REPUBLIC OF KENYA

IN THE HIGH COURT

AT NAIROBI

MILIMANI LAW COURTS

Misc Civ Appli 81 of 2007

IN THE MATTER OF AN APPLICATION FOR JUDICIAL REVIEW

AND

IN THE MATTER OF THE CHILDRENS ACT

AND

IN THE MATTER OF THE DECISION BY DISTRICT CHILDRENS OFFICER KIRINYAGA DISTRICT DATED 6th FEBRUARY 2007

IN THE MATTER OF OPTASIAH JERIOTH WARUGURU GACHECHE

AND

IN THE MATTER OF AN APPLICATION FOR MANDAMUS, CERTIORARI AND PROHIBITION

BETWEEN

REPUBLIC …….....…….....APPLICANT

VERSUS

ATTORNEY GENERAL …….....……1ST RESPONDENT

KIRINYAGA DISTRICT …….....……..2ND RESPONDENT

BEATRICE WAMBUGU GACHECHE, nee MUTHEGETHI.……3RD RESPONDENT

EX PARTE LEMMEY GACHECHE WA MIANO AKA GACHECHE WA MIANO

R U L I N G

The ex parte applicant, **LEMMY GACHECHE WA MIANO** sought and obtained leave to apply for the superior orders of Mandamus, Certiorari and Prohibition. Although the Chamber Summons which was dated 12.2.2007 had sought for other orders thereon, Wendoh, J. granted him leave to bring a substantive motion only for the Judicial Review orders above mentioned. The record shows that the applicant filed the substantive Notice of Motion on 19.2.07

There were two remarkable features of the said Notice of motion. The first one was that it was intituled "Miscellaneous Civil Application Number 81 of 2007" which was the title and number of the earlier Chamber summons dated 12.2.07 under which the leave was granted. The second feature was that the motion sought not only the three superior Judicial Review Orders but also additional reliefs which the leave granted earlier had not sanctioned.

In response the respondents in their defences through their advocates, filed a Notice of Preliminary Objection dated 22.6.2007 and raised the following preliminary objections: -

1. That the application by this Notice of Motion is not properly before the court in that it was commenced under the file under which the leave was sought and obtained.

2. That the application is incompetent in that it seeks orders of Mandamus and Prohibition against the 3rd respondent who is a person clothed with no legal authority to perform any public duty or warrants such orders to be issued against her.

3. That the application is fatally defective in that it is drawn as supported by the grounds on the face of it and the supporting affidavit of the ex parte applicant in clear contravention of the law.

The preliminary objections were argued on 24.7.07 by Mr. Muchiri Wa Gathoni for the 3rd Respondent who was supported by Mr. Kaka for the 2nd and 1st respondents. Mr. Gacheche Was Miano on the other hand, represented himself in reply.

Turning to the first preliminary objection, it is not in dispute that the Chamber summons seeking leave to file the motion for the Judicial Review Orders and which was intituled Miscellaneous Civil Application Number 81 of 2007, was heard and finally determined by Wendoh, J. on 12.2.07 when the leave was granted. Mr. Gacheche Wa Miano has not argued that there was any part of that application that remained to be dealt with by that court or by any other court except perhaps on appeal.

It is my considered view that once the court exhausted the application by granting the leave sought without leaving any part of it open, no return would be made to it. The order was final, subject to the right of appeal therefrom conferred by subsection 5 of section 8 of the Law Reform Act, Chapter 26 of the Laws of Kenya. In my further view, the immediately above position would apply also to any substantive orders that would be made in granting or refusing to grant Judicial Review orders thereafter.

It therefore appears to me that the process of seeking and obtaining leave in compliance with Order 53 rule I of the Civil Procedure rules is a totally independent process specifically intended to facilitate the subsequent filing of the Notice of Motion seeking the intended Judicial Review orders. It would accordingly follow that once the leave is granted, the process would end there. Another process seeking

specified Judicial Review orders through a Notice of Motion begins thereafter using the leave granted as its prescribed authority. That is what I understand the Court of Appeal to have meant in **Republic v Communications Commission of Kenya**, (2001) IEA, P. 199 at Paragraph 207, when it stated: -

"**In our view, the fallacy in Dr. Kiplagat's contention lies principally in his assuming that it is the Chamber summons application for leave to apply for the orders which originates the proceedings under Order LIII. The Proceedings under that order can only start after leave has been obtained and the proceedings are then originated by the notice of motion filed pursuant to the leave granted. It would be somewhat ridiculous to bring the application for leave by way of an originating summons and once the leave is granted, the originating summons is then swallowed up or submerged in the notice of motion."**

While in the quotation above (where the stress is mine) the appellate court had in mind a situation where the leave in that case was being wrongly challenged for having been brought by Chamber Summons instead of an originating summons as Dr. Kiplagat had purported to argue before it, the position in my view would remain the same. That is to say, the Chamber summons would in the case where the Notice of Motion is filed in the Chamber Summons file be swallowed by or be submerged in the Notice of Motion filed later. I accordingly do agree with the strong view expressed by the Court of Appeal which binds me, that the two stages are separate and independent of each other and that the chamber summons which grants leave exhausts itself at that point while the proceedings for Judicial Review orders really start only after the Notice of Motion is filed.

I am further persuaded that it is the above proposition that Sergon, J. accepted and applied in **Republic V Funyula Land Disputes Tribunal & 3 others,** (2004) I KLR, p. 586 – 87 when he stated as follows:-

"**Under Order LIII rule 3(1), the substantive motion can only be filed after leave has been obtained. The law does not envisage a situation where the motion is filed under the file which leave was issued. The Chamber Summons application is considered spent when leave has been granted."**

I am conscious of the fact that a copy of the statement of facts which accompanied the application for leave is mandatorily required by Order 53 rule 4 to be served with the Notice of Motion as filed. I as well observe that copies of affidavits which accompanied the application for leave are mandatorily to be served upon the respondents and other interested parties on demand. Finally, I also note that the applicant in the Notice of Motion will not during the hearing of the Notice of Motion, rely on new grounds or new documents not relied upon during the application for leave except with the leave of court. The question that arises is whether the legislator would have intended to prescribe the above requirements in subrule 4 aforementioned if he had in mind the requirements that the Notice of Motion would be filed inside the Chamber Summons file that carries exactly the same documents? I have asked myself whether such a course would with great respect, be necessary. This is so because it would be duplicating the service of the relevant documents which are already lying inside the Chamber Summons in which the Motion is in these circumstances, filed.

In my further view, only if the legislator intended that the two applications should be independent and in different files, would he prescribe the provisions of Order 53 rule 4. I see the purpose of rule 4 above as a measure of availing information and basic documents of the Chamber Summons in which leave was granted, to the court in the meantime hearing the Notice of Motion and the parties therein. This makes greater sense where the original file for leave is not the same file carrying the Notice of Motion.

Turning to the case before us, I note, and it is not denied, that the applicant failed to separate the Chamber summons file from the leave file. He even went further to give the Notice of Motion file the same number despite the fact that one is a Chamber Summons supposed to be heard ex parte in Chambers while the other is a Notice of Motion properly supposed to be heard in the open court. Using the Court of Appeal language, I hold that the Chamber Summons in this case was submerged in and swallowed by the

Notice of Motion, an approach the Court of Appeal in the **Communication Commission of Kenya** case, supra, as appears to have disapproved without reservation.

The applicant argued that he adopted the above method because it is the prevailing practice. If it is the practice, I, with respect, would seek the logical and legal basis of such a practice and the practice should be in compliance with the order, rules and spirit of Order 53. I am also not persuaded that it is the only practice in use because other practitioners also presently approach the court by treating the two applications as independent and separate. I am conscious of and not oblivious to the fact that where a practice is strongly and invariably established, the court would be slow or reluctant to throw it overboard. This is the proposition that Mr. Gacheche Wa Miano also stressed. I have already, however, stated above that it is not the only practice presently being adopted by applicants, as demonstrated by the case of **Republic V Funyula Lands Disputes Tribunal and 3 others** earlier referred to.

The result I come to, then, is that this Notice of Motion seeking the orders of Mandamus, Certiorari and Prohibition is incurably incompetent for the reason that the applicant approached this court using a procedure not supported by Order LIII. I would on my part, strike out the motion as sought by the respondents.

The second objection raised by the respondents is that this Notice of Motion is incompetent for purporting to obtain the orders of Mandamus and Prohibition against the 3rd respondent who is not clothed with any public duty by any statute.

It is not disputed in this case that the 3rd respondent is the wife of the applicant. She is not employed in the public service to perform any public duty imposed on her by any statute. Nor was it argued that even if she were so, she had failed to carry out any such public duty to the detriment of the applicant.

The order of Mandamus is described in **Halsbury's Laws of England**, 4th Edition Volume 1 at page III , from Paragraph 89 as follows:-

"The order of mandamus is ….. in form of a command issuing from the High Court of Justice, directed to any person, corporation or inferior tribunal, requiring him or them to do some particular thing therein specified which appertains to his or their office and is in the nature of a public duty. Its purpose is to remedy the defects of justice ….. in all cases where there is a specific legal right and no specific legal remedy for enforcing that right……."

The court of appeal in **Kenya National Examination Council Versus Republic, Ex parte, Geoffrey Gathenji Njoroge and 9 others** in Court of Appeal Civil Appeal No. 266 of 1996, at page 204, describes the nature of the Order of mandamus and how it functions, thus:-

"…..To conclude this aspect of the matter, an order of mandamus compels the performance of a public duty imposed by statute where the person or body on whom the duty is imposed fails or refuses to perform the same. ….. an order of mandamus cannot quash what has already been done."

As already pointed out, the applicant does not argue that the 3rd respondent who was his former wife has any public duty imposed on her, touching on her with her husband, the applicant, or with her daughter, concerning where and how she should obtain her education. Nor would it be the 3rd respondent's public duty to remove her daughter from Brookfield Academy to PCEA Academy. Supposing the 3rd respondent's act of transferring their daughter was an act outside the wishes of the applicant herein and supposing the applicant's wish was that the 3rd respondent should return their daughter to PCEA Academy, such contemplated act would not be in the domain of a public duty required to be performed under any statute. Her acts or conduct against the applicant's wishes would be in private

domain. The applicant would not in such private relationship rush to this court, as he did, and demand that this court should issue an order of mandamus to compel the 3rd respondent, to act in accordance with the wishes of the applicant. It follows, therefore, that this court would have no jurisdiction to issue the order to compel the 3rd respondent, a private citizen, to do anything. Indeed the applicant argued this point half-heartedly and was understood to be urging this court to sever the prayer for mandamus from the 3rd respondent and restrict it to the 1st and 2nd respondents only. That clearly invites this court to comment about the process of severing sometimes applied under the Civil Procedure Rules.

I on my part, have no doubt that in suitable cases a court has jurisdiction to separate one process from a bigger one in order to do justice to a case. But severing in my opinion, is a creature of civil procedure and can only be practiced under the relevant Civil Procedure Rules. Mr. Gacheche Wa Miano however argued that we can apply the rules of Civil Procedure in this and other issues which he raised for the purpose of doing justice. He did so while admitting as well that Order LIII under discussion is a special order specifically donated by section 8 and 9 of the Law Reform Act. It is trite, however, that the order was promulgated by the Rules Committee pursuant to the said section 8(2) and inserted within the Civil Procedure Rules. Despite such insertion however, the Order has remained independent of the rest of the Civil Procedure Rules.

Mr. Wa Miano did not produce any authority supporting the proposition that Civil Procedure Act and Rules are applicable to matters under Order LIII aforementioned. It is also observed that the procedures provided to the High Court to issue Judicial Review Orders are either fully found in Order LIII or in the Law reform Act. Put differently, the Law Reform Act and Order LIII are not, in their operation, subjected to any other Act or rules.

Faced with a similar issue in the case of Republic v Minister for Local Government and Another, Ex parte Mwahima (2) (2002)2 KLR; 574 at 576, I stated thus:-

"It is now trite law that where any proceedings are governed by a special Act of Parliament, the same shall be interpreted and construed strictly. It is my view also that the mere fact of the order 53 or the Law Reform Act being silent in certain aspects, cannot of itself necessitate the application of any sections of the Civil Procedure Act and rules, even such provisions as section 3A of the said Act."

I have not had good reason to change my views as expressed above, which I therefore still hold. I also, in taking this position, once more refer to the Communication Commission of Kenya case earlier quoted. On page 209, the Court of Appeal, referring to the Law Reform Act, stated:-

"So the legislature specifically had in mind other written laws; yet it never subjected the provisions of Section 8 and 9 to those other written laws"

Also on page 208 of the same case the same court had stated thus:-

"We have already referred to sections 8 and 9 of the Act and we need not set them out. Those sections set out in full the circumstances under which the High Court is entitled to issue the Orders and what facts the High Court is bound to take into account."

The impression made out of the Court of Appeal pronouncements above is that Sections 8 and 9 of the Law Reform Act and the Order LIII donated by them, is independent and self sufficient. They are not subjected to any other Act of Parliament including the Civil Procedure Act and Rules. In my view and in conclusion, this court has no jurisdiction to import any other provision into them, even where they are silent. Mr. Gacheche Wa Miano's contention to the contrary, cannot therefore be correct and I would on my part, reject it.

As concerns the 2nd respondent the District Children's Officer, Kirinyaga District, it is my view and finding also that the applicant failed to show that the Children's officer was under any imposed public duty prescribed under any statute to compel him to retrieve the applicant's daughter from any other

school into which the latter had been admitted, to return her to Brookfield Academy, Karatina. Nor did the applicant convince us that in helping to remove the child from PCEA Academy to Brookfield, the Children's Officer had a prescribed way of doing it or that he did not have discretion to exercise in the manner of carrying out the removal and transfer of the child elsewhere. This is so because the law is now trite that where a statute imposes a duty upon a person, tribunal or body but leaves discretion as to the mode of performing the duty in the hands of the party on whom the obligation is laid, a Mandamus cannot command the duty in question to be performed in a specific manner. Nor in my view can it be ordered to rectify what has already been done.

In these circumstances, I also find that the order of Mandamus would not be available to the applicant and this court would therefore have no jurisdiction to issue it as prayed. It accordingly follows that the part of this application that concerns this prayer of mandamus is incompetent and must also fail.

What about the order of Prohibition sought by the applicant to stop the respondents from removing his daughter Optasiah Jerioth Waruguru Gacheche (minor) from Brookfield Academy, Karatina town to PCEA Academy or to any other school? The fact which the applicant admits and depones in his affidavit supporting this application, is that the applicant's daughter aforementioned, was transferred back to Brookfield on or about 6.2.2007. This clearly was before this application seeking a prohibition order was filed. This now brings us to the consideration of the Order of Prohibition.

The nature of the order of prohibition as we understand it, is to prohibit an act or a conduct by a person who has a duty imposed on him or it, from acting or conducting himself contrary to the rules of natural justice. This means that where the conduct or act complained of already has taken place, then this court has logically no power to prevent what has already occurred. This is sunctly put by the Court of Appeal in the earlier quoted case of Kenya National Examination Council at page 11 of the judgment:-

"That is why it is said Prohibition looks to the future so that if a tribunal were to a announce in advance that it would consider itself not bound by the rules of natural justice the High Court would be obliged to prohibit it from acting contrary to the rules of natural justice. However, where a decision has been made, whether in excess of or lack of jurisdiction or whether in violation of the rules of natural justice an order of prohibition would not be efficacious against the decision so made. Prohibition cannot quash a decision which has already been made; it only prevents the making of a contemplated decision."

In this case, it is already pointed out and is not in dispute, that by the date the applicant filed this application the 2nd and 3rd respondents had decided to and had already withdrawn the applicant's daughter from PCEA Academy, Kerugoya to Brookfield Academy. Taking into account the Court of Appeal decision quoted above which binds me, I hold that this court has no jurisdiction to grant the prohibition order sought in the circumstances. If the order were issued it would not be efficacious. It would be in vain. I would therefore agree with the respondents, that the prayer for such an order is not only misconceived and impossible to achieve, but also incompetent. I would accordingly uphold the respondents' objection on this point of law.

The final ground raises the issue as to whether the Notice of Motion before us is properly filed and accordingly competent? The respondent argues that it is incompetent because it is not properly supported by proper affidavits. It is also not properly grounded on a relevant statement of facts and that the same does not comply with Order 53 rule 4 of Civil Procedure Rules.

What I see in the record is a Notice of Motion dated 19.2.2007. It is said to be grounded upon the annexed affidavit of Lemmy Gacheche Wa Miano sworn on 19.2.2007. It is also said to be grounded upon such other/and further grounds that will be adduced at the hearing. Effectively therefore the motion is grounded only upon the applicant's affidavit. It is not grounded on any statement of facts or even on any affidavits relied on in the chamber summons that granted the leave. When this issue was raised, Mr. Gacheche Wa Miano could only say that since the Motion was raised and contained in the Chamber Summons file which granted the leave, then this court is expected and indeed required not to shut its eyes to the documents that were relied upon from the beginning since they are all in the file. He did not say that his motion expressly referred to and relied on the Statement of Facts in the chamber summons.

Indeed it was not until the issue was raised by the respondents that Mr. Gacheche Wa Miano thought it necessary to refer the court to the documents contained in the chamber summons. In my view that was a second thought reaction, a mere response to something that never crossed his mind before then. For a person who appears to have handled many matters under Order LIII, I took his response to this issue as being made without seriousness.

Furthermore, since I have already concluded that the chamber summons granting leave had been spent out when leave was granted, it is my view and finding that this court was not persuaded to make any documents in the summons, part of this Notice of Motion. It is my view and finding also that the Notice of Motion seeking Judicial Review orders must, inter alia, in practice, include in its support, the statement of facts, the affidavits and the verifying affidavits earlier relied on to obtain the leave. The grounds upon which the motion is based should be on the face of the motion, based on the statement of facts and on the affidavit(s) earlier relied on. A different affidavit or statement of facts or a new relief at the stage of the Notice of Motion, cannot in my opinion, be used except with leave of court. Gacheche Wa Miano did not specifically seek authority of court to use the new and different documents.

In this case the applicant failed to comply with the mandatory requirements of Order 53 rules 4 as already discussed above. I would and do hereby therefore, find that this motion is also incurably incompetent for being supported by alien and unauthorized affidavit. I would accordingly, strike it out. A similar proposition was expressed and upheld in the case of Lydia Wanjiku Ndoto & Others Versus The Hon. The Attorney-General and Another in Nairobi H.C Misc. Application No. 1474 of 2005, at page 7 by Wendoh, J., with whom I concur.

The upshot of all the afore-going arguments and conclusions is that the preliminary points of objection in point of law, have merit. I would on my part, strike out this Notice of Motion dated 19.2.2007 on each and joint ground(s) raised and argued. Costs would be to the respondents.

I had the privilege of reading the joint Ruling of my two senior sisters, Aluoch, J and Nambuye, J. Clearly and with great respect, my views as to how the Notice of Motion seeking Judicial Review Orders should be filed after leave for it has been granted, differ from theirs. The end result in this particular case, however, is the same since both rulings strike out the applicant's Notice of Motion.

Dated and delivered at Nairobi this 18th day of October 2007.

D ONYANCHA

JUDGE