



REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA
AT BUNGOMA

Miscellaneous Civil Application 5 of 2010

**IN THE MATTER OF AN APPLICATION FOR LEVE TO APPLY FOR ORDERS OF JUDICIAL
REVIEW NAMELY CERTIORARI, PROHIBITION AND MANDAMAS**

**IN THE MATTER OF AN APPLICATION BY THE DIRECTORS JESUS CASRES ORPHANAGE FOR
LEAVE TO APPLY FOR JUDICIAL REVIEW ORDERS AFORESAID**

AND

**IN THE MATTER OF BUNGOMA SENIOR PRINCIPAL MAGISTRATE'S COURT CHILDREN'S
CASE NO.24 OF 2009**

**AND IN THE MATTER OF THE DECISION BY THE DISTRICT CHILDREN'S OFFICER TESO
NORTH/SOUTH DISTRICTS**

AND

IN THE MATTER OF THE PENAL CODE CAP 63 LAWS OF KENYA

AND

IN THE MATTER OF THE ATTORNEY GENERAL

REPUBLIC.....APPLICANT

~VRS~

THE ATTORNEY GENERAL.....RESPONDENT

RULING

This is a ruling on an application dated 5th February 2010 brought by the Directors of Jesus Care Orphanage. It seeks for orders to punish the District Children's Officer and the District Commissioner both of Teso North and South Districts for disobeying a court order

issued on the 18th day of January 2010 by this court. The application is supported by the affidavit of Japheth Barua Kirori which contains the grounds. Other grounds are on the face of the application.

The facts leading to the filing of this application are that on 11/12/2009 Bungoma Resident Magistrate, Mr. Kyambia issued ex parte orders barring the Applicant from accessing their private property on L.R. NO.TESO/ANGOROMO/6488. The Applicants are directors of Jesus Care Orphanage situated on the said land and which home had several orphaned children at the time the Resident Magistrate issued orders. There was a row involving the management which led to the District Children's Officer going to court to obtain the orders which are complained of herein. The court gave orders putting the home on temporary management of the Respondents without hearing the Applicants.

On the 18/01/2010, the Applicants obtained leave to file a judicial review application in this court seeking to quash the orders of the Resident Magistrate. The Applicant was granted leave to file judicial review proceedings. It was also ordered that the leave operates as stay of the proceedings and orders of the Resident Magistrate.

The Applicant's counsel M/S Nanzushi submits that the order of this court was served on the Respondents personally. The order contained a penal notice that the Respondents risked being punished for contempt of court in the event of non-compliance. It is the Applicant's contention that the order was very clear and that the Respondents cannot pretend not to understand it.

Mr. Onderi, Senior Principal State Counsel relying on grounds of objection filed on 09/03/2010 argued that the Respondents did not disobey the court order. His interpretation of the order is that the parties were to maintain status quo pending the filing of the judicial review proceedings. At the time the order was served, the police officers guarding the

home had already moved in on the instruction of the Respondents. The State Counsel admits that he advised the Respondents based on his interpretation of the order. He further argued that the Applicant should move to fix the substantive motion for hearing instead of pursuing this application which is not brought in good faith.

In this application, the Respondents do not deny that they were personally served with the court's order dated 18/01/2010. In an application of this nature, personal service is a requirement that has to be satisfied. The order which was duly served on the District Commissioner and the District Children's Officer, Teso North and South District is annexed to this application. The Respondents signed and stamped on the reverse of the page containing the order.

The defence raised by the Respondents is that the order was understood to mean that the parties maintain status quo. The Respondents had already taken over the Children's Orphanage and could not move out since they did not understand the order to mean that they do so.

In paragraph 4 of the supporting affidavit, the Applicant depones that the Respondents said they could not obey the order because the state counsel advised them not to do so. Mr. Onderi admitted in court that he interpreted the order to the Respondents to mean that status quo be maintained. The issue which arises herein is whether the interpretation by Mr. Onderi was correct. If it was not correct, the court has to decide whether it was excusable.

The first part of the order contains the number of the civil application and details of the parties. This is followed by the heading "ORDER". The first paragraph explains that the application explains that the application presented by M/S Lucy Nanzushi was heard in court before the Honourable Judge F. N. Muchemi.

The order itself follows and reads:

- a) The Applicants, Directors of Jesus Care Orphanage be granted leave to apply for judicial review orders of certiorari to remove to this and quash the proceedings and order of K. Kyambia, Resident Magistrate, Bungoma on the 11/12/2009, vide Children Case No.24/2009.
- b) That the grant of leave herein do operate as a stay of execution of proceedings in respect hereof.
- c) That the costs of the application be provided for.

The order is dated 18th January 2010 and signed by the Deputy Registrar, High Court of Kenya at Bungoma.

The order as framed is clear that the Applicant was granted leave to apply for judicial review orders of certiorari to remove to this court and quash the proceedings and order of K. Kyambia, Resident Magistrate. The second limb is very clear that the leave operates as stay of execution of proceedings in respect hereof.

The term "*stay of execution of proceedings hereof*" in its ordinary meaning basically means that the proceedings sought to be quashed are thereby stayed. The orders of Mr. Kyambia purported to hand over the orphanage home to the Respondents. The consequence of staying them means they are not in force until the substantive motion is filed, heard and determined. Any act by the Respondents done in pursuance of the said orders must be halted and vacated on receipt of the orders. In other words, the custody of the children and the management of the home reverts to the original position before Mr. Kyambia granted the orders. One does not need an English dictionary to interpret the said order of this court. It is as simple as that. The interpretation of the state counsel that status quo be maintained is therefore wrong and a misdirection to the Respondents.

I now proceed to decide whether that act of the state counsel which misdirected the Respondents is excusable. The state counsel is a lawyer by profession. He is also an advocate of the High Court of Kenya. In that capacity, the officer is well versed with the

law and procedure and specifically, judicial review proceedings. It follows that the consequences of a court order granting leave to operate as stay under Order LIII (53) of the Civil Procedure Rules are clear and ought to be understood.

In the case of R. –VS- COMMUNICATIONS COMMISSION OF KENYA & OTHERS “EX-PARTE” E. A. TELEVISION NETWORK LTD CIVIL APPEAL NO.175 OF 2000 1 E.A 199, the Court of Appeal held:

“That leave to apply for judicial review is granted where the court considers that the Applicant has an arguable case.”

In the case before me, I had considered that the Applicant deserved the leave to operate as stay having carefully perused the proceedings of the lower court and the statement of the Applicant. It is therefore, ridiculous that one could advise the parties to stay put and not obey the order.

I wish to point out that the power of the court to punish for contempt is exercised not for the benefit of the judge but for the benefit of the institution, the Judiciary. The court will not only punish parties in disobedience but also advocates who encourage their clients to disobey court orders. The integrity of the institution must be guarded at all costs. Any lawyer is expected to understand that a court order, unless it has been discharged must be obeyed. This was held in the case of SHAH & ANOTHER t/a LENTO AGENCIES -VS- NATIONAL INDUSTRIAL CREDIT BANK LTD K.L.R. 2005 when Justice Njagi said:

“Unless and until a court order is discharged, it ought to be obeyed. The only way in which a litigant can obtain reprieve from obeying a court order before it is discharged is by applying for and obtaining a temporary stay.”

It is noted that the state counsel did not attempt to obtain such a reprieve for the Respondents if he was convinced that the order should not be obeyed for some reason.

The misguided advice of the state counsel resulted in the Respondents disobeying

the court order. This court strongly condemns such conduct which may result to breakdown of law and order if allowed to continue. I am constrained to give a stern warning to the state counsel that such misdirection to innocent parties may lead to grave consequences.

The Respondents herein are laymen and on receipt of the order, they went to seek legal advise. The order was interpreted for them wrongly and they followed it. For this reason, I hold their action excusable in the circumstances. This court cannot punish the Respondents for contempt where their action was not deliberate. However, now that they are aware of the correct interpretation, they are directed to obey the order by handing over the management of the orphanage home to the Applicants within seven (7) days in default of which they will be punished for contempt without further ado. The Respondents are warned that any valid court must be obeyed so long as it has not been discharged.

For the foregoing reasons, I decline to grant the prayers in this application. The State Counsel, Mr. Onderi is hereby condemned to pay the costs of this application. Mention on 20/04/2010 to confirm whether the Respondents have complied with the order. The Respondents to appear in court in person for mention.

F. N. MUCHEMI
JUDGE

Dated, Delivered and Signed at Bungoma this 24th day of March, 2010.

In the presence of Mr. Makali for Nanzushi for Applicant and Mrs Leting for Respondents.