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 G W B 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 16/07/2013

BETWEEN

G W B .... EX-PARTE APPLICANT

VRS

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

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

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

AND

F W S ..... INTERESTED PARTY

R U L I N G

1. Before me is a Notice of Motion by the Ex-parte Applicant G W B dated 16th August, 2013 brought under Order 53 Rule 3 of the Civil Procedure Rules and Sections 8 and 9 of the Law Reform Act. It seeks an order of Certiorari to remove to the court for quashing, that part of proceedings and order made as well as warrant of arrest issued by the Principal Magistrate against the Applicant on 16/7/13 in BGM CM Children's Case No.17 of 2013. It also seeks an order to prohibit the 2nd Respondent from executing or enforcing the said Warrant of Arrest.

2. The motion was expressed to be based on the matters set out in the Statutory Statement of facts and Verifying Affidavit of the Applicant sworn on 24th March, 2014. The facts of this case

are that; F W S, the Interested Party, is the father of one G S. G S is married to one S N the daughter to G W B the Ex-parte Applicant. G S and his wife S live in the United States of America but they have a child by the name P N S whon lives in Kenya. The Interested Party and the Ex-parte Applicant are therefore paternal and maternal grandfathers of the child P N S (hereafter *"the said child", respectively*..

3. Sometimes in June, 2013, the Interested Party commenced proceedings against the Ex-parte Applicant and his wife in the Children's Court at the Chief Magistrate's Court Bungoma, **BUNGOMA CHILDREN'S CASE NO.17 OF 2013** for certain orders relating to the said child's custody and general welfare. On 1st July, 2013, the Court made an order granting custody of the child to the mother S N. On 15th July, 2013, that Court made an order that both the mother and father of the child had equal parental responsibility and that the child be taken back to ***[particulars withheld]*** School. The Court further directed that the parents do make arrangements as to the child's accommodation and her caretakers.

4. On 16th July, 2013, the counsel for the Interested Party informed the Court that the order made on 15th July, 2013 could not be complied with as the mother of the child and the Ex-parte Applicant had gone underground. That pursuant thereto, the Court directed the OCS, Bungoma to ensure the order of 15th July, 2013 was complied with and issued a Warrant of Arrest against the Applicant for disobeying the court order.

5. On the foregoing facts, the Ex-parte Applicant contended that the Warrant of Arrest was wrongly made yet the order of 15th July, 2014 was not made against or directed at or extracted and served upon him. That he, the Ex-parte Applicant had not been informed of the charges against him or afforded an opportunity to respond. That accordingly, he was apprehensive that he would be arrested and imprisoned. The Applicant further contended that the 1st Respondent acted *ultra vires* and in breach of natural justice and the duty to act fairly.

6. I have seen what is in the Supplementary Affidavit of the Applicant. Most of what is contained therein does not concern this application as it is better ventilated in the Children's Court.

7. In his written submissions, Mr. Ikapel, Learned Counsel for the Applicant submitted that failure to extract and exhibit the order sought to be quashed was not fatal; that the order was contained in the proceedings of the court that were exhibited in the Verifying Affidavit; Counsel rehearsed what had taken place in the lower court and submitted that the order of 15/7/13 was directed at the parents of the child who had not been enjoined in the Case; that the Applicant had not disobeyed any order to warrant an arrest and committal for contempt. That the law of contempt cited for contempt and show cause why he should not be punished , Counsel cited the decision of **MIRUGI KARIUKI -VS- AG (CA NO.1991) UR** in support of the proposition that when a decision is made that affects the rights of a party, that decision is justifiable. Counsel also relied on the Case of **O'REILLY -VS- MACKMAN & OTHERS [1982] 3 ALL ER. 1124** in support of the proposition that once it is shown that an authority has failed to act fairly and/or has acted in abuse of jurisdiction that decision is amenable to judicial review. Counsel concluded that since the warrants had not been executed, the order for prohibition can properly issue. Counsel urged that the application be allowed.

8. The application was opposed by the Interested Party vide the Replying Affidavit sworn by F W S sworn on 13/8/13, and his Further Affidavit sworn on 20/3/14, these Affidavits in my view dwelt with matters suited for the Children's Court and not the application for Judicial Review. Suffice it to the state that the Interested Party averred that the Applicant had disrespected court orders and was attempting to avoid arrest. He insisted that the Applicant was in contempt and abuse of lower court orders for the child to be and meted to [particulars withheld] School.

9. Mr. Sichangi, Learned Counsel for the Interested Party submitted that the application was defective and incompetent as the order sought to be quashed had not been attached to the

application. That what the applicant had done was to attach the entire proceedings which if quashed it will prejudice the proceedings in the Children's Case. Counsel further submitted that what the application is doing is to challenge the correctness of the order of 16/7/13. That the order was made in the ordinary course of practice by the 1st Respondent exercising its Constitutional and Judicial Mandate. Counsel referred to the Cases of **R -VS- REPUBLIC [1997] Eklr** in support of those submissions. He urged that the application be dismissed.

10. The Respondents opposed the application vide the Grounds of Opposition dated 11th March, 2014. The Respondent contended that the application was incurably defective and bad in law; that it did not fall in the scope and ambit of the requirements for application for judicial review; that the orders of Certiorari and Prohibition cannot be issued to correct a normal course of practice or procedure with the provisions of Order 22 of the Civil Procedure Rules and that the orders cannot issue to correct a wrong decision issued on merits of proceedings undertake in the exercise of their statutory mandates. Mr. Mohamed Odogo, Learned Counsel for the Respondent urged that the application be dismissed.

11. The application before me seeks the prayers for Certiorari and Prohibition. In the Case of the **KENYA NATIONAL EXAMINATIONS COUNCIL VS REPUBLIC [1997] Eklr** the court of appeal held:-

> ***"..... an order of Certiorari will issue if the decision is made without or in excess of jurisdiction, or where the rules of natural justice are not complied with or for such like reasons."***

In **ATTORNEY GENERAL -VS- RYAN [1980] A.C 718** the Court held at pg 730 that:-

> ***"It has long been settled law that a decision affecting the legal rights of an individual which is arrived at by procedure which offends against the principles of natural justice is outside the jurisdiction of the decision making body."***

this was upheld in the Case of **MIRUGI KARIUKI -VS- REPUBLIC** [Supra] where the Court of Appeal held that:-

> ***"It is not the absoluteness of the discretion nor the authority exercising it that matter but rather in its exercise, some person's legal rights or interested have been affected. This makes the exercise of such discretion justiciable and therefore subject to Judicial Review."***

Finally in **O'REILLY -VRS- MACKMAN** (Supra) the Court held that:

> ***"wherever any person or body of persons has authority conferred by legislation to make to make decisions of the kind I have described, it is amenable to the remedy of an order to quash its decision either for error of law in reaching it or for failure to act fairly towards the person who will be adversely affected by the decision by failing to observe either one or other of the two fundamental rights accorded to him by the rules of natural justice or fairness....."***

12. In the instant case, it is alleged by the Applicant that the 1st Respondent made the order of 16/7/13 without according him a hearing and acted unfairly in so making that order, that the 1st Respondent had acted unfairly. That in the premises, the 1st Respondent had made the order in breach of the principles of natural justice. The Interested Party contested this position and av erred that, since the Applicant was in breach of the order of that court, the order was properly made. In my view, the question that arises is whether the lower court had the power or mandate to make the order complained of and if it had, whether it exercised that power fairly.

13. The court is alive to the powerful statement by Lord Russel of Killowen in the Case of **Fairment Investments Ltd -vs- Secretary of State for Environment [1976] 1 W.L.R. 1255 AT 1263** that:-

> ***"For it is to be implied, unless the contrary appears, that Parliament does not authorize by the Act the exercise of powers in breach of the principles of natural justice, and that Parliament does by the Act require, in the particular procedures compliance with those principles."***

14. What was before the 1st Respondent was a children's matter. That court was exercising its jurisdiction under the Children's Act. Indeed the subject matter before that Court was a child barely four (4) and a half (½) years, P N S. Section 114 of the Children's Act Chapter 141, of the Laws of Kenya specifies the types of Orders a Children's Court can make under that Act. Some of those orders are an exclusion order (S114 (c)), a child assessment order (S114 (d)) and, a production order (S114 (g)). They type of production order is one which requires a person who is harbouring or concealing or otherwise unlawfully detaining a child or who intends to remove a child from the jurisdiction of the court to disclose information regarding the whereabouts of the child or to produce the child in court.

15. Section 115 of that Act provides:-

> ***"Where the court makes an order under paragraphs (e), (d) and (g) of Section 114, the Court may attach a power of arrest to the order and the person named in the order shall be liable to arrest if he shall contravene any stipulation or condition contained in the order, whilst the order remains in force." (Emphasis added).***

16. From the foregoing, it is clear that the children's Court can attach a power to arrest to any of the orders made pursuant to Section 114 (c), (d) and (g). The form and nature of the power to arrest is not specified in the Act or the schedules thereto. However, under the Children (Practice and Procedure Parental Responsibility Regulations, 2002, Regulation 19 provides that judgment and orders of the Children's Court shall be executed and enforced in the same manner as provided under Order 21(now 22) of the Civil Procedure Rules.

17. In the instant case, the question arises whether there was an order that had been contravened to warrant the arrest of the Applicant. From the record, the court made an order on 15/7/13 to the effect that both the parents of the child had equal parental responsibility and that the child should be placed at [particulars withheld] School. The following day 16/07/13, counsel for the Plaintiff in the case below appeared before court and convinced the court that, its order of 15/7/2013 could not be complied with because the mother of the child and the Appellant had disappeared with the child. It is then that the court issued the warrant of arrest.

18. What was the warrant of arrest about? I have seen Exhibit "GWB (b)" annexed to the Affidavit in support of the application for leave. It is the Warrant of Arrest issued on 16/7/13. It is directed to the OCS, Bungoma stating:-

> ***"WHEREAS G B was adjudged by a decree of this court in the above mentioned suit, dated the 16th day of July, 2013 and for contempt of court orders. These are to command you to arrest the said G B and unless he obeys the court orders issued....., to bring the said judgment-debtor before the court with all convenient speed....."***

18. The Appellant complains that he is not aware of any order he has disobeyed to warrant his being arrested. That if he had disobeyed any order he should have been cited for contempt, that he was not given a hearing and had been treated unfairly.

19. What was before court was an allegation that the Applicant had impeded the compliance of the order of the court of 15/7/13 by disappearing. How was the court to get the applicant to come and explain himself if the allegation was that he had gone underground and the court had believed that fact? Was it not to direct he availed before it with convenient speed in a manner known by law? How was the court to know the applicant's side of the story if he did not appear before it? The Warrant that was issued specified two matters that the Applicant was to be arrested if he failed to obey the order that had been issued and that he was to be brought to court with convenient speed. He was not to be detained for whatever reason.

20. Under Section 117 of the Children Act, that court has the power to review, vary, suspend or discharge any order made under part ix of the Act. One of such orders is the Warrant of Arrest that was issued. Further, Section 116 of that Act provides the penalty for breaching any of the orders set out in Section 114 (c), (d) and (g). such penalty cannot be ordered until and unless a person has been given a fair hearing. To my mind, the provisions of Sections 115 to 117 of the children's Act give a right to be heard in terms of the **Fairmont Investments Case.**

21. In view of the foregoing, I am satisfied that the court did not act in excess of jurisdiction. The court could not in the circumstances hear the Applicant before issuing the order it did. The Applicant could only be heard if he appeared before that court to explain himself. He did not but decided to come to this court. That court did not treat the applicant unfairly.

22. In **Halsburys Laws of England 4th Edn, Vol.II pg 805 at para.1508** it is stated:-

> ***"Certiorari is a discretionary remedy which a court may refuse to grant even when the requisite grounds for its grant exist. The court has to weigh one thing after another to see whether or not the remedy is the most efficacious in the circumstances obtaining. The discretion of the court being a judicial one, must be exercised on the basis of evidence and sound principles."***

23. In the present case, I would be hesitant to quash an order of a Children's Court issued in a proceeding whereby the Applicant is not only a party but had the right and opportunity of either challenging that order or explaining himself before that court. I think that to allow litigants to rush to the High Court to quash or stop proceedings of lower court each time they are aggrieved by orders made by lower courts without affording those courts an opportunity of pronouncing themselves in matters before them, it will create but a jam of cases both in this court and in the lower courts.

24. For the foregoing reasons, I find the application to be without merit, the same is hereby dismissed with costs. With this dismissal, the order made on 15th January, 2014 suspending the Warrant of Arrest is hereby set aside.

DATED and DELIVERED at Bungoma this 19th day of May, 2014

A. MABEYA

JUDGE