Republic v Senior Resident Magistrate, Malindi; Kefa (Interested Party); Pantaleo (Exparte Applicant) (Judicial Review 4 of 2021) [2024] KEHC 3801 (KLR) (19 April 2024) (Ruling)

Neutral citation: [2024] KEHC 3801 (KLR)

REPUBLIC OF KENYA

IN THE HIGH COURT AT MALINDI

JUDICIAL REVIEW 4 OF 2021

M THANDE, J

APRIL 19, 2024

BETWEEN

REPUBLIC .... APPLICANT

AND

SENIOR RESIDENT MAGISTRATE, MALINDI .... RESPONDENT

AND

MIRIAM WACHUKA KEFA .... INTERESTED PARTY

AND

ANTONIO PANTALEO .... EXPARTE APPLICANT

RULING

1. The genesis of this matter is the maintenance of a child of the Interested Party, Miriam Wachuka (Miriam). She maintains that the Ex parte Applicant, Antonio Pantaleo (Antonio), is the biological father of the child and has obtained orders against him for child maintenance from the children's court. Antonio has however refuted this claim stating that the DNA analysis he has financed has not yielded a valid result.

2. By an application dated 30.9.21, Antonio sought judicial review orders against the Respondent prohibiting it from enforcing or continuing to enforce any order or taking any further proceedings in Malindi CM Children's Case No. E2 of 2020 Miriam Wachuka Kefa v Antonio Pantaleo. He also sought an order of certiorari quashing a notice to show cause dated 14.9.21 and a ruling of 6.4.21 in that cause. By a ruling of 27.9.23, this Court dismissed the said application.

3. When the Court delivered the ruling, it directed that the parties who were absent, be informed of the same. This was not done and Antonio was thus unable to file an appeal against the ruling within the

stipulated period. On 11.10.23 Miriam obtained execution orders exparte in the lower court, pursuant to a notice to show cause. Warrants of arrest against Antonio were issued on 25.10.23.

4. The foregoing are the circumstances which led Antonio to file the Application before me dated 15.11.23 seeking the following orders:

   a. Spent.

   b. Spent.

   c. Pending the hearing and determination of this Application the court be pleased to order Mr. Stephen Ambani, DCIO Malindi to surrender to the Exparte applicant the Exparte Applicant's passport that he seized on the night of Friday, 10.11.23.

   d. The court be pleased to exercise its jurisdiction under Section 7 of the *Appellate Jurisdiction Act* to extend time for the Exparte Applicant to file a Notice of Appeal against the ruling delivered on 27.9.23.

   e. The Court be further pleased to order stay of the orders given on 11.10.23, the warrants issued on 25.10.23 and the orders made on 14.10.23 in the court below pending the filing, hearing and determination of the Intended Appeal.

   f. The costs of this Application be provided for.

5. It is Antonio's case that Miriam and the Respondent have stolen a match against him. He was arrested by the Malindi DCIO on Friday 11.10.23 pursuant to the said warrant, in a calculated move to have him held in custody on a long weekend. Antonio stated that his right to access to justice was violated and that unless the orders sought are granted, he will lose his liberty.

6. When the matter came before the Court, a conditional stay of the warrant of arrest was granted on terms that the amount in the said warrant be deposited in Court by 11.12.23.

7. Miriam has opposed the Application vide her replying affidavit sworn on 23.11.23 and preliminary objection of even date. Her contention is that this Court having dismissed the judicial review application, is *functus officio*. Further that this Court lacks the jurisdiction to stay orders of the court below absent of an appeal. Miriam contended that Antonio was represented by counsel in the judicial review application whose lack of diligence should not be blamed on her counsel. Her case is that the maintenance orders were issued on 6.4.21 and there has been no appeal against the same. Additionally, that a similar application was filed in the court below on the same day the present application was filed. Further that the Court has no jurisdiction to issue orders against the DCIO who is not a party herein. The Application is thus for striking out.

8. The objections raised in the preliminary objection in essence, are that the Application is sub judice the application of even date in the lower court. Further that the Court is *functus officio* and has no jurisdiction to entertain the Application.

9. Miriam filed her own Application dated 27.11.23 seeking in the main, that the sum of Kshs. 2,900,000/= deposited in Court by Antonio, be released for the benefit of the child. This is opposed by Antonio vide his further affidavit/replying affidavit sworn on 6.12.23.

10. The matter before me was commenced as a judicial review application dated 30.9.21 seeking an order of certiorari quashing a notice to show cause dated 14.9.21 and a ruling of 6.4.21 in the children's case in the court below. The Court rendered its decision on 27.9.23 by dismissing the Application. Having

done so, the Court performed all its duties in the matter and became *functus officio*. There is nothing further to litigate in this cause relating to the matter in the court below.

11. In *Telkom Kenya Limited v John Ochanda (Suing On His Own Behalf and on Behalf Of 996 Former Employees of Telkom Kenya Limited)* [2014] eKLR, the Court of Appeal considered the doctrine of *functus officio* and stated:

> *functus officio* is an enduring principle of law that prevents the re-opening of a matter before a court that rendered the final decision thereon. It is a doctrine that has been recognized in the common law tradition from as long ago as the latter part of the 19th Century.

12. The Supreme Court considered the doctrine of *functus officio* in *Odinga v Independent Electoral & Boundaries Commission & 3 others* (Petition 5, 4 & 3 of 2013) [2013] KESC 8 (KLR) (Civ) (24 October 2013) (Ruling) and stated:

> We, therefore, have to consider the concept of "*functus officio*," as understood in law. *Daniel Malan Pretorius, in "The Origins of the functus officio Doctrine, with Specific Reference to its Application in Administrative Law," (2005) 122 SALJ 832*, has thus explicated this concept:
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> > "The *functus officio* doctrine is one of the mechanisms by means of which the law gives expression to the principle of finality. According to this doctrine, a person who is vested with adjudicative or decision-making powers may, as a general rule, exercise those powers only once in relation to the same matter.... The [principle] is that once such a decision has been given, it is (subject to any right of appeal to a superior body or functionary) final and conclusive. Such a decision cannot be revoked or varied by the decision-maker."

13. Flowing from the cited decisions, it can be seen that once a court renders its final decision in a matter it cannot re-open the same.

14. The challenge to the warrants of arrest therefore cannot be competently entertained in this cause. This can only be done in this Court by way of an appeal under the provisions of Part VIII of the *Civil Procedure Act* and Order 42 of the *Civil procedure Rules*. An application for stay of the orders of 11.10.23 and 14.10.23 would then be made within the appeal. Antonio could also invoke the provisions of Order 53 of the *Civil Procedure Rules* for judicial review of the orders he now complains about.

15. Our courts have repeatedly stated that where a clear, sufficient and adequate legal avenue and procedure for redress has been provided by law, such procedure must be followed to the letter. In the case of *Speaker of the National Assembly v James Njenga Karume* [1992] eKLR where the Court of Appeal stated:

> In our view, there is considerable merit in the submission that where there is a clear procedure for the redress of any particular grievance prescribed by the *Constitution* or an Act of Parliament, that procedure should be strictly followed.

16. Similarly, in the case of *Secretary, County Public Service Board & another v Hulbhai Gedi Abdille* [2017] eKLR the Court of Appeal expressed itself thus:

> Time and again it has been said that where there exists other sufficient and adequate avenue or forum to resolve a dispute, a party ought to pursue that avenue or forum and not invoke the court process if the dispute could very well and effectively be dealt with in that other

forum. Such party ought to seek redress under the other regime. In the case of *Speaker of the National Assembly v James Njenga Karume* [1992] eKLR, this Court emphasized:-

> "....In our view, there is considerable merit in the submission that where there is a clear procedure for the redress of any particular grievance prescribed by the *Constitution* or an Act of Parliament, that procedure should be strictly followed. ..."

17. Antonio has the recourse to seek stay of the warrants in the court that issued them as indeed he has. To file an application for stay in that court and on the same day file the present Application in this Court seeking similar orders is clearly an abuse of the court process.

18. Courts must be vigilant and guard against abuse of their process. In the case of *Kenya Commercial Bank Limited v Benjoh Amalgamated Limited* [2017] eKLR the Court of Appeal stated:

> To allow Benjoh to relitigate, re-agitate and re-canvass any issues, no matter how crafted or the legal ingenuity and sophistry employed and in spite of the plethora of cases already conclusively determined by competent courts on the question of accounts, would be tantamount to throwing mud on the doctrine of res judicata and allow a travesty of justice to be committed to a party. The specific issue the respondent raises of rendering true and proper accounts to a customer's accounts, has been or could have been raised before the High Court in the previous suits.

19. It is noted that Antonio has moved from this Court, to the court below and is now back to this Court. Although he is not seeking to relitigate, re-agitate and re-canvass the issues dealt with in the judicial review application, he cannot come back to this Court in this cause to seek orders in respect of the decision in the court below. To allow him to do so when he is already in the lower court is to subject this Court to abuse of its process.

20. The above finding notwithstanding, all is not lost for Antonio. The prayer for extension of time to file a notice of appeal against the ruling delivered on 27.9.23, is validly before this Court, which I will now proceed to consider.

21. Rule 6 of the *Court of Appeal Rules*, 2010 provides that a person who desires to appeal to the Court of Appeal shall file a notice of appeal, which shall be filed within seven days of the date of the decision appealed against. Antonio seeks extension of time to file the notice to appeal the decision of this Court of 27.9.23.

22. This Court has the power to extend time for filing a notice of appeal. Section 7 of the *Appellate Jurisdiction Act* provides:

> The High Court may extend the time for giving notice of intention to appeal from a judgment of the High Court or for making an application for leave to appeal or for a certificate that the case is fit for appeal, notwithstanding that the time for giving such notice or making such appeal may have already expired:
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> Provided that in the case of a sentence of death no extension of time shall be granted after the issue of the warrant for the execution of that sentence.

23. The grant of extension of time to file a notice of appeal is discretionary. A party is required to demonstrate that it is deserving of the exercise of the Court's discretion in its favour. In the case of

Thuita Mwangi v Kenya Airways Ltd [2003] eKLR, the Court of Appeal considered the exercise of this discretion and stated:

> Over the years, the Court has, of course set out guidelines on what a single Judge should consider when dealing with an application for extension of time under rule 4 of the *Rules*. For instance in *Leo Sila Mutiso v Rose Hellen Wangari Mwangi*, (Civil Application No Nai 255 of 1997) (unreported), the Court expressed itself thus:
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> > "It is now well settled that the decision whether or not to extend the time for appealing is essentially discretionary. It is also well settled that in general the matters which this court takes into account in deciding whether to grant an extension of time are: first, the length of the delay: secondly, the reason for the delay: thirdly (possibly), the chances of the appeal succeeding if the application is granted: and, fourthly, the degree of prejudice to the respondent if the application is granted".

24. In considering an application under Section 7 of the *Appellate Jurisdiction Act*, the Court is required to consider the length and reason for delay as well whether the intended appeal has chances of success.

25. The decision which Antonio seeks to appeal against was rendered on 27.9.23. Accordingly, he ought to have filed a notice of appeal by 4.10.23. The present application was filed on 15.11.23. My view is that a delay of 41 days is not inordinate. The reason proffered for the delay is that he was unaware and was not informed of the delivery of the decision. It is noted that the decision in question was pursuant to Antonio's own application for judicial review. It is not clear why he or his advocate did not exercise diligence in following up on the ruling. However, in the wider interests of justice the Court will allow him to appeal the decision of this Court.

26. I now turn to Miriam's Application dated 27.11.23 seeking release to her, of the funds deposited in Court as a condition for stay of the warrants of arrest. The Court has found that it lacks jurisdiction in this cause, to entertain any application relating to the matter before the children's court. It follows that the application seeking the release of the said funds to Miriam cannot also be entertained in this cause. The issue can only be properly dealt with in the court below.

27. In the end and in view of the foregoing, I make the following orders:

    1. The Exparte Applicant is granted leave to file the notice of appeal in respect of this Court's ruling of 27.9.23, which must be filed by 26.4.24.

    2. All other prayers in the Application dated 15.11.23 are hereby dismissed.

    3. The Application dated 27.11.23 is hereby dismissed.

    4. The sum of sum of Kshs. 2,900,000/= deposited in Court by the Exparte Applicant shall forthwith be released to him with the effect that the stay granted on 15.11.23 is hereby lifted.

    5. There shall be no order as to costs.

SIGNED DATED AND DELIVERED IN MALINDI THIS 19TH DAY OF APRIL 2024

M. THANDE

JUDGE