



REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT NAKURU

Misc Appli 111 Of 2005

JOHANNE H. MARIA VAN LUIJIK.....APPLICANT

VERSUS

THE SENIOR RESIDENT MAGISTRATE'S COURT AT NAKURU.....1ST RESPONDENT

JANE MUTHONI MURAGE.....2ND RESPONDENT

RULING

The respondent, Jane Muthoni Murage, filed a plaint purportedly under the **Subordinate Courts (Separation and Maintenance) Act (Cap 153 Laws of Kenya)** (hereinafter referred to as the said Act) seeking several orders of the Magistrate's court against the applicant, Johannes H. Maria Van Luijik. The respondent sought an order of the said court for a declaration that she was no longer bound to cohabit with the applicant as his wife. She further prayed for an order to compel the applicant to pay the respondent such monthly sums as the court may consider as reasonable maintenance for her and her then unborn child. Contemporaneous with filing the suit, the respondent made an application by chamber summons under the provisions of **Order XXXIX rules 1, 2, 3 and 9 of the Civil Procedure Rules** and **Section 3A of the Civil Procedure Act** seeking an interim order of injunction relating to the applicant's property situate at [*particulars withheld*], Nakuru, motor vehicle registration number [*particulars withheld*] Mitsubishi Pajero and his account [*particulars withheld*] Bank Nakuru East Branch. The said application was filed under certificate of urgency. The applicant being then out of the country, was served by DHL Worldwide Express Kenya Ltd. There is no indication that the respondent made a formal application to be allowed to serve the respondent by substituted service. The applicant apparently did not attend court on the date that the application was scheduled to be heard.

The trial magistrate who heard the application granted the application sought by the respondent and issued orders restraining the applicant from operating his account [*particulars withheld*] Bank, Nakuru East Branch pending the hearing and determination of the suit. The applicant was further restrained from disposing off or evicting the respondent from the house erected on LR No. [*particulars withheld*], Nakuru pending the hearing and determination of the case. The applicant was further restrained from selling motor vehicle registration [*particulars withheld*], Mitsubishi Pajero. When the applicant became aware of the adverse orders issued against him, he filed an application before the trial magistrate's court seeking, firstly to, stay the proceedings and secondly to set aside the interim injunction issued. The main thrust of the applicant's application was that the trial magistrate lacked the requisite jurisdiction to issue the orders which had been granted. The application was disallowed.

On the 19th of November 2004, the applicant herein sought and was granted leave to institute for the

judicial review orders of certiorari and prohibition to have the said proceedings before the Senior Resident Magistrate's Court, Nakuru quashed and further to have the said court prohibited from taking any further proceeding in respect of the subject matter in dispute. The applicant duly filed and served the Notice of Motion seeking the said orders of judicial review. As in the argument made before the trial magistrate, the main thrust of the applicant's case is that the said trial magistrate lacked the requisite jurisdiction to hear and determine matters that were placed before it by the respondent. The applicant was of the view that the said interim orders of injunction issued were *ultra-vires* the provisions of the **Subordinate Courts (Separation and Maintenance) Act (Cap 153 Laws of Kenya)**.

When the 2nd respondent was served with the notice of motion, she filed grounds of opposition to the said Notice of Motion. She stated that the application was premature, badly premised and bad in law. She further stated that the applicant had come to court with unclean hands. She stated that the application as drafted was incompetent, defective, and could not be entertained by this court. The respondent urged this court to dismiss the application with costs. The respondent did not however file a replying affidavit in answer to the allegations made by the applicant in the application for judicial review.

At the hearing of the application, Mr Kemboi Learned Counsel for the applicant submitted that the applicant was faulting the proceedings before the trial magistrate because the said proceedings were entertained without jurisdiction. He submitted that the **Subordinate Courts (Separation and Maintenance) Act, Cap 153 of the Laws of Kenya** did not confer subordinate courts to entertain any complaint which has brought by a woman who was not married as defined by **Section 2 of the Matrimonial Causes Act, Cap 152 Laws of Kenya**. He submitted that for a woman to make an application under the said Act she has to satisfy the court that she was a married woman. In the case filed before the subordinate court the respondent had not established that she was married to the applicant. He submitted that the subordinate court therefore lacked jurisdiction to hear and issue the orders sought by the respondent.

He further submitted that the respondent had abused the court process by filing a plaint instead of a complaint as envisaged by the Subordinate Courts (**Separation and Maintenance) Act Cap 153 Laws of Kenya**. He argued that the **said Act** was of specific and limited application and could not be extended to include the grant of injunctions as provided for under **Order XXXIX of the Civil Procedure Rules**. He submitted that the respondent sought and was granted orders which were *ultra vires* the provisions of the **said Act**. He further submitted that the respondent had purported to serve the applicant by DHL without first seeking the orders of the court to serve the applicant by substituted service. He submitted that the applicant had properly come before this court by way of judicial review instead of an appeal as the filing of an appeal was not envisaged by the provisions of **The Subordinate Courts (Separation and Maintenance) Act (Cap 153 Laws of Kenya)**. He further submitted that even where there was a provision of appeal, a party had the liberty to choose the best way in which he could approach the court and obtain appropriate remedies. He submitted that the applicant had established that his rights were infringed and therefore he was within his legal rights to apply for judicial review. He urged the court to allow the application with costs.

Mr Musembi, learned counsel for the respondent opposed the application. He submitted that the application was unmerited, premature and filed contrary to the law. He submitted that the issue of improper service had not been raised by the applicant in the subordinate court and therefore he was not at liberty to raise the same at this stage. He submitted that the applicant had not filed appeal against the decision of the subordinate court which he was now seeking to impeach by judicial review. He submitted that the respondent had established that she was married to the applicant and therefore the subordinate court had jurisdiction to hear and determine all the matters that were placed before it. He submitted that the subordinate court had inherent jurisdiction as provided for by **Section 3A of the Civil Procedure Act** to do justice to the parties notwithstanding the provisions of **The Subordinate Courts (Separation and Maintenance) Act (Cap 153 Laws of Kenya)**. He submitted that the respondent had properly sought the prayers which were granted because the same could not be framed in a complaint as provided by **The Subordinate Courts (Separation and Maintenance) Act (Cap 153 Laws of Kenya)**. He submitted that the filing of the plaint was appropriate in the circumstances. He urged this court to disallow the application.

I have carefully considered the application for judicial review made by the applicants in this case. I have also considered the submissions made before me by the learned counsel for the applicant and the learned counsel for the respondent. I have read the decided cases which were filed by the parties to this application and referred to in the course of the submissions made before me. The issues for determination by this court are two-fold; firstly whether the applicant properly approached this court by filing an application for judicial review instead of an appeal against the decision of the subordinate court. The second issue for determination, if the first issue is determined in favour of the applicant, is whether the applicant had established that he was entitled to be issued with the judicial review orders of certiorari and prohibition. On the first issue the applicant's complaint is that the subordinate court clothed itself with the jurisdiction which it did not have and proceeded to hear the respondent's application and issue orders which were detrimental to the applicant. **The Subordinate Courts (Separation and Maintenance) Act (Cap 153 Laws of Kenya)** does not specifically provide for an appeal against the decision of the subordinate court to the High court. However in my considered view that omission does not prevent an aggrieved party from filing an appeal to the High court against the decision of the said subordinate court. The fact that an appeal is not specifically provided by the said Act gives the liberty to an aggrieved party to file an application for judicial review to the high court against the said decision by the subordinate court.

This court is aware that the jurisdiction of the High court to review decisions of inferior courts and tribunals is a special jurisdiction of this court which is specifically provided by statute. In this regard the jurisdiction of the High court is provided for by **Section 8 and 9 of the Law Reform Act** and the Rules made in **Order LIII of the Civil Procedure Rules. Order LIII Rule 2 of the Civil Procedure Rules** provides that

“Leave shall not be granted to apply for order of certiorari to remove any judgment, order, decree, conviction or other proceedings for the purposes of its being quashed, unless the application for leave is made not later than six months after the date of the proceedings or such shorter period as may be prescribed by the Act; and where the proceeding is subject to appeal, the judge may adjourn the application for leave until the appeal is determined or the time for appealing has expired”.

This rule which is virtually a word for word reproduction of **Section 9 (3) of the Law Reform Act** refers to “*judgments, order, decree and conviction*”. These orders are normally and in most cases granted by courts of law and not inferior tribunals. Therefore a party who is aggrieved by an decision of a subordinate court may choose to challenge the said decision by judicial review instead of an appeal. The only caveat is that where there is a provision for appeal to the High court from the subordinate court and a party has appealed to the High court, then the judicial review proceedings would be stayed pending the determination of the appeal.

In the instant application **The Subordinate Court (Separation and Maintenance) Act, Cap 153 Laws of Kenya** does not specifically provide that a decision of the lower court would be amenable to appeal to the High court. In this regard therefore, the applicant was within his legal right to apply to this court by way of judicial review to challenge the decision of the subordinate court. He could also approach this court by filing an appeal against the said decision of the subordinate court. I therefore hold that the objection by the respondent on the issue of whether the applicant should have appealed or not lacks merit and I consequently dismiss the same.

On the second of issue whether or not the applicant has established that he is entitled to the orders of certiorari and prohibition sought from this court, I will first address the issue of the jurisdiction of a subordinate court when dealing with a complaint filed under **The subordinates courts (Separation and Maintenance) Act Cap 153 Laws of Kenya. Section 4 of the said Act** provides as follows:

“The court to which any application under this Act is made may make an order or orders containing all or any of the following provisions –

(a) a provision that the applicant be no longer bound to cohabit with her husband (which provision while in force shall have the effects in all respects of a decree of judicial separation on the

ground of cruelty);

(b) a provision that the legal custody of any children of the marriage between the applicant and her husband while under the age of sixteen years be committed to the applicant;

(c) a provision that the husband shall pay to the applicant personally or for her use to any officer of the court or third person on her behalf such monthly sums as the court, having regard to the means both of the husband and the wife, consider reasonable;

(d) a provision for payment by the applicant or the husband or both of them of the costs of the court and such reasonable costs of either of the parties as the court may deem fit.”

These orders shall only be issued to an applicant who has established that she is married in a marriage as defined by **Section 2** of the **Matrimonial Causes Act** (See Section 15 of the said Act). **Section 2 of the Matrimonial Causes Act** defines marriage to be a “*voluntary union of one man and one woman for life to the exclusion of all others*”. An applicant therefore has to prove that she is married to the respondent under a marriage system recognized by the law.

In this regard therefore it was incumbent upon the respondent to plead in her complaint that she was married to the applicant and state under what system of marriage. Secondly, the respondent was required to file a complaint as provided by **Form I in the Schedule of the said Act**. She was not supposed to file a plaint. Although Mr Musembi, learned counsel for the respondent has submitted that the respondent had filed a plaint because the orders that she had sought went beyond the powers of the subordinate court as provided by the said Act, it is my considered opinion that once the respondent chose to file her complaint under the provisions of the said Act, she was required to abide fully by the provisions of the said Act both as regard the prayers sought and as to the procedure to be adapted.

The respondent therefore abused the procedure provided by the said Act by filing a plaint instead of a complaint. Furthermore the said Act does not contemplate that a party who has filed a complaint under the Act would seek orders of injunction as provided for under **Order XXXIX of the Civil Procedure Rules**. The only interim reliefs that could be sought and be granted is as provided for under **Section 10 of the said Act** and that relates to interim orders of maintenance. The respondent in the case after filing the plaint and seeking orders as envisaged by **Section 4 of the said Act**, proceeded and filed an application for injunction under **Order XXXIX of the Civil Procedure Rules** and was issued with orders which barred the applicant from evicting the respondent from a house situated in parcel number [particulars withheld] Nakuru, restrained the applicant from selling motor vehicle registration number [particulars withheld] and further restrained the applicant from operating his account at Barclays Bank Nakuru.

These orders were issued by the subordinate court *ultra vires* the provisions of the Act. The subordinate court had no jurisdiction to issue orders beyond those specifically provided for under **Section 4 of the said Act**. The subordinate court therefore acted beyond its jurisdiction. As was held by Nyarangi J.A. in the case of **The Owners of Motor Vessel “Lillian” S. –vs- Caltex Oil Kenya Limited [1989] KLR 1** at page 14

“I think that it is reasonably plain that a question of jurisdiction ought to be raised at the earliest opportunity and the court seized of the matter is then obliged to decide the issue right away on the material before it. Jurisdiction is everything. Without it, a court has no power to make one more step. Where a court has no jurisdiction there would be no basis for a continuation of proceedings pending other evidence. A court of law downs tools in respect of the matter before it the moment it holds the opinion that it is without jurisdiction”.

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“It is for that reason that a question of jurisdiction once raised by a party or by a court on its motion must be decided forthwith on the evidence before the court. It is immaterial whether the evidence is scanty or limited. Scanty or limited facts constitute the evidence before the court. A party who fails to

question the jurisdiction of a court may not be heard to raise the issue after the matter is heard and determined".

In this case, the applicant raised the issue of jurisdiction of the subordinate court immediately he became aware of the orders that were issued against him. The subordinate court overruled him hence his decision to file an application for judicial review before this court.

Having carefully evaluated the submissions which were made before me by the parties to this application and also having read the pleadings that were filed by the respondent before the subordinate court, it is evident that the respondent abused the due process of the court by obtaining orders against the applicant which are not provided for by the **said Act**. Furthermore the respondent obtained those orders after filing an application for injunction which is not envisaged by the **said Act**. Even if this court were to be lenient and to consider the said application on merit, upon perusal of the plaint on which the said application is based, it is clear that the respondent had not pleaded to be issued with such orders in her plaint. She could not therefore be issued with interim orders which were not prayed for in her main suit.

In the circumstances of this case therefore, I am not prepared to exercise or to invoke the inherent jurisdiction of this court as submitted by Mr Musembi to ride rough shod and rubbish the provisions of the law so as to achieve or attain what Mr Musembi refers to as substantial justice. Courts must first and foremost uphold and have fidelity to the law before delving into what it may interpret to constitute substantial justice. In any event, the inherent jurisdiction of the court can only be invoked where there is no specific provision of the law dealing with the issue before the court.

In the premises therefore, this court will allow the application filed by the applicant on the following terms:

- (i) An order of certiorari is hereby issued bringing the proceedings in respect of Nakuru Senior Resident Magistrate's Court Separation and Maintenance Cause No. 16 of 2004 and all the consequential orders made and arising therefrom to this court for the purposes of quashing the same as the said proceedings were undertaken and orders issued *ultra vires* the provisions of **The subordinate court (Separation and Maintenance) Act**.
- (ii) An order of prohibition directed at the magistrate's court prohibiting it or anybody else acting on its behalf or on their own behalf from seeking or instituting further proceedings in any way whatsoever in respect of Nakuru Senior Resident Magistrate's Court Separation and Maintenance Cause No. 16 of 2004 or effecting or enforcing any orders arising therefrom against the applicant.
- (iii) The orders issued by the said subordinate court in the said suit are hereby declared null and void and of no legal consequences.
- (iv) The applicant shall have the costs of this application for judicial review.

DATED at NAKURU this 9th day of March, 2006.

L. KIMARU

JUDGE