



REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA

AT MOMBASA

JUDICIAL REVIEW E034 OF 2021

NK.....APPLICANT

VERSUS

THE SENIOR RESIDENT MAGISTRATE TONONOKA

CHILDREN'S COURT.....RESPONDENT

AND

AOA.....INTERESTED PARTY

RULING

1. The appellant herein NK is a wife to the interested party AOA. Vide a plaint dated 31st March, 2020 and filed in court on 1st April, 2020 in Tononoka children's court case no 129/20, NK (applicant/plaintiff) sought various order's against the interested party (husband) inter alia; school fees arrears, kshs120,000, kshs 30,000 for medical attention, house bills Kshs 12,000, House help kshs10,000, food kshs153,000, clothing Kshs 30,000, Tv bills kshs1,250 and school uniforms kshs160,000.
2. The applicant further sought orders of; physical custody of the suit minors; defendant be granted access to the minors and, any other further reliefs the court could deem fit to grant.
3. Contemporaneously filed with the plaint was a chamber summons application of even date seeking interim orders among them; an order restraining the interested party defendant/respondent from evicting the applicant from their matrimonial house; an exclusion order restraining the respondent/defendant from accessing the said house; maintenance payment by the defendant in the sum of kshs105, 000 per month and legal custody to vest on both parents.
4. Consequently, on 1st April, 2020, the court granted the prayer restraining the interested party from evicting the applicant from the house pending hearing and determination of the suit.
5. In his defence dated 22nd June 2020, the interested party /defendant prayed for sole custody of the child; plaintiff/applicant to provide for the children's maintenance as well as medical care.
6. Vide a ruling dated 5th August, 2020, the court granted interim custody to the interested party/defendant after the applicant voluntarily left their matrimonial house before determination of the suit. After hearing the suit fully, the court found that the applicant /plaintiff had left their matrimonial house leaving the interested party with the children. The court held that it was not prudent to disturb the children from their well-known environment (shelter) and awarded physical custody to the father with unlimited access to the mother (applicant).
7. As regards maintenance, the court ordered equal parental responsibility at 50:50. On education, the father was to continue catering for the same and parents to share provision of the rest of the children's needs.
8. Aggrieved by the said judgment and orders thereof, the appellant lodged a memorandum of appeal dated 8th April, 2021. The appeal registered as Family Appeal No 8/2021 is still pending hearing and determination.
9. Subsequently, the interested party filed a Notice of Motion dated 15th april,2021 seeking orders that; the appellant/plaintiff to produce the subject children in court in default OCS, Bamburi police station to effect arrest to facilitate their production; the court to find the appellant guilty of contempt of court orders; court to review its orders issued in its judgment granting unlimited access to the applicant to

the children on weekends during week days; access by the appellant be subject to issuance of notice to the interested party (defendant); each party to have children on half of the small holidays; unlimited communication to the children while in the custody of the other and, the plaintiff to avail education policy monies for the children as and when due.

10. The application was duly opposed by the applicant/Plaintiff claiming that it was bad in law, incompetent, useless, an afterthought, waste of court's time and that, the court upon delivery of its judgment had become functus officio.

11. After considering the said application, the court delivered its ruling on 30th June, 2021 directing that;

- (1) Other than unlimited access to the children, the rest of the orders in the judgment to remain in force;**
- (2) The unlimited access is reviewed to a structured access as follows;**
 - (a) the plaintiff gets unlimited access to the children on all weekends from Friday evening after school to Sunday at 4.00pm during school days and half of the school holidays;**
 - (b) The plaintiff to have the first half of the school holidays while the defendant to have the second half.**
- (3) Prayer 6 (d) on communication to children and (e) on education policy of the application to be allowed as prayed.**
- (4) Once the education policy amounts matures, the funds be paid direct to the children respective school accounts by the plaintiff for purposes of their school fees.**

12. Aggrieved by the orders of 30th June, 2021, the applicant/plaintiff moved to this court vide a Chamber Summons dated 26th July, 2021 and filed the same day seeking orders as follows;

- (1) That for reasons given in the certificate of urgency filed herewith, this application be certified urgent and the orders sought be granted forthwith;**
- (2) That the applicant herein NK be granted leave to apply for;**
 - (A) order of certiorari do issue removing to the high court of Kenya and quashing the proceedings, taken before the respondent on 16th April 2021, 15th May, 2021, 19th May 2021 and 2nd June, 2021 in Tononoka children's case No 129 of 2020; NK Vs AOA, by which proceedings the respondent, inter alia, irregularly and/or unprocedurally engaged in merit-based re-evaluation proceedings on her own final judgment rendered therein on 31st March, 2021 through;**
 - (i) Summarily re-opening the interested party's case to re-litigate upon the interested party's notice of motion application dated 15th April, 2021.**
 - (ii) Summarily re-litigating the interested party's case with regard to the already adjudicated -upon twin issues of custody and maintenance of the minors subject thereof, despite;**
 - (a) being rendered functus officio upon the drawing up and delivery of final judgment therein on 31st March, 2021;**
 - (b) The pendency of appellate proceedings viz Mombasa high court Family Appeal No E008 of 2021; NK Vs AOA, initiated by the applicant vide memorandum of appeal lodged on 9th April,2021**
 - (B) An order of certiorari do issue removing to the high court of Kenya and quashing the decision rendered by the respondent on 30th June, 2021, in Tononoka children's case No 129 of 2020; NK Vs AOA, by which decision the respondent irregularly and/or unprocedurally engaged in a merit-based re -evaluation and /or review of her own final judgment rendered therein on 31st March, 2021 through;**
 - (i) Summarily re -evaluating and reviewing evidence placed before her during the trial of said suit;**
 - (ii) Summarily re -evaluating and reviewing issues already fully litigated upon before her during the trial of said suit;**
 - (iii) Summarily evaluating and reviewing new evidence presented by the interested party after delivery of judgment, which evidence was wholly available to him during the trial of said suit;**
 - (iv) summarily evaluating and reviewing new issues raised by the interested party after delivery of judgment, which issues ought to have been ventilated at/during the trial of said suit;**
 - (v) Summarily re-evaluating and reviewing her own final judgment rendered on 31st March, 2021, despite;**
 - (a) Being rendered functus officio upon the drawing up and delivery of final judgment therein on 31st March 2021;**

(b) the pendency of appellate proceedings viz Mombasa high court family appeal No E008 of 2021, NK vs AOA, initiated by the applicant vide memorandum of appeal lodged on 9th April, 2021;

(C) An order of prohibition do issue restraining the respondent from rendering any further decision in Tononoka children's case No 120 of 2020, NK vs AOA, as regards, inter alia, the issues of custody and maintenance of the minors as well as the applicant's utility of the education policy ref 169-818 taken out by herself on 22nd September 2016 in respect of DA, a Minor;

(D) An order of prohibition do issue restraining the interested party from interfering with the applicant's utility of the education policy Ref 169-818 taken out by herself on 22nd September 2016 in respect of Darren Amore, a minor.

(3) That the grant of leave to institute these proceedings do operate as a stay of the respondent's decision to inter alia, review the previous finding of the court on the issues of custody and maintenance of the minors, as well as supervise and/or restrain the applicant's utility of the education policy 169-818 taken out by herself on 22nd September, 2016 in respect of DA, a minor.

(4) That costs of this application be in the cause.

13. When the file was placed before the duty Judge on 26th July, 2021, the court found that the application had raised serious issues hence could not be granted exparte. The court ordered for the same to be served and a suitable date be taken at the registry. On 4th August, 2021, parties appeared at the registry and fixed the same for hearing on 26th August, 2021.

14. From the record, the matter next appeared on 9th August 2021 before Chepkwony J duty Judge who gave directions for parties who had not filed their responses to do so and then file submissions for highlighting on 30th August, 2021. Meanwhile, the Attorney General appearing for the Senior Principal Magistrate Tononoka court named as the respondent filed grounds of opposition on 10th August 2021. The interested party filed a replying affidavit sworn on 26th August 2021 thus opposing the application.

Applicants' case.

15. The applicant's application is anchored on the statement of particulars and grounds in support of the application. Unfortunately, there is no verifying affidavit in support of the application as required under Order 53 (2) of the Civil Procedure Rules.

16. Principally, the applicant's application is seeking leave to file a substantive Notice of Motion to challenge certain directions and orders made by the Tononoka children court which she considers ultravires and irrational. The applicant is seeking orders to quash the children courts' proceedings undertaken and orders made on 16th April, 2021, 15th May, 2021, 19th May, 2021 and 2nd June 2021. She contended that reopening, re-evaluating and entertaining further proceedings after judgment had been delivered was ultravires, illegal and irrational acts committed by the trial court. That during the pendency of the appeal against the said judgment, the trial court had no power to entertain further proceedings in the file and that the review orders of 30th June 2021 were illegal and un-procedural.

17. It was stated that, by re-evaluating and recording new evidence in the application culminating to the orders of 30th June 2021, the court summarily acted on new evidence and issues which ought to have been dealt with during the main hearing. That the court irregularly reviewed its new judgment after becoming functus officio.

18. The applicant further sought prohibitory orders restraining the respondent from entertaining further proceedings in children case No 129/20 touching on issues of child custody, maintenance and education policy. The court was urged to issue an order of stay of proceedings in the said children's case pending hearing and determination of the substantive application. During the hearing, Mr. Ngonze for the applicant basically adopted the content contained in the statement of facts in support of the application.

Respondent's case

19. In opposition to the application, the respondent through the Attorney General's office filed grounds of opposition dated 5th August, 2021 stating that; the application is misconceived, frivolous, vexatious and an abuse of the court process; courts are independent and should not be condemned for doing what is right; the applicant if aggrieved with the impugned orders should appeal to the high court; allowing the application herein will set bad precedent thus interfering with court's inherent power; Judicial review court is not an appellate court; applicant will not suffer any prejudice if the orders sought are not granted.

20. During the hearing, Mr. Mkok for the respondent basically adopted the aforesaid grounds.

Interested part's case

21. Unfortunately, the interested party did not file any response to the application dated 26th July, 2021. Instead, he filed a replying affidavit in response to the Notice of Motion dated 20th August, 2021 which is not the subject of this ruling.

Analysis and Determination.

22. The Application before me for determination is anchored under Order 53 rule (1) and (2) of the Civil Procedure Rules. Before a

substantive motion can be filed to seek judicial review orders, leave of the court must be sought. Besides relying on Order 53 of the Civil Procedure rules, the applicant further submitted on alleged violations of constitutional rights.

23. It is trite that the power to grant or not to grant leave to institute judicial review proceedings is purely a matter of discretion exercised by the adjudicating court. In other words, the grant of leave is not automatic. See Justus Ongera Vs Director of Public Prosecution and Another (2018) e KLR where the court of appeal held that;

“We are aware that the grant of leave is not automatic. The purpose of it, as stated in numerous courts decisions, is to exclude frivolous and vexatious applications or applications which prima facie appear to be in abuse of the process of the court or those applications which are statute bound”

24. Similar position was held in Republic Vs County Council of Kwale and another Exparte Kondo and 53 others Mombasa HCMCA No. 384/1996 where Judge Waki, as he then was stated that;

“the purpose of application for leave to apply for judicial review is firstly to eliminate at an earlier stage any applications for Judicial review which are either frivolous, vexatious or hopeless and secondly to ensure that the applicant is only allowed to substantive hearing if the court is satisfied that there is a case fit for further consideration. The requirement that leave must be obtained before making an application for Judicial Review is designed to prevent the time of the court being wasted by busy bodies with misguided or trivial complaints or administrative error, and to remove the uncertainty in which public officers or authorities might be left as to whether they could safely proceed with administrative action while proceedings for Judicial Review of it were actually pending even though misconceived...”

25. The test therefore applicable in considering whether to grant leave or not, is whether there is an arguable or prima facie case worth entertaining on the face of it even before delving into the details of the case.

26. This court therefore has powers to grant or not to grant the leave sought herein bearing in mind that the scope of Judicial Review proceedings has since evolved or expanded under the purview of the 2010 Constitution which recognizes the avenue of Judicial review proceedings as a relief available for violation of constitutional rights. See Ernest and young LLp Vs Capital Markets Authority and Another (2017) e KLR where Mativo J held that;

“Judicial review is available as a relief to a claim of violation of the rights and freedoms guaranteed in the Constitution. The Constitution has expressly granted the High court jurisdiction over any person, body or authority exercising a quasi-judicial function. The point of focus is no longer whether the function was public or private or by statutory body, but whether the function was Judicial or quasi-judicial and affected constitutional rights including the right to fair administrative action under Article 47, or the right to natural justice under Article 50. The Kenyan Judiciary must guard against the development of a two-tracked system of judicial review. One that looks like the old cases influenced by the common law, and cases that are decided under the 2010 Constitution’s principles of Judicial Review (on the other). Those two tracks are likely to undermine the establishment of a vibrant tradition of Judicial review as required by the 2010 Constitution.”

27. In the instant case, the applicant is complaining that the trial court in Tononoka children court has re-opened, entertained new issues and evidence after delivery of its judgment. The applicant further argued that the court has become *functus officio* and therefore should not do anything on that file until the pending appeal is determined.

28. Indeed, courts are independent and therefore discharge their duties without favour or undue influence. The applicant has already appealed against the judgment delivered on 31st March, 2021. The appeal is still pending determination. This court cannot supervise the appellate court handling that matter. Besides, Judicial Review proceedings cannot supersede the appeal process or be used to oversee the court seized of the appeal nor can they substitute the right of appeal.

29. Concerning post judgment proceedings, it is not automatic that upon delivery of judgment a court must down its tools completely never to touch that file again. Ordinarily, and depending on the nature of the case, interlocutory proceedings including application for stay of execution or review can be made under order 42 and 45 respectively. These are legally and procedurally provided for stages depending on the merits of a particular case. The impugned orders of 30th June, 2021 reviewing some directions and orders made on 31st March, 2021 was as a result of an application for review.

30. I do agree with Mr. Ngonze that a court can not purport to reopen a suit and then hear it a fresh without following appropriate procedure and relevant provisions. However, where a court applies wrong principles of the law or purports to exercise jurisdiction which it does not possess after becoming *functus officio*, the remedy is to appeal and not to seek Judicial review orders. Mere misapprehension or misinterpretation of the law does not amount to an illegality, irrationality nor procedural impropriety.

31. In my view, the applicant has inappropriately summoned the intervention of the Judicial review court as the wrongs complained of do not fall under the purview of Judicial review principles for a remedy. Although courts should decline to grant leave only in rare circumstances where the application is hopeless, this is one of the exceptional cases that I do not find fit for substantive judicial review proceedings to be undertaken. The applicant has a proper and clear legal remedy of challenging the orders by way of appeal or stay of further proceedings pending the outcome of the appeal if well-grounded and not judicial review.

32. For the above reasons stated, the application dated 26th July, 2021 is hereby dismissed. This being a family related issue each party to bear own costs. As to the Notice of Motion dated 20th August, 2021, the same was filed improperly before leave was granted. Having rejected the application for leave, it is automatically bound to fall by the way side hence its existence is of no consequence and therefore struck out *suo motto*.

Dated, signed and delivered virtually at Mombasa this 21st day of September, 2021

J. N. ONYIEGO

JUDGE