



REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT MURANG'A

MISCELLANEOUS APPLICATION NO. 5 OF 2013

(JUDICIAL REVIEW)

**IN THE MATTER OF MURANG'A CHIEF MAGISTRATE'S COURT MISCELLANEOUS
APPLICATION NO. 5 OF 2013**

AND

**IN THE MATTER OF MURANG'A SENIOR PRINCIPAL MAGISTRATES COURT
CHILDREN CASE NO. 10 OF 2013**

AND

IN AN APPLICATION

BETWEEN

REPUBLIC.....APPLICANT

VERSUS

THE ACTING SENIOR

RESIDENT MAGISTRATE.....RESPONDENT

AND

M.M.K & L.M.K (suing in the name of their

mother and next of kin

N N M).....INTERESTED PARTY

Ex Parte

TIMOTHY KIMANI MURIMA

JUDGMENT

In a Notice of Motion dated 8th March, 2013 filed in the **Senior Principal Magistrates Court at Murang'a** as **Miscellaneous Application No. 5 of 2013**, the applicant, who is the interested party herein,

sued the *ex parte* applicant, **Timothy Kimani Murima** and asked the court to hear the application *ex parte* and issue an order extending parental responsibility in respect of one M.M.K who was then over eighteen years old.

The motion which was brought to court under **section 28** of the **Children Act, 2001** was certified as urgent and was accordingly heard *ex parte* on the same date it was filed on 8th March, 2013. The learned magistrate proceeded to grant the principal prayer in that application which was to extend the parental responsibility in respect of M.M.K.

The next step that the interested party herein took was to file a substantive suit against the applicant herein seeking for, *inter alia*, a declaration that the applicant has a legal duty to discharge parental responsibility towards his children and so he sought for an order compelling him to pay for their education and medicare.

One of the documents listed in support of the plaintiff's suit against the applicant herein was the order granted *ex parte* by the learned magistrate on 8th March, 2013. The *ex parte* applicant was aggrieved by that order because he was not given an opportunity to respond to the application in which that order was issued yet it affected him and more so he was named as the respondent in that application.

Against this background, the *ex parte* applicant, after obtaining the requisite leave, filed the motion herein and sought for this court's order of certiorari to remove into this honourable court for purposes of being quashed the proceedings and the order dated and issued on 8th March, 2013 and 18th March, 2013 respectively by the Ag. Senior Resident Magistrate, in **Murang'a Senior Principal Magistrates Miscellaneous Application No. 5 of 2013**.

The respondent and interested party were served with the substantive motion and in response thereto the respondent filed grounds of objection. When the matter came up for directions on 10th February, 2014, the attorney general did not appear though his office was duly served. Kinuthia for the interested party appeared but he told the court that he did not have instructions. Mr. Kirubi filed written submissions on which he relied entirely.

The only question in this matter, in my view, is whether the learned magistrate was right in granting the order of 8th March, 2013 without inviting the respondent who was named as the respondent the opportunity to respond to it.

As noted the application was made under **section 28 of Children Act, 2001**. That section provides as follows:-

28.(1) Parental responsibility in respect of a child may be extended by the court beyond the child's eighteenth birthday if the court is satisfied upon application or of its own motion, that special circumstances exist with regard to the welfare of the child that would necessitate such extension being made:

Provided that an order may be applied for after the child's eighteenth birthday.

(2) An application under this section may be made by-

(a) the parent or relative of a child;

(b) any person who has parental responsibility for the child;

(c) the director;

(d) the child.

It is apparent from this provision of the law that an order for extension of parental responsibility of a child over eighteen years can validly be applied for just like the interested party did in the Magistrate's court. The Act, does not, however, say that upon such an application, the order may be granted *ex parte* without according any interested party who may be affected by that order an opportunity to be heard.

There is no doubt that the applicant herein was going to be affected by the order issued by the learned magistrate and the applicant was fully aware of this fact not only because she named him as the respondent in her application but also because that order was part of her evidence in the case which she subsequently filed against the applicant.

If the **Children Act** does not provide for an *ex parte* order in an application for extension of parental responsibility then the learned magistrate acted *ultra vires* the Act to issue that sort of an order. Again since the applicant was named as the respondent and the order which was granted directly affected him, he was effectively condemned unheard when that order was issued without his participation in the proceedings of 8th March, 2013.

I agree with the learned counsel for the applicant that the proceedings before the learned magistrate and the order which she subsequently issued breached the basic principles of natural justice whose foundation is that nobody should be condemned unheard. It follows that, as stated in the case of **Ridge versus Baldwin (1964) AC 40** the decision of the learned magistrate which was given without observing the principles of natural justice is void. Accordingly the applicant's motion dated 24th April, 2011 is allowed; an order of certiorari is hereby issued and the proceedings in **Murang'a Senior Principle Magistrates Court Miscellaneous Application No. 5 of 2013** together with the order given on 8th March, 2014 and issued on 18th March, 2014 are hereby removed into this court and quashed accordingly. The applicant shall have costs of the application.

Signed, dated and delivered in open court this 10th April, 2014

Ngaah Jairus

JUDGE