



REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA

AT MOMBASA

MISC. JR APPLICATION NO. 3 OF 2015

IN THE MATTER OF: KADHI'S COURT ACT CAP 11 LAWS OF KENYA

AND

IN THE MATTER OF: THE CIVIL PROCEDURE ACT

AND

IN THE MATTER OF: THE REPUBLIC

VERSUS

KADHI'S COURT MOMBASA.....RESPONDENT

AND

F A H.....EX PARTE APPLICANT

AND

MS H a.k.a. M H.....INTERESTED PARTY

RULING

INTRODUCTION:

1. F Ab H and M S H a.k.a. M H were married under Islamic Law on 4th August, 1991 in Kakamega. They were blessed with two children who are now adults. Sometime in 2014, F A H filed for a divorce before the Kadhi's Court at Mombasa in Suit No.197 of 2014. In the Divorce Petition (Amended Plaint) dated 16th December, 2014, F A H avers that she constructed a house at Plot Number Kisumu/Municipality/Block [Particulars withheld] from her savings, where she resided together with her family until she was forced to move back to her parents in Mombasa. The said premises is now said to be occupied by M S H. The property on which the said premises stand is registered in the joint names of their children. M S H in the amended defence dated 25th November, 2014 denied the allegations, stating instead that he purchased the plot and constructed the premises which is their matrimonial home. He also challenged the jurisdiction of the Kadhi's court to entertain the suit since the marriage was contracted in Kisumu where both parties reside. A Notice of Preliminary Objection under sections 12 and 15 of the Civil Procedure Rules dated 25th November, 2014 was also filed.

2. While this was pending in court, M S H filed on 29th January, 2015 under Certificate of Urgency an application for access to the premises and other property, claiming that F A H had forcefully evicted him out of the matrimonial suit premises rendering him destitute without even his personal effects. The court granted the order sought stating,

“(2) The Defendant/Applicant is allowed to gain entry into and reside in the matrimonial home situated on Plot Number Kisumu/Municipality/Block 5/810 pending the hearing and determination of this application.

(3) The Officer Commanding Station, Kondele – Kisumu to assist the Defendant/Applicant in effecting this order.

(4) Inter-partes Hearing shall be on 23rd February, 2015.”

3. Few days later, on 3rd February, 2015, Fairuz Abdul Hamid filed under Certificate of Urgency, an application to review/ set aside the orders above on the ground that they were irregularly obtained, and have resulted in the Respondent damaging the property of the Applicant and her children. The Kadhi declined to issue ex parte orders, and instead directed that the application be served and argued inter-partes. It is at this point, on 5th March, 2015, that the Applicant sought and obtained leave to make an application for Judicial Review.

THE APPLICATION

4. The application before court is the Notice of Motion dated 10th March, 2015 for the judicial review orders:

1. That this Honourable Court be pleased to grant an order of certiorari to remove the proceedings in **KADHI'S DIVORCE CAUSE NO. 197 OF 2014 F A H VS M S H AKA M H** and the order given on 29th January, 2015 to this Honourable Court be quashed.

2. That the costs of this application be paid to the Applicant.

5. The application is supported by the statutory statements and affidavit of F A H Verifying the Facts sworn on 3rd February, 2015. The Applicant is aggrieved that the Interested Party's application dated 27th January, 2015 was fully determined and orders thereon granted ex parte which is both unfair and a breach of the rules of natural justice. The Kadhi's court had no jurisdiction to hear the matter as it related to the premises before addressing the issue of jurisdiction as raised in the Preliminary Objection of the Interested Party. Further, the Kadhi's court lacks jurisdiction to issue orders to enter or break into immovable property.

RESPONSE TO THE APPLICATION

6. The application is opposed. The Interested Party filed Grounds of Opposition dated 5th May, 2015 as well as a Replying Affidavit sworn by M S H on 5th May, 2015. The grounds stated included that the order of certiorari directed at the Respondent cannot issue as the court cannot question the decision of the lower court subject to the right of appeal which the Applicant opted not to explore. The rules of natural justice were not breached as the orders issued were interim orders pursuant to Order 40 Rule 2 of the Civil Procedure Rules, 2010. Further, there were no orders for the court to quash as the order which the Applicant seeks to quash lapsed within 14 days from the date of issue as per the provisions of Order 40 Rule 4(2). In any event, the trial court had held that it lacked territorial jurisdiction, thus the ex parte orders of 29th January, 2015 have since abated and the application dated 27th January, 2015 which was scheduled for inter partes hearing has been overtaken by events.

7. The Interested Party faulted the application for judicial review as offending Order 53 Rule 7 (1),

being baseless, misconceived, frivolous, scandalous and an abuse of due process. Annexed to the affidavit sworn by the Interested Party and marked “MS-5” is a copy of the Ruling before Kadhi Mwidadi Salim delivered on 19th March, 2015. The Kadhi found that the court did not have jurisdiction and directed that the divorce and matrimonial proceedings be filed in Kisumu for the reasons of convenience and jurisdiction. He explained that the earlier order had been temporary and issued in the interests of justice, to allow the Defendant access to his home since he had claimed to be destitute. He advised that since he lacks the jurisdiction to transfer the suit, the parties were at liberty to pursue transfer through other channels.

SUBMISSIONS

8. The Kadhi's court, though served, did not enter appearance.

9. In a Further Affidavit sworn on 14th May, 2015, the Applicant questions why the Interested Party despite acknowledging that the interim orders issued on 29th January, 2015 by the Kadhi's court became null and void, continues to reside in the premises and refuses to vacate. It was further alleged that Counsel for the Interested Party, at the time the application dated 27th January, 2015 was filed was not properly before the court. She produced “FAH1” a print out from the LSK Website indicating that Mr. Ochuka's status was inactive for 2015.

10. It was submitted for the Applicant that this application is questioning the legality of the Kadhi's decision and not its merit. The matter therefore squarely falls within the ambit of judicial review, nature if was explained in the case of **Municipal Council of Mombasa v Republic & another, Civil Appeal 185 of 2001 in the Court of Appeal at Nairobi [2002] eKLR** was cited in which O'Kubasu JA states that,

“... The court would only be concerned with the process leading to the making of the decision. How was the decision arrived at? Did those who made the decision have the power, i.e. the jurisdiction to make it? Were the persons affected by the decision heard before it was made? In making the decision, did the decision - maker take into account relevant matters or did he take into account irrelevant matters? These are the kind of questions a court hearing a matter by way of judicial review is concerned with, and such court is not entitled to act as a court of appeal over the decider; acting as an appeal court over the decider would involve going into the merits of the decision itself-such as whether there was or there was not sufficient evidence to support the decision – and that, as we have said, is not the province of judicial review...”

11. It was also submitted that the Kadhi erred in granting orders to the Interested Party when he did not have jurisdiction to hear the matter. He therefore acted **ultra vires**. The interim order granted were as good as final orders, and they were granted without the Applicant being given an opportunity to be heard. The Kadhi also failed to take into account relevant matters before making its decision or took into account irrelevant matters.

12. The Interested Party filed written submissions dated 28th May, 2015 urging that at the time the Kadhi issued the orders of 29th January, 2015, the objection on his jurisdiction had not been argued. So, for all intents and purposes, the Kadhi was not barred from granting a temporary order permitting the Interested Party to continue residing on the premises. It was submitted that at the time of making the application for judicial review, the Kadhi's court decision had abated, since he had dismissed the entire suit for want of jurisdiction. All orders therein became null and void **ab initio**. The court cannot review orders that do not exist. The Applicant had sufficient opportunity to be heard.

DETERMINATION

(a) The Law

13. It is trite law that Judicial Review is concerned not with the merits of a decision but rather the

decision making process (See: **REPUBLIC vs. KENYA REVENUE AUTHORITY, ex parte Yaya Towers Limited [2008] eKLR**). Its ingredients have been restated in many cases and may be summarized in three general categories being **illegality, irrationality and procedural impropriety**. (See: **REPUBLIC vs. THE CHIEF MAGISTRATE & 2 OTHERS, ex parte MICHAEL W. MWANGI & 3 OTHERS [2004] eKLR**; **Re an Application By Bukoba Gymkhana Club [1963] E.A. 439**; **COUNCIL OF CIVIL SERVANTS UNIONS vs. MINISTER FOR THE CIVIL SERVICE [1985] AC2**, and **PASTOR vs. KABAWE DISTRICT LOCAL GOVERNMENT & OTHERS [2008] E.A. 300**).

14. The Applicant in this case seeks the judicial review remedy of Certiorari. The scope of certiorari among other reliefs, was the subject of discussion in the Court of Appeal case of **KENYA NATIONAL EXAMINATIONS COUNCIL vs. REPUBLIC Ex Parte GEOFFREY GATHENJI & 9 OTHERS Nairobi Civil Appeal No. 266 of 1996 [1997] eKLR**. In that case, it was stated that, “*...Only an order of certiorari can quash a decision already made and an order of certiorari will issue if the decision is without jurisdiction or in excess of jurisdiction, or where the rules of natural justice are not complied with or for such like reasons...*”

15. The jurisdiction of the Kadhi's court is limited by Article 170(5) of the Constitution of Kenya to determination of questions of Muslim law relating to personal status, marriage, divorce or inheritance in proceedings in which all the parties profess the Muslim religion AND submit to the jurisdiction of the Kadhi's court. A challenge on the jurisdiction of the Kadhi's court by any party to the suit would therefore deny that court jurisdiction.

(b) Is the application defective?

16. The Interested Party claims that the application offends Order 53 rule 7 of the Civil Procedure Rules.

17. Order 53 rule 7 (1) of the Civil Procedure Rules provides that “**In the case of an application for an order of certiorari to remove any proceedings for the purpose of their being quashed, the applicant shall not question the validity of any order, warrant, commitment, conviction, inquisition or record, unless before the hearing of the motion he has lodged a copy thereof verified by affidavit with the registrar, or accounts for his failure to do so to the satisfaction of the High Court.**” The Applicant did file a copy of the order in her Supporting Affidavit sworn on 10th March, 2015. The order is marked FH-6. In any event, Article 22(3)(d) and 159(2)(d) bears on the court not to place undue regard to procedural technicalities. The Interested Party's submission for dismissal on this ground therefore fails.

(c) Whether the Interested Party's Counsel is Unqualified

18. The applicant has accused the Interested Party's counsel of practicing without a valid practicing certificate. The Applicant made this allegation in the Further Affidavit dated 14th May, 2015. To support this contention, she attached a copy of print out from the www.lsk.or.ke marked FAH-1. This print out has not however been validated as to source and date stamp. Under Section 34 of the Advocate's Act, an unqualified person cannot take instructions, draw or prepare any document in a legal proceeding. Under Section 31 of the Act, it is an offence for an unqualified person to act as an Advocate. The allegation is a serious one, as it may lead to civil and criminal liability. Such an allegation should only shift the burden of proof on more than a mere computer printout produced without observing the conditions contained in Section 65 (b) of the Evidence Act, (Cap 80, Laws of Kenya), regarding conditions for admission in evidence of computer print-out.

(d) Whether the order of certiorari may issue.

19. As stated above, the jurisdiction of the Kadhi's court is dependent upon both parties to the suit admitting to it. Where as in this case the Interested Party denied that jurisdiction, the Kadhi ought to have tackled that objection before advancing one more step. Incidentally, the party that denied its jurisdiction, in an act of approbation and reprobation, thereafter sought temporary orders from the same court. This would amount to an abuse of process, since nothing prevented the Interested Party from seeking those

orders from the court with requisite jurisdiction. However, in this particular instance, the offending order sought to be quashed is the order dated 29th January, 2015 allowing the Interested Party access to the suit premises with the assistance of the Police pending the inter partes hearing of the application for access. The Applicant has conceded that in the subsequent inter partes hearing, the Kadhi rightly held that he lacked jurisdiction and dismissed the suit forthwith.

20. There can be no order if the suit on which it stands has been dismissed. In essence therefore, there is nothing for the court to quash. The Applicant was however, in light of the circumstances entitled to make the application as she did. There appears to have been sufficient ground to warrant the Applicant to question the process in which the offending order was issued. It has however been overtaken by events. The application therefore fails and is dismissed with a direction that each party bears its costs.

21. There shall be orders accordingly.

Dated, signed and Delivered in Mombasa this 30th day of July, 2015.

M. J. ANYARA EMUKULE

JUDGE

In the presence of:

Miss Ali for the Applicant

No Appearance for Respondent

Mr. Kaunda Court Assistant