In this case, the order complained of and which is sought to be quashed was purportedly issued on 23rd December, 2013. These proceedings were not commenced until 21st April, 2015 more than a year after the said order. Section 9(3) the ***Law Reform Act***, Cap 26 Laws of Kenya provides:

> ***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.***

15. Judicial review proceedings ought as a matter of public policy to be instituted, heard and determined within the shortest time possible hence the stringent limitation provided for instituting such proceedings. It is recognised that judicial review jurisdiction is a special jurisdiction. The validity of the decisions of public bodies, ought not, as a matter public policy, be held in suspense indefinitely. It is important that citizens know where they stand and how they can order their affairs in the light of such administrative decisions. As such judicial review remedies being exceptional in nature should not be made available to indolents who sleep on their rights. When such people wake up they should be advised to invoke other jurisdictions and not judicial review. Public law litigation cannot and should not be conducted at the leisurely pace too often accepted in private law disputes. See **Republic vs. The Minister for Lands & Settlement & Others Mombasa HCMCA No. 1091 of 2006.**

16. In **Republic vs. The Minister For Lands & Settlement & Others Mombasa HCMCA No. 1091 of 2006** it was held that legal business can no longer be handled in a sloppy and careless manner and some clients must realise at their cost that the consequences of careless and leisurely approach must fall on their shoulders.

17. These proceedings were clearly instituted out of time and as was held in **Raila Odinga & 6 Others vs. Nairobi City Council Nairobi HCCC No. 899 of 1993; [1990-1994] EA 482**:

> **"Order 53 contains the procedural rules made in pursuance of s. 9(1) of the Law Reform Act. S. 9(2) of that Act states that the rules made under subsection (1) may prescribe that an application for mandamus, prohibition and certiorari shall be made within six months or such shorter period as may be prescribed. Thus it will be seen that on one hand s. 9(2) of the Act enjoins that the court may make rules prescribing that application for mandamus prohibition and certiorari shall be made within six months or such shorter period as may be prescribed by the rules. On the other hand O. 53 rule 2(1) which is a procedural rule made under that very section says that the court may for good reason extend the period of six months. The rules of court made under the Act cannot defeat or override the clear provisions of s. 9(2) of the Act. An Act of Parliament cannot be amended by subsidiary legislation. The parliament in its wisdom has imposed this absolute period of six months and it is the Parliament alone which can amend it. The Court's duty is to give effect to the law as it exists. Thus that part of Order 53 rule 7 as amended by Legal Notice No. 164 of 1997 which reads "unless the High Court considers that there is good reason for extending the period within which the application shall be made" is ultra vires section 9(2) of the Act. Thus an application for judicial review, may it be for an order of mandamus, prohibition or certiorari should be made promptly and in any event within a maximum period of six months from the date when the ground for the application arose…As far as the notice of**

motion seeks to remove into the High Court and quash the minutes in question of the meeting of 4.8.1992 of the Respondent or seeks an order of prohibition against the Respondent prohibiting it from doing any act or deed in pursuance of the said meeting of 4.8.1992 it is time barred."

18. It follows that these proceedings are incompetent.

Order

19. Consequently, the Notice of Motion dated 12th May, 2015 fails and is hereby struck out as the interested party has not participated in these proceedings and as the factual averments were not controverted, there will be no order as to costs.

20. Orders accordingly.

Dated at Nairobi this 26th day of July, 2016

G V ODUNGA

JUDGE

Delivered in the presence of:

Mr Mugo for the applicant

Cc Mwangi