Republic v Randu; Wada (Interested Party); Gonjobe (Exparte) (Application E044 of 2024) [2024] KEHC 11396 (KLR) (Judicial Review) (20 September 2024) (Judgment)

Neutral citation: [2024] KEHC 11396 (KLR)

REPUBLIC OF KENYA

IN THE HIGH COURT AT NAIROBI (MILIMANI LAW COURTS)

JUDICIAL REVIEW

APPLICATION E044 OF 2024

J NGAAH, J

SEPTEMBER 20, 2024

BETWEEN

REPUBLIC ..... APPLICANT

AND

MOHAMED GARAMA RANDU SENIOR RESIDENT KADHI, NAIROBI ..... RESPONDENT

AND

ABDUBA GUYO WADA ..... INTERESTED PARTY

AND

HAWO ABDI GONJOBE ..... EXPARTE

JUDGMENT

1. The application before court is the applicant's motion dated 17 April 2024 expressed to be brought under Section 8 and 9 of the *Law Reform Act*, cap. 26 and Order 53 of the Civil Procedure Rules, 2010. The applicant has also invoked the *Fair Administrative Action Act*, No. 4 of 2015. She seeks the following orders:

    1. That an Order for Certiorari do issue to quash the Order of the Lower Court for the unlawful and illegal Warrant of Arrest that was issued upon the Applicant by the Hon. Mohamed Garama Randu, Senior Resident Kadhi (the Respondent herein) in Nairobi Kadhi's Court Divorce Cause Petition No. KCDC/E072/2022: Hawo Abdi Gonjobe vs. Abduba Guyo Wada.

2. That an Order for Prohibition do issue to prohibit the Lower Court in Nairobi Kadhi's Court Divorce Cause Petition No. KCDC/E072/2022: Hawo Abdi Gonjobe –vs- Abduba Guyo Wada from hearing, handling, proceeding and/or making any further orders in regard to the said cause pending the hearing and determination of this Application."

The applicant also asked for costs.

2. The application is based on a statutory statement dated 12 April 2024 and an affidavit sworn on even date by Hawo Abdi Gonjobe, verifying the facts relied upon.

3. From what I gather in these documents, the applicant and the interested party are entangled in a divorce cause in the Kadhis Court, being Nairobi Kadhis Court Divorce Petition No. E072 of 2022; Hawo Abdi Gonjobe versus Abduba Guyo Wada. The divorce cause was initiated by the applicant in the instant application.

4. In the course of the divorce proceedings, and more particularly on 23 March 2024, the presiding Kadhi, the respondent in this application, issued a warrant of arrest for the arrest of the applicant. It would appear from the proceedings that the warrant was issued at the instance of the interested party's counsel. The application for the arrest of the applicant appears to have been provoked by the what has been alleged to be the applicant's disregard of an order to produce a minor, born between the applicant and the interested party, to court.

5. At the time the application for warrants of arrest was made and subsequently issued, there was a pending application on record for the Kadhi to recuse himself from the divorce cause. The application had been lodged by the applicant and it is her case that the application for recusal ought to have been determined before the Kadhi could issue the order for warrants of arrest, or any other order for that matter.

6. As far as the production of the minor in court is concerned, the applicant has sworn that the order in that regard was made ex parte without the interested party disclosing to the court that the applicant together with the minor reside in Saudi Arabia where the applicant is Kenya's diplomatic attache. It is against this background that the applicant is seeking the judicial review reliefs.

7. The respondent did not file any response to the motion but the interested party did. According to the interested party, the applicant and the minor were in Kenya, and not in Saudi Arabia, when the order by the Kadhi was made. The crux of his response is that the that the applicant is only hell-bent on disobeying court orders and that this application is not made in good faith.

8. I have considered the submissions by both the applicant and the interested party.

   As usual, a judicial review court would be more interested in the process by which the impugned decision was made than in the merits of this decision. My attention has, therefore, been caught by the proceedings of the court on 20 March 2024 when the impugned order was made. The record of the proceedings of that date, culminating in the order was as follows:

> " 20/3/2024
>
> Coram before Hon. M. G. Randu SRK
>
> Court Assistant Abdishakur Adan
>
> Mr Hassan for the petitioner Hawo Abdi
>
> Ms Achayo holding brief for Mr Yusuf for respondent

Ms Achayo

Matter coming up to confirm whether the minor has been produced in court as per the orders granted in the 2 November 2023and hearing of application dated 14/12/23.

Mr Hassan

We filed on the 13th of March 2024 application under certificated (sic) of urgency. On Friday 15/3/2024 no follow up was at registry. No orders were granted/directions on hearing of our application. 19/3/2024 directions still were not given at about 5p.m yesterday.

Instructions from my client are that I cannot proceed with the hearing until our application is disposed because it touches on the conduct of this case by this court.

I can't proceed any further until the application is heard and determined. It's application on recusal.

And that is all.

Hon. M. G. Randu SRK

20/3/2024

Ms Achayo

It's trite law that application that comes first is dealt with and there are orders that were previously granted. The issue has been over and over again minor not produced. The facts not denied. In the circumstances that the orders that were previously granted are not obeyed we ask the court for a warrant of arrest to be issued to the petitioner.

And that is all.

Hon. M. G. Randu SRK

20/3/2024

Court Order

Warrant of arrest is issued. Further hearing date is for 4/4/2024 application 14/12/2023. And that is all.

Hon. M. G. Randu SRK

20/3/2024"

9. If the warrants of arrest were issued because the applicant is alleged to have disobeyed a court order, the provision of the law which the court was enjoined to apply and give effect to was rule 120 of the Kadhis' Courts (procedure and practice) Rules. This rule reads as follows:

120. Contempt of court

1. The Court shall have the power to institute proceedings against any person for contempt of court and may, in such proceedings, make an order of committal or may impose a fine in accordance with written laws.

2. The Court shall be deemed a court of record for the purposes of contempt of court proceedings.

3. Where contempt is committed in the face of the Court, it shall not be necessary for the Court to serve the notice to show cause:

> Provided that the Court shall ensure that the person alleged to be in contempt understands the nature of the offence alleged against him or her and has the opportunity to be heard in his or her own response, and shall make a proper record of the proceedings.

4. In the case of contempt committed outside court, notice to show cause shall be served personally on the person alleged to have committed such contempt.

10. According to this rule, the order for committal and, therefore, the order for issue of warrants of arrest could only be made in the context of contempt of court proceedings instituted under rule 120(1). Rule 120(2) implies that proceedings for contempt would be preceded by a notice to show cause (why contempt proceedings should not be initiated against the alleged contemnor) unless, of course, the alleged contempt is committed in the face of the court. Most importantly, the proviso is to the effect that the alleged contemnor must have been given an opportunity to be heard before a committal order is made.

11. It is apparent from the record of court proceedings of 20 March 2024 that prior to issuing the warrants of arrest against the applicant, none of these conditions prescribed in rule 120 had been met. Although the learned Kadhi proceeded to issue warrants of arrest of the applicant as if she had been adjudged to be in contempt of court, there were no contempt of court proceedings before the court. And even assuming that the applicant was in contempt of court, there is no evidence that a notice to show cause had been served upon her and, finally; there is no proof that the applicant had been given an opportunity to be heard before she was held to have disobeyed a court order and, therefore, in contempt of court.

12. It follows that the respondent's decision is tainted by at least two of the three traditional grounds of judicial review. These grounds are illegality, irrationality and procedural impropriety. These grounds were enunciated in the English case of Council of Civil Service Unions versus Minister for the Civil Service (1985) A.C. 374,410. In that case, Lord Diplock set out the three heads which he described as "the grounds upon which administrative action is subject to control by judicial review". These grounds are illegality, irrationality and procedural impropriety. While discussing susceptibility of administrative actions to judicial review and, in the process defining these grounds, the learned judge stated as follows:

> "My Lords, I see no reason why simply because a decision-making power is derived from a common law and not a statutory source, it should for that reason only be immune from judicial review. Judicial review has I think developed to a stage today when without reiterating any analysis of the steps by which the development has come about, one can conveniently classify under three heads the grounds upon which administrative action is subject to control by judicial review. The first ground I would call "illegality," the second "irrationality" and the third "procedural impropriety." That is not to say that further development on a case by case basis may not in course of time add further grounds. I have in mind particularly the possible adoption in the future of the principle of "proportionality" which is recognised in the administrative law of several of our fellow members of the European Economic Community; but to dispose of the instant case the three already well-established heads that I have mentioned will suffice.
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> By "illegality" as a ground for judicial review I mean that the decision-maker must understand correctly the law that regulates his decision-making power and must give effect

> to it. Whether he has or not is par excellence a justiciable question to be decided, in the event of dispute, by those persons, the judges, by whom the judicial power of the state is exercisable.
>
> By "irrationality" I mean what can by now be succinctly referred to as "Wednesbury unreasonableness" (Associated Provincial Picture Houses Ltd. v. Wednesbury Corporation [1948] 1 K.B. 223). It applies to a decision which is so outrageous in its defiance of logic or of accepted moral standards that no sensible person who had applied his mind to the question to be decided could have arrived at it. Whether a decision falls within this category is a question that judges by their training and experience should be well equipped to answer, or else there would be something badly wrong with our judicial system. To justify the court's exercise of this role, resort I think is today no longer needed to Viscount Radcliffe's ingenious explanation in Edwards v. Bairstow [1956] A.C. 14 of irrationality as a ground for a court's reversal of a decision by ascribing it to an inferred though unidentifiable mistake of law by the decision-maker. "Irrationality" by now can stand upon its own feet as an accepted ground on which a decision may be attacked by judicial review.
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> I have described the third head as "procedural impropriety" rather than failure to observe basic rules of natural justice or failure to act with procedural fairness towards the person who will be affected by the decision. This is because susceptibility to judicial review under this head covers also failure by an administrative tribunal to observe procedural rules that are expressly laid down in the legislative instrument by which its jurisdiction is conferred, even where such failure does not involve any denial of natural justice. But the instant case is not concerned with the proceedings of an administrative tribunal at all."

13. These grounds of illegality, irrationality and procedural impropriety are ordinarily regarded as the traditional grounds for judicial review. The court will intervene and may grant the remedy for judicial review if any of them is proved to exist. But as Lord Diplock suggested, the list is by no means exhaustive. The learned judge hastened to say that further development of this area of law may yield further grounds on a case by case basis. It is in this spirit, the learned judge suggested, that the principle of proportionality as a further ground for judicial review has been developed.

14. Turning back to the applicant's application, the respondent's decision would fall on the ground of illegality because the order to arrest the applicant is obviously ultra vires rule 120 of the Kadhis Courts (procedure and practice) Rules on matters contempt. By granting the order for issue of warrants of arrest against the applicant without due regard to this provision of the law, the learned Kadhi demonstrated that he did not understand correctly the law that regulates the kind of orders he issued and that he did not give effect to it.

15. The learned Kadhi's order would fall on the ground of procedural impropriety because, as noted, he sidestepped the prerequisite conditions prescribed in rule 120 of the Kadhis Courts (procedure and practice) Rules before issuing the impugned order. It is evident that he did not observe basic rules of natural justice or that he failed to act with procedural fairness towards the applicant who was obviously prejudiced by being exposed to arrest. Taking cue from Lord Diplock's definition of this ground, I would say that the learned Kadhi failed to observe procedural rules that are expressly laid down in the legislative instrument by which his jurisdiction in contempt proceedings is conferred.

16. For the reasons I have given, I hold that there is merit in the applicant's application and, therefore, it is hereby allowed in terms of prayer 1 of the motion. To be precise, an order of certiorari is hereby issued quashing the order of issue of warrant of arrest against the applicant made by the respondent in Nairobi Kadhi's Court Divorce Cause No. KCDC/E072 of 2022: Hawo Abdi Gonjobe versus Abduba Guyo

Wada. Parties will bear their respective costs. Meanwhile, considering that the order by Hon. Mohamed Garama Randu has been impeached, I direct that the applicant's divorce petition shall be heard by a different Kadhi other than Hon. Mohamed Garama Randu. Orders accordingly. It is so ordered.

SIGNED, DATED AND DELIVERED ON 20 SEPTEMBER 2024

NGAAH JAIRUS

JUDGE