



REPUBLIC OF KENYA

High Court at Mombasa

Miscellaneous Application 138 of 2011

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

AND

IN THE MATTER OF: CIVIL PROCEDURE ACT CAP 21 LAWS OF KENYA

AND

IN THE MATTER OF: THE REPUBLIC

VERSUS

THE KADHI'S COURT MOMBASA RESPONDENT

EX PARTE

LAI ASHRAFF MUDHIR APPLICANT

AND

MWANAMANGA HUSSEIN YUSUF..... INTERESTED PARTY

JUDGMENT

1. The applicant sought leave of court to apply for an order of certiorari to quash the proceedings at the Mombasa Kadhi's Court civil suit No. 227 of 2010 and the orders given interim relating to interested party who is his divorced wife under Islamic Sharia.
2. The High Court (Nzioka J.) granted leave and prayer and ordered that the grant of leave do operate as a stay of the proceedings in Kadhi's Court civil case No. 227 of 2010 and further that the matter be mentioned on 20/12/2011 for further orders.
3. The application came up for mention on 20/12/2011 before the court differently constituted (Kasango J.) ruled that "the orders staying the Kadhi's Court proceedings in my view are not in the best interest of the children. I therefore hereby lift and set aside the stay which was issued on 29th November 2011, although it ought to be noted, that stay expired today."
4. When the matter first came up before me as head of the Family Division of the Court, the respondent sought the payment of maintenance while the application is pending hearing before the court. Noting the applicant's counsel's willingness to pay maintenance dues in the sum of Kshs. 15,000, I made an order for the payment of the Kshs.15,000 on account and without prejudice beginning December 2011

and set the hearing of the application on 27th March 2012. In the meantime, I ordered a stay of the proceedings of the Kadhi's Court case until then.

5. On the 27th March 2012, the parties proceeded on the basis that there was an application for the orders of certiorari. The Respondent had filed a replying affidavit to the applicants verifying affidavit in support of the application for leave. However, I have perused the record of proceedings before the court and I have established that no substantive Notice of Motion for an order of certiorari was filed by the applicant pursuant to the leave granted by the court herein.

6. The applicant's case as set out in the grounds for the relief in the statement dated 25/11/2011 paragraph 1-9 is that:-

“The interested party filed Kadhi's succession (sic) civil suit No. 227 of 2010 of the Kadhis court at Mombasa against the applicant; both the suit and the chamber summons were filed at a time when the applicant was outside the country. The proceedings were served upon the applicant's sister; despite the fact that pleadings were served on a party who was not [a party to the proceeding the respondent proceeded to issue orders on 11/10/2010 and on 29/9/2011; from the proceedings[it was] obvious that the respondent showed open bias, from the order given on 11/10/2010 it is clear the respondent was aware that the applicant was out of the country; the order given against the rules of natural justice, the respondent did not have jurisdiction to give the order sought considering that there was no service on the applicant.”

7. The substance of the interested party's defence to the application saying that the applicant had been served with the court papers by registered post as ordered by the court and given ample time (21days) to enter appearance to the proceedings, and that service on the applicant's sister was in abundance of caution. Furthermore, the interested party contended, “it is a constitutional provision that the best interest of a child are paramount and there was no breach of natural justice as equity itself provides that he who comes to equity must come with clean hands and the applicant even without need for litigation should have maintained his children by right under Sharia law.”

8. In urging the applicant's case, counsel for the Applicant Mr. Hamza, submitted as follows;

“Applicant seeks an order of certiorari to quash the proceedings of the kadhi and order of 11/10/2010,29/10/11 and 2/11/2011. The respondent [interested party] to the Kadhi's court by application dated 16/8/2010 seeking injunction orders and orders were granted exparte against the applicant who was not in Kenya. The fact is accepted by the respondent. The procedure for service of a party outside Kenya is set out in Order 5 of the civil procedure rules. The service cannot be made by a mere letter. Rule 26 of the order 5 requires the sealing of the order by the High Court and forwarded to the Minister for Foreign Affairs. The person served needs to file a power of attorney or to come back to the country. He was given 21 days which is unreasonable. It is tantamount to denying him the right of being heard. The kadhi proceeded to issue further orders in the absence of the applicant. It is against the rules of natural justice.”

Counsel referred to the case law authorities of *Nyongesa .v Egerton University* (1990) KLR 693 and *R v. Chief Magistrate's Court, Mombasa ex p. Ganijee & Another.* (2002) KLR 703 on the power of the court to issue orders of certiorari and prohibition.

9. In response, counsel for the interested party, Mrs. Kipsang, submitted:-

“The notice of the case was given to the applicant. It is the applicant who triggered the matter by directing that the respondent be evicted from the matrimonial home. Hence the injunction against the relatives from evicting the Interested Party and her children. The order was to be served upon the applicant within 21 days. It is not denied that notice was received. The argument was that notice was defective. The interested party complied with the order of the court. Service was effected accordingly.

As regards opportunity to come to court, it has not been shown whether the employer refused the applicant to travel to Kenya or whether he came to Kenya and failed to attend court for whatever reason. The applicant only came to court when a notice to show cause by order of 2/11/2011 which was one year after the filing of the proceedings. The applicant did not file any court papers. The court acted in the best interests of the children and prayer of the dismissal of the case.”

Counsel distinguishes the case law authority cited by the applicant on the grounds that there was no malice or bias in the present proceedings; only a desire to protect the welfare of the children.

10. The only issue that arises is whether there is a basis for the grant of the order of certiorari sought or whether the order will be issued in the circumstances of this case.

11. As noted above the applicant did not file the substantive motion for the order of certiorari as he was required to do within 21 days of the grant of leave under Order 51 rule 3 (1) of the Civil Procedure Rules. Without a Notice of Motion for the judicial review orders there would technically be no basis for the grant or prayers sought by the applicant.

12. However, as the party’s counsel submitted on the faith that such substantive application was before the court, I would pursuant to the Article 159 principle for substantive justice without regard to technicalities of procedure, deem the present application as the substantive Notice of motion and proceed to deal with the application on its merits.

13. Order 5 rules 21-31 of the Civil procedure rules makes provision of service or process in a foreign country with an elaborate procedure for such service under rules 27 and 29 for commonwealth and other foreign counties respectively. Under rule 26, the order for leave to effect service out of Kenya, shall limit a time after such service within which the defendant is to enter an appearance depending on the place or country where the service is to be served. The applicant’s counsel contended that the 21 days notice given in the present case was unreasonable.

14. I agree that service of process in the present matter should have been by way of the procedure set out in Order 5 rules 21-31 of the civil procedure rules and not by registered post, and that the period of 21 days is insufficient having regard to the procedure of service out of jurisdiction. Moreover, time is to be calculated from the date of such service, which may not be ascertainable in the method of registered post to an address in a foreign country. I would agree that the applicant in the circumstances be afforded a reasonable opportunity to be heard.

15. However, I do not agree that the discretionary order of certiorari should issue in the interests of this case. The Kadhi’s court has under the Civil Procedure Rules the jurisdiction to grant orders *ex parte* in cases of urgency under Order 40, and in cases where the defendant fails to enter appearance, defence or to attend court on the date of hearing (Orders 10 and 12 of the Civil Procedure Rules). Any person aggrieved by orders or judgment made *ex parte* under these provisions may move the court for the setting aside of the *ex parte* orders. In view of these alternative remedies, the judicial review orders are inappropriate. Strictly, in my view, this is not a case of want of jurisdiction for which certiorari is the appropriate remedy; it is rather an irregularity in the exercise of jurisdiction, for which there is ready remedy under the rules of court for setting aside, review and even appeal. The court itself has jurisdiction *ex debito justitiae* to set aside its own order.

16. Most compelling consideration in the exercise of the discretion to grant or refuse the judicial review remedy in this case is the constitutional injunction under Article 53 (2) on the constitution that “a child’s best interests are of paramount importance in every matter concerning the child”. I have considered that the applicant does not deny his liability to maintain the children whose paternity is not in issue. The dispute appears to relate only to the quantum of the maintenance dues. I consider that the best interest of the children is in the continued maintenance by their father, the applicant herein. In these circumstances, it is inappropriate to order this quashing of the orders for maintenance of the children.

17. Accordingly, for the reasons set out above, I dismiss the applicant’s application herein which I

deemed is the substantive Notice of Motion for the judicial review order of certiorari. However in view of the matrimonial nature of the proceedings the subject of judicial review, I do not make any order as to costs between the parties.

EDWARD M. MURIITHI
JUDGE

Dated and delivered this 8th day of March 2013.

M. ODERO
JUDGE

In the presence of: -

Mr. Hamza for the Petitioner/Plaintiff/Applicant

No appearance for the Respondent/Defendant

Mr. Mutisya - Court Clerk