



REPUBLIC OF KENYA

IN THE HIGH COURT

AT NAIROBI

MILIMANI LAW COURTS

Judicial Review 24 of 2011

IN THE MATTER OF THE CHILDREN'S ACT, ACT NO.8 OF 2001 LAWS OF KENYA

AND

**IN THE MATTER OF AN APPLICATION BY GERALD ALUMASI FOR
ORDERS OF CERTIORARI AND PROHIBITION**

BETWEEN

GERALD ALUMASI.....APPLICANT

-VERSUS-

THE PRESIDING MAGISTRATE CHILDREN'S

COURT AT NAIROBI.....RESPONDENT

BEATRICE IMBWEYA ALUMASI.....INTERESTED PARTY

**EXPARTE
GERALD ALUMASI**

J U D G M E N T

In the Notice of Motion dated 28th February 2011 and filed in court on 3rd March 2011, the exparte applicant Gerald Alumasi (*herein referred to as the applicant*) seeks the following orders:

0. (a) That an ORDER OF CERTIORARI do issue to bring to this Honourable Court for purposes of it being quashed, the ex-parte Order of the Respondent made on 7th January 2011 in Nairobi Children's Court Cause No.18 of 2011.

(a) AN ORDER OF PROHIBITION prohibiting the Respondent from hearing and making any further orders in Nairobi Children's Court Cause No.18 of 2011.

1. THAT costs be provided for.

The application is supported by the amended statutory statement dated 9th February 2011, the amended verifying affidavit and the further affidavit sworn by the ex parte applicant on 9th February 2011 and 31st March 2011 respectively.

The application is premised on nine (9) grounds which can for convenience be summarized into the following grounds:

(1) That the Respondent violated the rules of natural justice in issuing the orders dated 7th January 2011 annexed to the verifying affidavit marked GA3 in **Nairobi Children Cause No.18 of 2011** at an ex parte stage without hearing the ex parte applicant and when the respondent denied the ex parte applicant the right of audience on 24th January 2011 when the chamber summons application dated 7th January 2011 was scheduled for hearing inter partes.

(2) The ex-parte orders and the decision made on 7th January 2011 are irrational in that the respondent extended parental responsibility to and made an order for payment of school fees of one TYLER ALUMASI against the applicant notwithstanding that the applicant was neither the father nor had he assumed parental responsibility over the child.

(3) That the respondent did not have jurisdiction to entertain Nairobi Children's Court Case No.18 of 2011 which essentially sought injunctive orders against the applicant in respect of Plot No. Nairobi/Block 73/328 which was matrimonial property.

(4) That the respondent acted in excess of her jurisdiction in granting injunctive orders in respect of matrimonial property which in any event no longer belonged to the ex parte applicant.

(5) That the interests of justice and fairness would only be served if the orders sought were granted.

The application was opposed by the interested party Beatrice Imbweya Alumasi who was the plaintiff in the case filed at the Nairobi Children's Court. She swore a replying affidavit on 24th March 2011 which was filed on 25th March 2011.

The respondent did not oppose the motion since no replying affidavit or grounds of opposition were filed on its behalf in this case. I have gone through the court record and I have not come across any papers filed on behalf of the respondent in response to the applicant's motion except the written submissions filed on 18th July 2011.

In her replying affidavit, the interested party denied that the ex parte orders impugned in this case had been made in contravention of the rules of natural justice and that the respondent did not have jurisdiction to make such orders. She averred that the applicant herein was her husband who had abandoned his family and failed to pay upkeep and school fees for their children for 12 years. She deponed that at the time she filed suit at the Children's Court, he had threatened to evict her and their children out of their matrimonial home to the streets.

It was her contention that the issue before the Children's Court was shelter for the Children not ownership of matrimonial property and that the respondent had jurisdiction to make orders regarding shelter and payment of school fees for the children whose paternity is not denied by the applicant. The interested party asserted that the respondent made the ex parte orders lawfully in the exercise of her discretion as mandated by the law and taking into account the best interests of the children.

The applicant's case is that the respondent treated him unfairly and violated the rules of natural justice by granting final orders at an interlocutory stage which adversely affected him without giving him an opportunity to be heard on the interested party's claims and by denying him audience on 24th January 2011. It was his further contention that the respondent's decision was irrational and unreasonable as it

assumed that the applicant had accepted parental responsibility for all the children before case was heard on its merits.

To further advance their respective positions, advocates for the parties herein filed written submissions which they highlighted before me on 29th February 2012.

I have carefully considered the pleadings in this case and the submissions made by counsel for the parties herein and in my view, the following appear to be the issues that arise for determination by the court:

- (1) Whether in making the *ex parte* orders of 7th January 2011, the respondent violated the rules of natural justice to the detriment of the applicant.
- (2) Whether the existence of alternative remedies is a bar to judicial review.
- (3) Whether the respondent acted without or in excess of the court's jurisdiction.
- (4) Whether the respondent acted illegally, irrationally or unreasonably in granting the said *ex parte* orders and lastly
- (5) Whether the applicant is entitled to the reliefs sought.

Starting with the first issue, it is not disputed that the impugned orders were issued by the respondent *ex parte* meaning that they were granted in the absence of the applicant and before the respondent heard the applicant in response to claims made by the interested party in her chamber summons application dated 7th January 2011. It is evident from the pleadings that the interested party had filed suit in Children Cause No.18 of 2011 simultaneously with the chamber summons application that gave rise to the issuing of the impugned orders.

Though for undisclosed reasons the body of the application showing the prayers sought and the law relied upon by the interested party were not annexed to the applicant's verifying affidavit as only the certificate of urgency and grounds relied upon were annexed and marked GA2, it is clear from the supporting affidavit that the applicant (interested party) had made serious claims against the applicant which required investigation by the court before making final orders on the matters raised in the application. The interested party had prayed for a maintenance order against the applicant on grounds that he was the father of five children whom he had abandoned for 12 years and who urgently needed money for their upkeep and payment of school fees. It was also claimed that the applicant was a man of means who worked as an Insurance Agent earning a monthly salary of Kshs.120,000 per month and that he could therefore afford the money claimed for the Children's maintenance and for school fees.

The respondent without giving the applicant an opportunity to state his case in response to claims made by the interested party particularly on the issue of paternity and his earning capacity proceeded to make *ex parte* orders which obviously adversely affected the applicant.

I have looked at the said *ex parte* orders exhibited and marked as annexure GA3 and I agree with Mr. Muchoki for the applicant that Order 3 & 4 were in fact not interim orders. They were final orders conclusively determining the amount to be paid as school fees by the applicant and extending parental responsibility of the applicant in respect of Nelly Alumasi and Sylvia Alumasi beyond their 18th birthday. These are orders which prejudicially affected the applicant and failure to give him an opportunity to be heard before making such orders violated one of the cardinal principles of the rules of natural justice that no man shall be condemned unheard (*addi alteram partem*).

It is trite law that the rules of natural justice must be observed by all courts, inferior tribunals or bodies which exercise either judicial or quasi judicial powers or who have a duty to act fairly before any final orders are made which adversely affect the rights or interest of a citizen.

Though I wholly concur with the submission by the respondent and the interested party that the respondent being a Children's Court was mandated to protect, safeguard and promote the rights of children guaranteed in **Article 53(1)(a) – (f)** of the **Constitution of Kenya 2010** and that the presiding magistrate was empowered by both the Constitution of Kenya 2010 at **Article 53(2)** and **Section 4** of the Children's Act to make any orders aimed at achieving the best interest of a child, the law requires that such power or discretion must be exercised judiciously having due regard to the rights of other parties involved in litigation which includes the right of a defendant to be heard before final orders adverse to his interests are made.

In the instant case however, the respondent made maintenance orders *ex parte* against the applicant which were substantive and final in nature which is not what is envisaged by **Section 97** of the Children's Act. Section 97 of the Children's Act (**hereinafter referred to as the Act**) only empowers the respondent to make interim orders not final orders in the best interest of a child. The final nature of the orders issued in this case was aptly demonstrated by the respondent's refusal to give audience to the applicant's counsel to argue a preliminary objection filed on behalf of the applicant challenging the validity of the interested party's application until the applicant complied with the said orders.

As observed earlier, Order 3 also finally determined *ex parte* at an interlocutory stage the prayer for extension of parental responsibility to the applicant for Nelly and Sylvia Alumasi beyond their 18th birthday.

The applicant has sought for orders of certiorari to quash the aforesaid *ex parte* orders among others on grounds ***inter alia*** that they were made in violation of the rules of natural justice.

In Halisbury's laws of England, 4th Edition Vol.1 at Page 202 the learned author states that the remedy of certiorari will issue to quash a determination of an inferior court or tribunal or public authority which is made in excess of or without jurisdiction or for an error of law on the face of the record, breach of the rules of natural justice or where the determination was procured by fraud, collusion or perjury. Prohibition would also issue to forbid any such determination. This proposition of law was well captured by my brother Asike Makhandia, J in Misc Civil Appn No.136 of 2009 R Vs Senior Resident Magistrate, Kisii Law Courts Ex parte Jackson Masega & 4 Others which was relied upon by the respondent herein but which I must add is of persuasive authority to this court. I find that the said authority is not applicable in this case as the facts and circumstances relating to the issuance of the *ex parte* orders sought to be impugned in that case are completely different from those prevailing in this case.

In this case I reiterate my earlier finding that the respondent breached the rules of natural justice by making the *ex parte* orders in question which were final in nature without giving the applicant an opportunity to be heard on the claims made against him by the interested party and on the reliefs sought particularly without investigating his financial capacity.

This finding would have been sufficient to dispose off this application but in view of the fact that several other issues have been raised by the parties, I will attempt to briefly address the rest of the issues together as I conclude my findings on this matter.

On the issue of the existence of an alternative remedy, it is true that Section 80 of the Act provides for the remedy of appeals to the High Court and the Court of Appeal to a party aggrieved by the decision of the Children's Court. However, it is now settled law that the existence of an alternative remedy is no bar to judicial review. This is because in judicial review, the court is not concerned with the merits of a decision but with the fairness of the process employed to reach at the impugned decision. It is however required that at the leave stage, the applicant should disclose the existence of the other available remedies and why he/she thinks they are not as efficacious and convenient as judicial review remedies.

Though there were no such disclosures in this case, considering that the orders challenged in this case had been made *ex parte* at the interlocutory stage and the hearing of the main suit was yet to take place, and considering that judicial review is supposed to be a more speedy mode of resolving disputes compared to

appeals and taking into account the applicant's main complaint that the ex parte orders were illegal for having been made in breach of the rules of natural justice, I am persuaded to find that the remedy of judicial review was more efficacious and appropriate in this case than lodging an appeal under Section 80 of the Act.

The applicant had argued that the respondent had no jurisdiction to entertain the interested party's suit No.18 of 2011 and the chamber summons application filed within it since it sought injunctive orders in relation to matrimonial property.

A casual reading of the plaint in the said suit and the affidavit supporting the application shows clearly that the suit was mainly concerned with issues relating to the maintenance, shelter and general welfare of the children named in the suit papers. Injunctive orders sought therein were aimed at securing the interested party's peaceful occupation of the matrimonial property for the purpose of guaranteeing the children shelter pending the hearing and determination of the main suit. They were not targeting the matrimonial property as an asset for distribution under the Married Women Properties Act.

Under **Section 73(a)** of the Act and under Rule 5 of the General Rules and Regulations made under the Act legal Notice No.77 of 2002, the respondent had jurisdiction to hear and determine the suit filed in the Children's Court as well as the chamber summons application filed therein on matters of maintenance, parental responsibility and shelter for the children.

Lastly, regarding the issue of whether the respondent acted illegally, unreasonably or irrationally in granting the said ex parte orders, let me state at the outset that though the respondent had a statutory mandate to exercise its discretion to make any orders in the best interest of the children, this was a discretion that had to be exercised objectively and judiciously on the basis of evidence presented before the court. The purpose of judicial review is to ensure that discretionary power statutorily bestowed on inferior courts, tribunals or other public bodies is not abused by being exercised unreasonably, arbitrarily or irrationally exposing citizens to unfair treatment. It is my view that though the respondent cannot be said to have acted unreasonably within the meaning of *Wednesbury's* unreasonableness – see **Associated Provincial Picture Houses Ltd. –Vs- Wednesbury's Corporation [1947] EWCA Civ.1**. It is my view that the respondent acted arbitrarily and irrationally in making the impugned orders. I make this finding because it is evident that the respondent made the said orders without having heard the ex parte applicant to determine whether he was disputing paternity of either one or all of the children in whose benefit the maintenance order was sought to be made and whether he had any objection to his parental responsibility being extended for two children beyond their 18th birthday though it was clearly admitted in the suit papers that the interested party and the applicant had not lived together for 12 years prior to the institution of the suit and that Tyler Alumasi was a minor in kindergarten. I also find that the respondent acted arbitrarily and irrationally in ordering that the applicant pay's a sum of Kshs.140,000/- in school fees without any evidence to support the interested party's claims that the applicant was in gainful employment and more so with the interested party's averment that the applicant earned a salary of Kshs.120,000/- per month.

In view of the foregoing, this court is satisfied that the applicant has demonstrated that he is deserving of the orders of certiorari as sought in Prayer 1(a) of the Notice of Motion dated 28th February 2011. I therefore allow the application in terms of Prayer 1(a) and I hereby issue an order of certiorari to remove to this court and to quash the ex parte orders made by the respondent on 7th January 2011 in Nairobi Children's Court Cause No.18 of 2011.

I however decline to issue the order of Prohibition as prayed in Prayer 1(b) since as noted earlier, it is my finding that the respondent has jurisdiction to hear and determine the issues raised in the Nairobi Children's Court Cause No.18 of 2011. The law is that the High Court in its supervisory jurisdiction cannot prohibit an inferior court or other statutory bodies or tribunals from performing their duties and functions in execution of their statutory mandate. The order of prohibition only issues to prohibit an inferior court, tribunal or public authority from acting in excess of its jurisdiction or contrary to the law.

Since this court has found that the respondent has jurisdiction to entertain the aforesaid suit, I cannot in the same breath prohibit the respondent from hearing and determining the said suit. I instead direct that the said suit should now proceed for hearing interpartes on a priority basis before another magistrate other than the one who made the exparte orders subject of these proceedings.

Considering the circumstances that necessitated the filing of this proceedings and the fact that the proceedings emanated from a case still pending hearing and determination at the Children's Court, I will not make any orders as to costs. Each party to bear its own costs.

Dated, Signed and Delivered by me at Nairobi this **12th** day of June, 2012.

C. W. GITHUA
JUDGE

In the presence of:

Florence – Court Clerk

Mr. Muchoki for Applicant

N/A for Respondent

N/A for Interested Party