



**REPUBLIC OF KENYA**

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

**MILIMANI LAW COURTS**

**JUDICIAL REVIEW DIVISION**

**JUDICIAL REVIEW CASE NO. 143 OF 2016**

**IN THE MATTER OF AN APPLICATION BY MWIKYA MUNYALO FOR JUDICIAL  
REVIEW ORDERS OF CERTIORARI, PROHIBITION AND MANDAMUS**

**AND**

**IN THE MATTER OF SECTIONS 8 AND 9 OF THE LAW REFORM ACT, CAP26 LAWS OF  
KENYA**

**AND**

**IN THE MATTER OF ORDER 53 OF THE CIVIL PROCEDURE RULES, 2010**

**BETWEEN**

**REPUBLIC.....APPLICANT**

**VERSUS**

**RESIDENT MAGISTRATE'S COURT, MILIMANI CHILDREN'S COURT....1ST  
RESPONDENT**

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

**JIRANI CHILDREN CHOIR.....1ST INTERESTED PARTY**

**JIRANI CULTURAL ORGANIZATION.....2ND INTERESTED PARTY**

**EX PARTE: MWIKYA MUNYALO**

**DENIS OLOO**

**GEORGE OLUOCH suing as the CHAIRMAN, SECRETARY & TREASURER OF THE**

**PARENTS COMMITTEE JIRANI CHILDREN'S CHOIR**

**JUDGEMENT**

## **Introduction**

1. By a Notice of Motion dated 12<sup>th</sup> April, 2016 the *ex parte* applicants herein seek the following orders:
  - a. **A judicial review order of certiorari bringing into this court for purposes of quashing and to quash the 1<sup>st</sup> respondent orders issued on the 12<sup>th</sup> day of February 2016 and 26<sup>th</sup> February 2016 directing the parents of Jirani Children's Choir to have a meeting and to conduct elections.**
  - b. **A judicial review order of prohibition prohibiting the 1<sup>st</sup> respondent from compelling the parents of Jirani Children's Choir to have a meeting, conduct elections or in any other manner directing the operations of Jirani Children's Choir and Jirani Cultural Organization.**
  - c. **An order of mandamus does issue compelling the interested parties to amend its record of its officials to indicate the officials that were in office as at the time of filing Nairobi Children's Case No. 275 of 2015, Chairman, Secretary and Treasurer-Parent and Community Committee of Jirani Children's Choir –vs- Director of Children's Service Secretary & 4 Others.**
  - d. **That the costs of this application and the interest thereon be provided for.**

## **Ex Parte Applicants' Case**

2. According to the Applicants, on the 6<sup>th</sup> March, 2016 the Chairman,, Secretary and Treasurer of the Parents and Community Committee of Jirani Children's Choir commenced proceedings against the Director of Children's Service Secretary and 4 Others at the Milimani Children's Court in Nairobi Children's Case No. 275 of 2015 and pursuant thereto, on the 12<sup>th</sup> February, 2016 the 1<sup>st</sup> respondent (hereinafter referred to as "the Court") issued orders *inter alia* that the parents of Jirani Children's Choir do have a meeting and elect a chairman on 20<sup>th</sup> February, 2016 at 2.00pm.

3. Aggrieved by the said orders the Applicants filed an application on 18<sup>th</sup> February, 2016 pursuant to which **Hon. F.N. Munyi** granted a stay of execution of the said orders issued on 12<sup>th</sup> February, 2016 pending the inter partes hearing. It was averred that on 26<sup>th</sup> February, 2016, one **Tobias Onganyi Auma** a stakeholder of the interested parties herein filed in the said Court a report on the election of the chairman of the interested parties herein and on 26<sup>th</sup> February, 2016, the issued the following orders:

**1. That elections conducted and done on the 20<sup>th</sup> February, 2016 are invalid due to the stay order issued by Hon. F.K. Munyi (Ms) resident Magistrate and that the parents will have another elections which will be presided by Cecilia Agunda on 12<sup>th</sup> March, 2016 in respect of stakeholders and venue of the meeting to be complied with.**

**2. That mention be on the 31/3/2016.**

4. According to the Applicants, the 1<sup>st</sup> Interested Party is a Community Based Organization while the 2<sup>nd</sup> interested party is a Non-Governmental Organization and that they are intertwined and amalgamated. It was further averred that the interested parties are subject to the jurisdiction of Non-Governmental Organizations Co-ordination Board and not the Children's Court whose jurisdiction is spelt out in section 73 of the *Children's Act* in the following manner;

**73. There shall be courts to be known as Children's Courts constituted I accordance with the provisions of this Section for the purpose of-**

**(a) conducting civil proceedings on matters set out under parts III, V, VII, VIII, IX, X, XI and XII;**

**(b) hearing any charge against a child, other than a charge of murder or a charge in which the child is charged together with a person or persons of or above the age of eighteen years;**

**(c) hearing a charge against any person accused of an offence under this Act;**

**(d) exercising any other jurisdiction conferred by this or any other written law;**

5. The Applicants' case was that the Non-Governmental Organization Co-ordination Board is established under section 3(1) of the Non-Governmental Organizations Co-ordination Act No. 19 of 1990 and its functions are provided for in section 7 thereof. It was therefore contended the orders issued by the 1<sup>st</sup> respondent on 12<sup>th</sup> February 2016 and 26<sup>th</sup> February, 2016 in Nairobi Children's Case No. 275 of 2015 - **Chairman, Secretary and Treasurer-Parent and Community Committee of Jirani Children's Choir –v- Director of Children's Service Secretary & 4 Others** were illegal, *ultra vires* and were issued by the Court in excess of its jurisdiction.

6. The Applicants further asserted that the Court assumed and was about to continue assuming jurisdiction not conferred upon it either by the Constitution or the law.

### **Respondents' Case**

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

**1. That the applicant has not raised any issue triable under judicial review to warrant issuance of the orders sought herein and that the application should be dismissed.**

**2. That the judicial review orders an application challenging the jurisdiction of the Resident Magistrate has already been filed and that the same should first be settled before seeking judicial review remedies which are remedies of last resort.**

**3. That Jirani Children's Choir, first interested party herein is not a Non-Governmental organization and that Section 3(1) of the Non-Governmental Act applies to it and thus is subject to the jurisdiction of the 1<sup>st</sup> respondent.**

**4. That ex parte applicants herein sought the orders that it is seeking to have them quashed before the first respondent and indeed advised that the 1<sup>st</sup> respondent has jurisdiction and that all the parties are subject to it. The ex parte applicant has thus come to this court unclean hands.**

**5. That from the pleadings filed before the first respondent it is clear that there is a dispute within the first and second interested parties and the ex parte applicants and a solution to a dispute which involves minors is not within the mandate of the Non-Governmental Organization Board.**

**6. That the issues raised in the pleadings filed before the first respondent are issues affecting children and hence the magistrate is properly seized with the matter.**

**7. That I pray that the application be dismissed with costs to the first and second respondents**

### **Determination**

8. I have taken into account the foregoing as well as the submissions filed herein.

9. In this case the Applicants contend that the Court had no jurisdiction to make orders directing a Non-

Governmental Organization to conduct elections. It is however clear that it is the applicants who invoked the jurisdiction of the Court. In light of my finding hereinbelow I will however refrain from going into details on that issue.

10. 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 Court of Appeal 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.”**

11. It is therefore clear that a party challenging the jurisdiction of a Court or Tribunal ought to raise the issue before the Court or Tribunal whose decision is under challenge for consideration though the decision thereon does not bar this Court from entertaining judicial review proceedings if in fact the Tribunal had no jurisdiction. In other words the mere fact that a Court or Tribunal lacks jurisdiction to entertain a matter does not bar it from hearing and determining the issue of jurisdiction which ought to be determined in the initial stages of the proceedings. In this case it is contended which contention is not seriously disputed that the applicants have in fact filed an application before the Court challenging the impugned decisions based on the ground of want of jurisdiction which application is yet to be determined. The problem here however is that the Court has made certain orders whose execution are likely to render the pending application superfluous.

12. Section 9(2)(3) and (4) of the *Fair Administrative Action Act*, No. 4 of 2015 provides that:

***(2) The High Court or a subordinate court under subsection (1) shall not review an administrative action or decision under this Act unless the mechanisms including internal mechanisms for appeal or review and all remedies available under any other written law are first exhausted.***

***(3) The High Court or a subordinate Court shall, if it is not satisfied that the remedies referred to in subsection (2) have been exhausted, direct that applicant shall first exhaust such remedy before instituting proceedings under sub-section (1).***

***(4) Notwithstanding subsection (3), the High Court or a subordinate Court may, in exceptional circumstances and on application by the applicant, exempt such person from the obligation to exhaust any remedy if the court considers such exemption to be in the interest of justice.***

13. It was similarly held in **Republic vs. National Environment Management Authority [2011] eKLR**, that where there is an alternative remedy and especially where Parliament has provided a statutory appeal procedure, it is only in exceptional circumstances that an order for judicial review would be granted.

14. It is however my view that the onus is upon the applicant to satisfy the Court that he ought to be exempted from resorting to the available remedies.

15. Accordingly as the applicants have raised the issue of jurisdiction before the Court, that issue ought to be determined at that level in the first instance. On the same vein the Court is enjoined to determine the issue of its jurisdiction before moving a step further.

16. In the premises whereas I decline to grant the orders sought in this application on the ground that the application is misconceived, in the exercise of this Court's supervisory jurisdiction pursuant to Article 165(6) of the Constitution I direct the Resident Magistrate Court, Milimani Children's Court to hear and determine the issue of its jurisdiction before making any further orders in the Children's Case No. 275 of 2015. Accordingly pending that determination the execution of the orders made therein on 12<sup>th</sup> February 2016 and 26<sup>th</sup> February, 2016 are hereby stayed.

17. As the matter involves the interests of children, there will be no order as to costs of these proceedings.

Orders accordingly.

**Dated at Nairobi this 19<sup>th</sup> day of September, 2016**

**G V ODUNGA**

**JUDGE**

*Delivered in the absence of the parties.*

*Cc Mwangi*