REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT NAIROBI

CONSTITUTION AND HUMAN RIGHTS DIVISION

JUDICIAL REVIEW MISC. NO. 272 OF 2015

IN THE MATTER OF AN APPLICATION BY LUCY NGINA MAGU FOR LEAVE TO APPLY FOR JUDICIAL REVIEW AND ORDERS OF CERTIORARI

AND

IN THE MATTER OF HONOURABLE L. GITARI, THE CHIEF MAGISTRATE, CHILDREN'S COURT AT MILIMANI COMMERCIAL COURT

AND

IN THE MATTER OF THE CHILDREN'S COURT CAUSE NUMBER 833 OF 2015 AT NAIROBI

AND

IN THE MATTER OF ARTICLE 165(6) & (7) REGARDING THE HIGH COURTS SUPERVISORY JURISDICTION OVER SUBORDINATE COURTS

BETWEEN

LMN…….……..……....…….……...APPLICANT

AND

RWK…….....1ST RESPONDENT

HON. L. GITARI, THE CM, CHILDREN'S

COURT AT MILIMANI…..…….……..……..2ND RESPONDENT

THE ATTORNEY GENERAL……..…….…....….3RD RESPONDENT

AND

IN THE MATTER OF THE CHILDREN'S COURT CAUSE NUMBER 833 OF 2015

BETWEEN

LNM…….....…….....…..PLAINTIFF

VERSUS

RWK……..……..…….....….1ST DEFENDANT

LK…….…….....…..…..2ND DEFENDANT

JMG……..…….....…….3RD DEFENDANT

RULING

1. By a Chamber Summons dated 20th August, 2015, the applicant herein, , seeks the following orders:

> **1. This application be certified urgent and the same be places before the duty judge for hearing *Ex parte* in the first instance.**
>
> **2. The Applicant be excused, on the account of urgency from giving notice to the registrar.**
>
> **3. The Applicant be granted leave to apply for Judicial Review and an order of Certiorari to remove to the High Court and quash the Decision and order given on 19/8/2015 by Honourable L. Gitari Chief Magistrate, Milimani Children's Court in Children's Case Number 833 of 2015: LNM versus RWK and Others.**
>
> **4. That the grant of leave pursuant to prayer 3 above do operate as a stay of the decision/order given on 19/8/2015 by Honourable L. Gitari, Chief Magistrate, Milimani Children's Court in Children's Court Number 833 of 2015; LNM versus RWK and Others and a stay of any further proceedings in Children's Court Number 833 of 2015; LNM versus RWK & Others.**
>
> **5. That pursuant to the stay granted in prayer 4 above the 1st Respondent be ordered to fully comply with the terms and conditions of the court orders given on 4/8/2015 by Honourable F. K. Munyi (M/s).**

2. When the parties' counsel appeared before me on 27th August, 2015 to argue the said application, it turned out from the submissions made that the prayer seeking the grant of leave was not seriously contested. That notwithstanding the sentiments expressed by the Court of Appeal in **Nakumatt Holdings Limited vs. Commissioner of Value Added Tax [2011] eKLR** ought always to be kept in mind. In the said case the Court expressed itself as follows:

> **"Although leave granted *ex parte* can be set aside on an application, that is a very limited jurisdiction and will obviously be exercised very sparingly and on very clear cut cases unless it be contended that judges of the Superior Court grant leave as a matter of course which is not correct."**

3. The requirement for leave was explained by a three judge bench comprising **Bosire, Mbogholi-Msagha & Oguk, JJ** in **Matiba vs. Attorney General Nairobi H.C. Misc. Application No. 790 of 1993** in which the Court held that it is supposed to exclude frivolous vexatious or applications which *prima facie* appear to be abuse of the process of the Court or those applications which are statute barred. Similarly, in **Republic vs. Land Disputes Tribunal Court Central Division and Another ex Parte Nzioka [2006] 1 EA 321, Nyamu, J** (as he then was) held that leave should be granted, if on the material available the court considers, without going into the matter in depth, that there is an arguable case for granting leave and that leave stage is a filter whose purpose is to weed out hopeless cases at the earliest possible time, thus saving the pressure on the courts and needless expense for the applicant by allowing malicious and futile claims to be weeded out or eliminated so as to prevent public bodies being paralysed

for months because of pending court action which might turn out to be unmeritorious. See also **Republic vs. The P/S Ministry of Planning and National Development ex Parte Kaimenyi [2006] 1 EA 353.**

4. **Waki, J** (as he then was), on the other hand, in **Republic vs. County Council of Kwale & Another ex Parte Kondo & 57 Others Mombasa HCMCA No. 384 of 1996** put it thus:

> **"The purpose of application for leave to apply for judicial review is firstly to eliminate at an early stage any applications for judicial review which are either frivolous, vexatious or hopeless and secondly to ensure that the applicant is only allowed to proceed to substantive hearing if the Court is satisfied that there is a case fit for further consideration. The requirement that leave must be obtained before making an application for judicial review is designed to prevent the time of the court being wasted by busy bodies with misguided or trivial complaints or administrative error, and to remove the uncertainty in which public officers and authorities might be left as to whether they could safely proceed with administrative action while proceedings for judicial review of it were actually pending even though misconceived…Leave may only be granted therefore if on the material available the court is of the view, without going into the matter in depth, that there is an arguable case for granting the relief claimed by the applicant the test being whether there is a case fit for further investigation at a full *inter partes* hearing of the substantive application for judicial review. It is an exercise of the court's discretion but as always it has to be exercised judicially".**

5. This position was confirmed by the Court of Appeal in **Meixner & Another vs. Attorney General [2005] 2 KLR 189** in which the Court held that the leave of the court is a prerequisite to making a substantive application for judicial review and that the purpose of the leave is to filter out frivolous applications hence the granting of leave or otherwise involves an exercise of judicial discretion.

6. It therefore follows that the mere fact that an application for leave is not opposed does not necessarily confer merit on an otherwise unmerited application.

7. In his case, the applicant contends that the impugned orders made by **Hon. L Gitari**, Chief Magistrate, Milimani Childrens Court, on 19th August, 2015 were made *ex parte* without notification to her hence the same orders which are in any event permanent in nature were made in breach of the rules of natural justice since they had the effect of conferring on the 1st respondent the legal custody of the minor the subject of these proceedings contrary to an earlier order made by the same Court presided over by a different magistrate on 4th August, 2015. It was further contended that the effect of the order made on 19th August, 2015 was to review the order of 4th August, 2015 yet the Magistrate had no jurisdiction to do so.

8. The circumstances which guide the grant of leave to apply for judicial review remedies were enumerated in **Mirugi Kariuki vs. Attorney General Civil Appeal No. 70 of 1991 [1990-1994] EA 156; [1992] KLR 8** as follows:

> **"The law relating to judicial review has now reached the stage where it can be said with confidence that, if the subject matter in respect of which prerogative power is exercised is justiciable, that is to say if it is a matter on which the Court can adjudicate, the exercise of the power is subject to review in accordance with the principles developed in respect of the review of the exercise of statutory power…the controlling factor in determining whether the exercise of prerogative power is subject to judicial review is not its source but its subject matter… It is not the absoluteness of the discretion nor the authority of exercising it that matter but whether in its exercise, some of the person's legal rights or interests have been affected. This makes the exercise of such discretion justiciable and therefore subject to judicial review. In the instant appeal, it is of no consequence that the Attorney General has absolute discretion under section 11(1) of the Act if in its exercise the appellant's legal rights or interests were affected. The applicant's complaint in the High Court was that this was so and for that reason he sought leave of the court to have it investigated. It is wrong in law for**

the Court to attempt an assessment of the sufficiency of an applicant's interests without regard to the matter of his complaint. If he fails to show, when he applies for leave, a *prima facie* case, on reasonable grounds for believing that there has been a failure of public duty, the Court would be in error if it granted leave. The curb represented by the need for the applicant to show, when he seeks leave to apply, that he has a case, is an essential protection against abuse of the legal process. It enables the Court to prevent abuse by busybodies, cranks and other mischief-makers…"

9. In **Re Bivac International SA (Bureau Veritas) [2005] 2 EA 43 (HCK)**, the Court stated:

10. **"There should be an arguable case which without delving into the details could succeed and an arguable case is not ascertained by the court by tossing a coin or waving a magic wand or raising a green flag, the ascertainment of an arguable case is an intellectual exercise in this fast growing area of the law and one has to consider without making any findings, the scope of the judicial review remedy sought, the grounds and the possible principles of administrative law involved….Although leave should not be granted as a matter of routine, where one is in doubt one has to consider the wise words of Megarry, J in the case of *John vs. Rees [1970] Ch 345 at 402.* In the exercise of the discretion on whether or not to grant stay, the court takes into account the needs of good administration."**

11. What comes out clearly from the foregoing is that the grant of leave to commence judicial review proceeding is not a mere formality and that leave is not granted as a matter of course. The applicant for leave is under an obligation to show to the court that he has a *prima facie* arguable case for grant of leave. Whereas he is not required at that stage to go into the depth of the application, he has to show that he has not come to court after an inordinate delay and that the application is not frivolous, malicious and futile. As was held in **Re: Kenya National Federation of Co-Operatives Ltd & Others [2004] 2 EA 128** based on ***Judicial Review Handbook* (3 Ed) By Michael Fordham:**

"A claimant for permission is under an important duty to make frank disclosure to the Court of all material facts and matters and it is especially important to draw attention to matters which are adverse to the claim, in particular: (1) any statutory restriction on the availability of judicial review; (2) any alternative remedy; (3) any delay/ lack of promptness and so need for an extension of time. In facing up to adverse points, the claimant will have an early opportunity to explain why those points are not fatal and why the case should be permitted to proceed (that is a "confess and avoid"). The duty of "full and frank" disclosure harks back to the time when permission for judicial review was *ex parte.*"

*12. This position was appreciated by **Majanja, J** in Judicial Review Misc. Civil Appl. No. 139 of 2014 between **Vania Investments Pool Limited and Capital Markets Authority & Others** in which the learned Judge expressed himself as follows:*

"I do not read the Court of Appeal to be saying that the Court should not have regard the facts of the case or have at best a cursory glance at the arguments. As I stated in Oceanfreight Transport Company Ltd vs. Purity Gathoni and Another Nairobi HC Misc. Appl JR No. 249 of 2011 [2014]eKLR, "In my view, the reference to an "arguable case" in W'Njuguna's Case is not that the issue is arguable merely because one party asserts one position and the other takes a contrary view." The duty of the court to consider the facts is not lessened by the mere conclusion that the case if frivolous, or that leave is underserved by examining the facts...Indeed, if leave was to be considered a matter of right then the purpose for which leave is required would be rendered otiose."

13. In this case, the record of the proceedings under challenge shows that proceedings of 19th August, 2015 were conducted *ex parte*. There is no explanation on record by the Court why it was necessary to have the proceedings whose effect were to vary an earlier order conducted *ex parte*. Apart from being satisfied that the matter as urgent, there was no reason indicated as to why the matter had to be heard *ex parte*. The Courts ought to take into account the sentiments of the Court Appeal in **Bahadurali Ebrahim**

Shamji vs. Al Noor Jamal & 2 Others Civil Appeal No. 210 of 1997 where it held:

> **"Order 39 rule 3 of the Civil Procedure Rules provides that where the court is satisfied for reasons to be recorded that the object of granting the injunction would be defeated by the delay, it may hear the application *ex parte.* The granting of *ex parte* injunction is the exercise of a very extraordinary jurisdiction, and therefore the time at which the plaintiff first had notice of the act complained of will be looked at very carefully in order to prevent an improper order being made against a party in his absence."**

14. Without going into the merits of this case, it is my view and I so find that on a *prima facie* view, the allegations of procedural impropriety are not far-fetched. Accordingly, I am satisfied that a *prima facie* case for the purposes of the grant of leave has been disclosed.

15. The applicant contends that the effect of the impugned order is that the minor is likely to be prevented from resuming her studies when the next term opens. However the 1st Respondent contends that she is the biological mother and has secured an educational institution for the minor hence the impugned order ought not to be interfered with.

16. This Court is not the right forum for the determination of dispute revolving around the custody of a minor. That is a matter which falls squarely within the jurisdiction of the Childrens Court. However Article 53(2) of the Constitution provides that a child's best interests are of paramount importance in every matter concerning the child. Similarly section 76 of the ***Childrens Act*** provides that where a court is considering whether or not to make one or more orders under the Act with respect to a child it shall not make the order or any other orders unless it considers that doing so would be more beneficial to the welfare of the child than making no order at all. Further, in any proceedings in which an issue on the upbringing of a child arises, the court shall have regard to the general principle that any delay in determining the question is likely to be prejudicial to the welfare of the child.

17. It is therefore clear that the paramount constitutional and statutory consideration in matters affecting a child is the interest of the child, first and foremost. Other considerations must necessarily take a back seat. From the proceedings, it is apparent that the parties appeared in the Childrens Court on 25th June, 2015 when interim custody was given to the applicant herein. That was before **Gichana, RM**. Subsequent orders were made by **Munyi, SRM** on 4th August, 2015. That was before the file fell on the laps of **Gitari, CM** who made the impugned orders.

18. In my view the foregoing state of affairs cannot be said to be geared towards the welfare of the child with respect to the need for expeditious determination of such matters. When a matter involving the interest of a child is allowed to move from one judicial officer to another with conflicting or varying orders being made therein with no foreseeable end in sight, such course of events is inimical to the interest of the child. It is even worse when the matter, before a determination is made on its merits, crosses over from the Magistrate's Court to the High Court under the guise of judicial review proceedings challenging *ex parte* orders. The rationale for that is the old age principle in the English Civil practice that *ex parte* orders are provisional. That until the other side is heard on the matter, the orders granted at an *ex parte* stage are merely provisional. Therefore the Court always retains an inherent power to set aside such orders. See **Wea Records Limited vs. Visions Channel 4 Limited and Others [1983] 2 ALL ER 589; R. vs. Land Registrar Kajiado and Others Ex Parte John Kigunda HCMA 1183 of 2004.**

19. That being the position any party aggrieved by an *ex parte* order is entitled to apply for the same to be set aside. To do so cannot be equated to challenging a decision of the Court that made the order so as to warrant the institution of judicial review proceedings. I accordingly, disagree with counsel for the applicant that the option of seeking to set aside was not available to the applicant. From the records, it is also clear that as the *ex parte* order was granted pending the filing of the COR, the order was not permanent. That being the position the applicant ought in the first instance to have moved the Court making the *ex parte* order to have the same set aside. As was appreciated in **Bahadurali Ebrahim Shamji vs. Al Noor Jamal & 2 Others** (supra):

"…assuming for the purposes of argument only, that the granting of the *ex parte* orders was wrong, a matter over which the court does not agree, nor subscribe to, the plaintiff who was represented by an experienced counsel did not at the first opportunity challenge those orders, but instead, consented on them being extended on more than two occasions. There is no doubt whatsoever that the learned Judge was right in the manner he entertained the *ex parte* application that was presented before him. The plaintiff had an option under Order 39 rule 3 to seek to vacate the injunctive orders by letting the application to set aside the *ex parte* orders to be argued in the normal manner, but instead, raised preliminary objections, which consequently confused issues and prolonged the trial. The practice is to be discouraged…The determination of the *inter partes* application, one way or the other would have enabled the Court at the earliest opportunity to decide the issues right away on the material before it"

20. As was held by this Court in **Republic vs. Ministry of Interior and Coordination of National Government and Another ex parte ZTE** Judicial Review Case No. 441 of 2013:

"…one must not lose sight of the fact that the decision whether or not to grant judicial review orders is an exercise of judicial discretion and as was held by Ochieng, J in John Fitzgerald Kennedy Omanga vs. The Postmaster General Postal Corporation of Kenya & 2 Others Nairobi HCMA No. 997 of 2003, for the Court to require the alternative procedure to be exhausted prior to resorting to judicial review is in accord with judicial review being very properly regarded as a remedy of last resort though the applicant will not be required to resort to some other procedure if that other procedure is less convenient or otherwise less appropriate. Therefore, unless due to the inherent nature of the remedy provided under the statute to resort thereto would be less convenient or otherwise less appropriate, parties ought to follow the procedure provided for under the statute. This position was re-affirmed by the Court of Appeal in Speaker of The National Assembly vs. Karume Civil Application No. Nai. 92 of 1992, where it was held that there is considerable merit in the submission that where there is a clear procedure for redress of any particular grievance prescribed by the Constitution or an Act of Parliament, that procedure should be strictly followed. Accordingly, the special procedure provided by any law must be strictly adhered to since there are good reasons for such special procedures."

21. Therefore whereas I have found that the applicant herein has established a case to warrant the grant of leave, this being a matter involving a child this Court must go further and investigate whether the grant of the orders sought would be more beneficial to the welfare of the child than making no order at all. The Court is therefore expected to be pragmatic in its approach to such issues. Barring the application before me this Court under Article 165(6) of the Constitution has supervisory jurisdiction over the subordinate courts and over any person, body or authority exercising a judicial or quasi-judicial function. In exercising its said jurisdiction the Court is empowered under Article 165(7) thereof to call for the record of any proceedings before any subordinate court or person, body or authority referred to in clause (6), and make any order or give any direction it considers appropriate to ensure the fair administration of justice. See **Republic vs. Chairman Nandi Land Disputes Tribunal, Kapsabet Division & Paul Fundi Tuwei Ex Parte Martha Jerogony Cheres Eldoret HCMCA No. 164 of 2005.**

22. In these kinds of matters I am guided by the decision of **Madan, J** (as he then was) in **Yasmin vs. Mohamed [1973] EA 370** in which the learned Judge in his characteristic eloquent style expressed himself as follows:

"The High Court is especially endowed with the jurisdiction to safeguard the interests of infants, as the court is the parent of all infants. The welfare of the infants is paramount and it is dear to the heart of the court. There would be no better tribunal to perform the task more wisely as well as affectionately. All infants in Kenya of whatever community, tribe, sect fall within the ambit of the Guardianship of Infants Act and the court is charged with the sacred duty of ensuring that their interests remain paramount and are duly preserved."

23. In order to preserve the interest of the minor herein and in order to expedite the matters in dispute

herein, I decline to grant the leave sought in this application with the result that these proceedings are rendered stillborn. I, however, in the exercise of the said supervisory powers, vary the orders made on 19th August, 2015 and direct that the application dated 18th August, 2015 filed in the Childrens Case No. 833 of 2015, Milimani be listed before the said Court for mention on 1st September, 2015 for the purposes of *inter partes* hearing within 14 days of the date thereof and that the proceedings in the said Court in respect of the subject child be expedited. The said Court to ensure that in the meantime appropriate orders are made to ensure that the child's education is not adversely affected.

24. There will be no orders as to costs of these proceedings.

Dated at Nairobi this 28th day of August, 2015

G V ODUNGA

JUDGE

Delivered in the presence of:

Mr Nyamai for the Applicant

Prof Wangai for Mr Omari for the 1st Respondent

Cc Patricia