



THE REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA

AT GARSEN

JR. MISC. APPLICATION NO. E001 OF 2021

IN THE MATTER OF: AN APPLICATION BY HGH FOR JUDICIAL REVIEW FOR ORDERS AGAINST OF KADHI'S COURT GARSEN CASE NO. 1 OF 2020

AND

IN THE MATTER OF: ORDERS DATED 3RD AUGUST, 2020 ISSUED BY HON. M. MURSAL KADHI IN GARSEN DIVORCE CASE NO. 1 OF 2020

AND

BETWEEN

REPUBLIC.....APPLICANT

VERSUS

THE KADHI'S COURT GARSEN..... 1ST RESPONDENT

HON. MOHAMED MURSAL (KADHI GARSEN KADHI'S COURT).....2ND RESPONDENT

HGB3RD RESPONDENT

AND

HGH.....EX-PARTE APPLICANT

Coram: Hon. Justice Reuben Nyakundi

Ruth C. Lutta for the 1st and 2nd respondent

Mr. Alenga for the state

Ex-parte Applicant in person

RULING

The applicant lodged a notice of motion dated 1.2.2021 expressed to be brought in terms of Section 8 and 9 of the Law Reform Act, The Kadhi's Act on Divorce and Order 53 of the Civil Procedure Rules against the decision of the Kadhi's Court Garsen and **HGB**.

In support of the application is a sworn affidavit of the applicant dated the same day like the notice of motion. According to the applicant, he is lawfully married to the respondent **HGB**. However, during the subsistence of the marriage there arose minor family differences. In the meantime instead the respondent resorting to amicable settlement of the conflict she preferred to file a divorce cause before the Kadhi's Court.

It is the applicant's contention that the respondent filed and pursued the divorce proceedings without any notice of existence of the suit.

According to the applicant, as if that was not sufficient, the Honourable Kadhi: ex-parte heard the respondent version of the divorce cause without being given an opportunity to be heard. It was at that ex-parte proceedings a certificate of divorce nullifying the marriage was issued to the respondent.

The respondent filed the replying affidavit opposing the notice of motion on the grounds that the ex-parte divorce ordered did not prejudice the applicant. That it was not necessary for the applicant to be served with the petition for divorce under the parameters of Islamic Law.

Determination

The facts of the case are brief and straight forward. I have considered the notice of motion, the affidavit in support and the replying affidavit in objection to the reliefs not to be granted as prayed by the applicant.

The Law

A writ of mandamus is one directed at an inferior authority or the government of Kenya to promptly carry out its constitutional and statutory duty. As the inferior tribunal or Court and public body makes their decisions under Article 23 and Article 165 (6) of the Constitution donates power to the High Court supervisory jurisdiction over subordinate Courts over any person, body or authority exercising a judicial or quasi-judicial functions but not over a superior Court. Judicial Review therefore constitutes another significant control mechanism by the High Court against any excesses and administrative decision flaws of those public bodies and persons. This is all done for the Court to ensure that the inferior Court, tribunal or public body adhered to the principle of legality in their decision making process.

Also of note is that in interpreting order 53 of the Civil Procedure Act, the Court is to take cognizance that judicial review is a constitutional right linked to fundamental rights. The nuts and bolts of judicial review remedies encompass, prohibition which is available to prevent future unlawful acts or to stop a continuing unlawful act. Secondly certiorari is available to quash an act already done. The scope of this Court judicial review jurisdiction was considered by **De Smith's Judicial Review Book 6th Edition** in which the Learned Scholar underpinned the administrative decisions which are challenged as illegal they read:

“An administrative decision is flawed if it is illegal. A decision is illegal if it:

- (a). contravenes or exceeds the terms of the power which authorizes the making of the decision.**
- (b). pursues an objective other than that for which the power to make the decision was conferred.**
- (c). Is not authorized by any power.**
- (d). Contravenes or fails to implement a public duty.**

In the current matter, the applicant claims that the Kadhi's Court entertained judicial divorce proceedings filed by the respondent ex-parte and conclusively determined the cause without his participation. He is therefore aggrieved by the decision in which the trial Court issued a certificate of divorce without being granted an opportunity to challenge that evidence on resolution of their marriage.

In the case of **Rhodes v Police Commissioner for Lincolnshire (2013)** the Court held inter alia that:

“The Court must not interfere simply because it thinks it would have made a different decision if it had been the primary decision maker. Nothing else than wednesbury unreasonableness will do. In other words the Court must not interfere unless it is satisfied that the impugned decision is tribunal or perverse.”

In **Cannock Chase District Council v Kelly (1978)** Megaw J. said:

“That a decision of an inferior tribunal or public body could be quashed on the basis of having been made in bad faith, or dishonestly here “bad faith” or as it is sometimes put lack of good faith, means dishonestly not necessarily for a financial motive, but still dishonesty it always involves a grave charge. It must not be treated as a synonym for an honest, although mistaken, taking into considerations of a factor which is in Law irrelevant.”

In this case, the applicant asserts that the decision by the Kadhi's Court to grant divorce was against the principles of natural justice. He moved the Court to have it quashed and to compel the Kadhi's Court to re-open the case *denovo*. The threshold at which the Court could issue a writ of mandamus was opined in the case of **R v Kenya National Examination Council ex-parte Gathenji & 8 others Civil Appeal no. 234 of 1996** in which the Court stated that:

“the order of mandamus is of most extensive remedial nature and is in form, a command arising from the High Court of justice, directed to any person, corporation or inferior tribunal requiring him or others 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 and accordingly it will issue to the end that justice may be done, in all cases where there is a specific legal right and no alternative legal remedy, yet that mode of redress is less convenient, beneficial and effectual. These principles mean that an order of mandamus compels the performance of a public duty which is imposed on a person or body of persons or body of person by a statute and where that person or body of persons has failed to perform the duty to the detriment of a party who has a legal right to expect the duty to be performed.”

In applying those principles to the instant case, the applicant has built his case on the contract pillar of natural justice that the Kadhi's Court denied him an opportunity to be heard and that conduct violated his right to a fair trial under Article 50 of the Constitution. As will be seen in the outline of the notice of motion and affidavit evidence which the Court was invited to embrace its clear that the Learned Kadhi failed in his duty pursuant to the power donated to him by the constitution and statute.

The **Court of Appeal in R v Attorney General & Registrar of Societies Misc. Application No. 769 of 2004** held thus:

“The Law relating to judicial review, courts and loath to interfere with decisions of domestic bodies and tribunals including college bodies. However, Courts will interfere and quash decisions of any bodies when moved to do so where it is manifest that decisions have been made without fairly and justly hearing the person concerned or the other side.”

The upshot of all these the file is remitted back to the Kadhi's Court to re-open the proceedings in the case and permit the applicant to file a reply to the petition for divorce by the respondent. The certificate of divorce issued to the respondent is hereby quashed for being void abinitio.

In the light of the facts and the elucidated principles put before me, I allow the notice of motion dated 1.2.2021 with no orders as to costs.

It is so ordered.

DATED, SIGNED AND DELIVERED AT MALINDI ON THIS 3RD DAY OF MARCH, 2021

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R. NYAKUNDI

JUDGE

In the presence of:

1. The applicant
2. The respondent