



REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT BUNGOMA

JUDICIAL REVIEW MISC APPLICATION NO 179 OF 2013

IN THE MATTER OF AN APPLICATION BY GEORGE WEKESA BUSOLO FOR LEAVE TO
APPLY FOR ORDERS OF CERTIORARI AND PROHIBITION

AND

IN THE MATTER OF BUNGOMA CHIEF MAGISTRATE'S COURT CHILDREN CASE NO 17
OF 2013

AND

IN THE MATTER OF ORDERS MADE BY THE PRINCIPAL MAGISTRATE AND WARRANT
OF ARREST ISSUED ON 16.7.2013

BETWEEN

GEORGE WEKESA BUSOLO.....EX PARTE APPLICANT

Versus

THE PRINCIPAL MAGISTRATE, BUNGOMA.....1ST APPLICANT

THE O.C.S., BUNGOMA POLICE STATION.....2ND APPLICANT

THE HON. ATTORNEY GENERAL.....3RD APPLICANT

AND

FRANCIS WEPHUKULU SANGURA.....INTERESTED PARTY

EX PARTE

RULING

SCOPE

[1] Under the Civil Procedure Rules, 2010 (hereafter the CPR), the grant of leave to apply for orders of *Certiorari*, *Prohibition* or *Mandamus* does not automatically operate as a stay of the proceedings or decision in question. The judge has power under Order 53 rule 1(4) to order the issue of stay to be heard *inter partes* and separate from the grant of leave. Accordingly, on 29.7.2013, the court ordered that stay of the decision in question to be determined *inter partes* on a date to be assigned by the Deputy Registrar.

The Deputy Registrar then fixed the hearing of the issue of stay to be on 13.11.2013. The **Ex Parte** Applicant served notice for the hearing scheduled on 13.11.2013 as evidenced by the filed Affidavit of Service sworn on 11.11.2013. Despite the service, the other parties did not attend court on the appointed date for hearing, and being satisfied that parties had been properly served, the court allowed **Ex Parte** Applicant to present argue his application for stay of proceedings. This ruling is, therefore, a determination on whether leave to apply for orders of certiorari and prohibition which was granted to the **Ex Parte** Applicant on 29.7.2013 should operate as stay of the decision and or proceedings in question.

Arguments by Ex Parte Applicant

[2] The **Ex Parte** Applicant made terse submissions; that the purpose of stay is to preserve the status quo, thus, unless the warrants issued against the **Ex Parte** Applicant are suspended, the **Ex Parte** Applicant will be arrested for contempt of court and the entire application for orders of **certiorari** and **prohibition** will be defeated.

COURT'S RENDITION

[3] By its very nature, stay of proceedings or decision of a court of law pending the hearing of the substantive motion for orders of judicial review; **certiorari**, **mandamus** and **prohibition**, is an intermediate relief which is meant to preserve the subject matter of the suit; to prevent barren results and the court from acting in vain should the application be successful. I observe I should approach this matter in two convergent dimensions: One, a minor is involved in these proceedings, and should be the vital subject for protection by the court in accordance with Article 53 of the Constitution of Kenya, 2010 and the peremptory commands emanating from the international instruments on rights of a child which Kenya has signed and ratified. At the same time, I reckon that the liberty of the **Ex Parte** Applicant is at risk due to the warrant of arrest hanging over his head. Amidst such scenario, the court finds itself in a novel act of balancing these competing rights; protection of the child on the one hand, and protection of the liberty of the **Ex Parte** Applicant on the other.

[4] Upon perusal of the record, I see a sort of confusion in the orders made by the trial court on 16.7.2013; which is the source of a serious conflict between the said order and the other one issued on 15.7.2013. The earlier order placed parental responsibility of the minor herein on the biological parents of the minor herein, whereas the last order, without providing any reason, just ordered the arrest of the **Ex Parte** Applicant, who was not the subject of the earlier order. I am aware that, where such conflict exists, as a general rule, the status quo should be maintained until the case is determined. However, and I have stated this earlier, these proceedings concern a minor in need of protection, and it would be insidious to issue a blanket order of stay of proceedings. Therefore, under the supervisory jurisdiction of the High court- a jurisdiction which is sufficient to deal with the situation confronting the court- in the best interest of the child, I hereby issue the following specific orders and directions:

- 1) ***The warrant of arrest issued against the Ex Parte Applicant on 16.7.2013 is hereby suspended pending determination of this judicial review application;***
- 2) ***The trial court should determine, with immediate effect:***
 - (i) ***The status of the minor herein and take such measures as may be necessary to protect the rights of the child and or to obviate any injury to the child;***
 - (ii) ***The effective enforcement of order made on 15.7.2013 against the parents of the minor G S and S N for the sake of the child, P N S; and***
 - (iii) ***Finalize the case before it within shortest time possible in order to determine with finality the rights of the child, the protection of those rights and the persons who bear the parental responsibility over the child. That course will avoid the unhealthy state of affairs herein, which if***

protracted, will only be at the expense of the rights of the child.

Dated and signed at Nairobi this 15th day of January, 2014.

F. GIKONYO

JUDGE

Dated, signed and delivered at Bungoma this 20th day of January 2014

A MABEYA

JUDGE