REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA

AT MOMBASA

MISC CIV APPLI 949 OF 2005

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

AND

IN THE MATTER OF: THE CHILDREN ACT 2001

AND

IN THE MATTER OF: MOHAMED OMAR ……APPLICANT

AND

IN THE MATTER OF: DM II – J.B. MDIVO ……..RESPONDENT

AND

NAIMA HADI ABDALLA ……..INTERESTED PARTY

R U L I N G

The basis of this ruling is the motion dated 6/2/2006 taken out pursuant to the provisions of Order

LIII rule 3 of the Civil Procedure Rules. In that motion, Mohamed Omar is seeking for an order of certiorari to remove into this court the proceedings and the subsequent order of 5.12.2005 given by J.B. Mdivo R.M., the Respondent; herein vide Mombasa Children's Cause No. 275 of 2005, to be quashed. Basically it is the argument of the applicant that the Children's Court had no jurisdiction to hear and give orders whereas the same dispute is before the Kadhi's court. It is the argument of Mr. Hamza, advocate for the applicant, that the Respondent acted in contravention of Section 6 of the Civil Procedure Act. It is the prayer for the applicant that the Children's Case be stayed pending the outcome of the dispute before the Kadhi's court. The Learned advocate is of the considered opinion that the children's court has no jurisdiction to hear the matter because the parties involved are still married under the Muslim Law.

The motion is opposed by Naima Hadi Ali, the interested party herein, who filed a replying affidavit she swore on 16.2.2006. It is submitted by the interested party that she has relinquished the part relating to the custody of the children before the children's court thus rendering the motion a mere academic exercise. It is the argument of the interested party that the judicial review proceedings will work against the spirit of the Childlren's Act.

I have considered the submissions presented by both sides for and against the motion. I have also taken into account the material placed before this court. The applicant herein seeks for judicial review orders in the nature of certiorari. It is well established that an order of certiorari can issue to quash a decision already made and 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 reason. It is admitted by both sides that the issue regarding custody of the children is both before the Kadhis and the Children's Court. However there is evidence that the same issue has been withdrawn before the Kadhi's court. In my humble view the motion to some extent has been overtaken by events in that its substratum has been removed. However, even if I were to consider the same motion on its merit, I do not think the jurisdiction of the Kadhi's court has been taken away by the enactment of the Children's court. I note that the Children's Court dismissed the application for stay of proceedings under Section 6 of the Civil Procedure Act. Its reasoning is that it is to the best interest of the child that the issue be sorted out expeditiously.

I agree with the learned Resident Magistrate that matters touching on children must be expedited. However, that does not mean that courts must ignore clear and unambiguous provisions of the law at the alter of expediency. The issues raised were valid. On the other hand I doubt whether the applicant should have filed these proceedings. In my view it was inappropriate for the applicant to file judicial review proceedings whereas he had clear and better alternative redress in the form of an appeal. I could have dealt with the merits of this motion substantively but because of what I will state in the next paragraph, I do not need to go further.

Judicial review proceedings are special proceedings. It is a well established practice that the same are brought in the name of the Republic unlike in other proceedings. This issue was settled long ago by the East African Court of Appeal in the case of **Farmers Bus Service and Others =vs= The Transport Licensing Appeal Tribunal [1959] E.A. 779** in which the revered court said that the prerogative orders (judicial review orders) are issues in the name of the crown (Republic) and applications for such orders must be correctly instituted. In these proceedings, the application is instituted in the name of the applicant which in my view made this application fatally defective. I am in agreement with the position by Justice (Retired) Ringera (as he then was) in the case of **Jotham Mulati Welamondi =vs= The Chairman Electroal Commission (unreported) Bungoma H.C. MISC. App. No. 81 of 2002** that such applications are incompetent and hence should be struck out.

The upshot is that the motion is ordered struck out and dismissed for being incompetent and lacking in merit. The applicant to meet the costs of the application.

Dated and delivered at Mombasa this 12th Day of February 2007.

J.K. SERGON

J U D G E

In open court in the presence of Hamza for the applicant and Miss Jadeed for the Interested party.