



REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT MALINDI

JUDICIAL REVIEW NO. 05 OF 2019

(Formerly Mombasa Misc. Civil JR Application 41 of 2019)

IN THE MATTER OF: ORDER 53 RULE 1 OF THE CIVIL PROCEDURE ACT

IN THE MATTER OF: SECTION 8 (2) OF THE KADHI'S COURT ACT

IN THE MATTER OF: SECTION 7 (2) (b) OF THE FAIR ADMINISTRATIVE ACTIONS ACT

AND

IN THE MATTER OF: AN APPLICATION FOR LEAVE TO APPLY FOR JUDICIAL REVIEW

REPUBLIC.....APPLICANT

VERSUS

THE RESIDENT KADHI

AT MARIAKANI KADHI'S COURT.....RESPONDENT

ZYJ.....EX PARTE APPLICANT

MKW.....INTERESTED PARTY

Coram: Hon. Justice R. Nyakundi

Mgupa for the Ex-parte applicant

Attorney General for the Respondent

Mogaka Omwenga & Mabeya for the interested party

RULING

The exparte applicant **ZYJ** was married to the interested party **MKW** who professes Islamic faith. That on 30.4.2019 the respondent who exercises the judicial function at Mariakani Kadhis Court ruled and adjudged that the exparte applicant marriage with the interested party stood annulled from the date of the order. As a consequence of nullification the exparte applicant was to compensate the interested party of his dowry of Kshs.150,000/= in three equal instalments of Kshs.50,000/= with effect from May 2019.

The exparte applicant in seeking judicial review orders of certiorari made against her by the Resident Kadhi in the proceedings held at Mariakani, alleges that the Judgment was as a result of an exparte hearing without being given an opportunity to be heard. The dispositions as per the affidavit in support dated 18.9.2019 are set out below:

- 1. The interested party who profess the Islamic faith and while married to the exparte applicant under Islamic Law, filed Divorce Cause Number 9 of 2019 against the exparte applicant before the respondent on 30th April, 2019 accompanied by his verifying affidavit, witness statement, list of documents and list of witnesses in compliance with Order 3 of the Civil Procedure Rules 2010.***

2. On the same date (30th April 2019), the interested party took summons against the exparte applicant in order to serve her and enable her enter appearance in the matter and file her defence.
3. On the same date and without inquiring on whether the summons were served on the exparte applicant or not and without asking for proof of service of the summons and plaint, the respondent proceeded to hear the matter allegedly in the presence of the exparte applicant.
4. The respondent proceeded to hear the matter despite the fact that the exparte applicant neither filed her defence or response for that matter or been afforded time to do so. The respondent did not further advise the exparte applicant of her options and/or right to do so as stated above.
5. On the same date the exparte applicant with little or no legal knowledge nor representation and without the advice of the respondent as an officer of the court, at the same time while under duress, coercion and intimidation by the interested party, was compelled to sign an agreement to pay the interested party back his dowry of Kshs.150,000/= effective May 2019.
6. On the same date (30th April 2019), the respondent recorded the terms of the alleged agreement of 30th April 2019 as an order of the court and gave further orders dissolving the marriage there and then despite there being no indication in the proceedings that the parties had negotiated to settle the matter.
7. The respondent did all this despite being the Kadhi who presided over the marriage ceremony (Nikkah) between the interested party and the exparte applicant.
8. The respondent did all this despite the provisions of Section 8 (2) of the Kadhi's Courts Act which provide that until such time as the Chief Justice makes Rules of court providing for the procedure and practice to be followed in Kadhis' court, the procedure to be followed should be that of Magistrates' courts as provided under the Civil Procedure Act.
9. The respondent deliberately ignored such procedure provided for under the Civil Procedure Act and Civil Procedure Rules 2010 (herein referred to as "the Rules") which have elaborate provisions on the filing and disposal of suits.
10. The respondent failed to adhere to the following rules and procedures mandatory in filing and disposal of suits:
 - f) Failure to ensure that the interested party had served summons and plaint and the exparte applicant had entered appearance in accordance to Order 5 and 6 of the Rules.
 - g) Failure to allow the exparte applicant to file her defence and/or counterclaim in accordance with Order 7 of the Rules.
 - h) Failure to transfer the suit to Mombasa where the marriage was contracted and where both parties reside in accordance with Section 17 of the Civil Procedure Act.
 - i) Failure to convene at least one Pre-trial conference and case conference in accordance with Order 11 of the Rules.
 - j) Failure to disclose his interest in the matter by being the Kadhi who was requested by the interested party to preside over the marriage ceremony (Nikkah) and did so between the interested party and the exparte applicant and thereafter recusing himself and/or ordering the matter be heard before another Kadhi.
11. Ultimately, the respondent ordered he annulment of the marriage between the exparte applicant and the interested party together with an order that the exparte applicant compensate the interested party his dowry of Kshs.150,000/= in three (3) monthly instalments of Kshs.50,000/= each beginning May 2019.
12. Empowered by the said order, the interested party had resorted to intimidation tactics against the exparte applicant for the payment ordered and has now threatened execution of the same against the applicant by way of committing the applicant to civil jail.
13. The exparte applicant is apprehensive that the interested party shall commence the process of the threatened execution against her any time from now for her failure of meeting the terms of the order of the respondent.
14. Further, the exparte applicant stands to suffer irreparably as she may be committed to civil jail if and when the interested party as promised, proceeds and succeeds in applying for execution of the order 30th April 2019 made by the respondent.

In relation to the objection **Mr. MKW** filed a replying affidavit dated 24.10.2019 on account of the application. The respondent deponed that the exparte applicant has failed to disclose material facts that would assist the court to arrive at a just decision. He further deposed that the exparte applicant on her free-will before the respondent stated on oath that she wanted the marriage dissolved on condition of her paying the dowry assessed at Kshs.150,000/=.

The interested party further averred that the return of dowry was to be repayable in three equal instalments from the date of the consent Judgment.

It was further the averment by the interested party the basis of the consent Judgment was on mutual agreement without any coercion or

duress on either side or the respondent. That the fact of the matter is due to the default by the exparte applicant to fulfil her part of the Judgment in settling the dowry compensation. This application has been filed to scuttle the execution process.

Analysis

I have reviewed the chamber summons, affidavits in support and the interested party rejoinder on the issues raised by the exparte applicant.

The first question to be answered is whether this exparte application is a judicial review remedy case in exercise of supervisory jurisdiction of this court, in terms of Article 165 (6) & (7) of the constitution, as premised under Order 53 (1) of the Civil Procedure Rules.

The second issue for consideration is whether, a consent Judgment recorded and adopted by the respondent is valid and binding on the parties on its terms.

Issue No. 1:

The Law

The starting point to answer this issue would be the exposition by Learned author **DeSmith's judicial review 6th Edition** where he observed as follows:

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

- a) contravenes or exceed 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*

5 – 003 the task for the courts in evaluating whether a decision is illegal is essentially one of construing the content and scope of the instrument conferring the duty or power upon the decision-maker. The instrument will normally be a statute or statutory instrument, but it may also be an enunciated policy, and sometimes a prerogative or other “common law” power. The courts when exercising this power of construction are enforcing the rule of law, by requiring administrative bodies to act within the “four corners” of their powers or duties. They are also acting as guardians of Parliament’s will, seeking to ensure that the exercise of power is in accordance with the scope and purpose of Parliament’s enactments.”

The circumstances of this case, is underpinned in the relief of judicial review which **Lord Diplock M in Re Racal communications Ltd [1980] 2 ALL ER** said:

“Judicial review is available as a remedy for mistakes of law made by inferior courts and tribunals only.

Refocusing on judicial review remedy flexibility in the new dawn of our constitutional dispensation and fair administration of justice the Court of Appeal in **Suchan Investment Limited vs Ministry of National Heritage & Culture & 3 others [2016] KLR** held:

“An issue that was strenuously urged by the respondents is that the appellant’s appeal is bad in law to the extent that it seeks to review the merits of the minister’s decision while judicial review is not concerned with merits but propriety of the process and procedure in arriving at the decision. Traditionally, judicial review is not concerned with the merits of the case. However, Section 7 (2) (1) of the Fair Administrative Action Act provides proportionality as a ground for statutory judicial review. Proportionality was first adopted in England as an independent ground of Judicial Review in R v Home Secretary: Exparte Daly [2001] 2 AC 532. The test of proportionality leads to a “greater intensity of review” than the traditional grounds. What this means in practice is that consideration of the substantive merits of a decision play a much greater role. Proportionality invites the court to evaluate the merits of the decision. First, proportionality may require the reviewing court to assess the balance which the decision maker has struck, not merely whether it is within the range of rational or reasonable decisions; secondly, the proportionality test may go further than the traditional grounds of review in as much as it may require attention to be directed to the relative weight accorded to interests and considerations; thirdly, the intensity of the review is guaranteed by the twin requirements in Article 24 (1) (b) and (e) of the constitution to wit that the limitation of the right is necessary in an open and democratic society, in the sense of meeting a pressing social need and whether interference vide administrative action is proportionate to the legitimate aim being pursued. In our view, consideration of proportionality is an indication of the shift towards merit consideration in statutory judicial review applications. Analysis of Article 47 of the Constitution as read with the Fair Administrative Action Act reveal the implicit shift of judicial review to include aspects of merit review of administrative action. Section 7 (2) (f) of the Act identifies abuse of discretion as a ground for review while Section 7 (2) (k) stipulates that an administrative action can be reviewed if the impugned decision is unreasonable. Section 7 (2) (k) subsumes the dicta and principles in the case of Associated Provincial Picture Houses Ltd v Wednesbury Corp.[1948] KB 223 on reasonableness as a ground for judicial review. Section 7 (2) (i) and (iv) deals with rationality of the decision as a ground for review. In our view, whether relevant considerations were taken into account in making the impugned decision invites aspects of merit review. The grounds for review in Section 7 (2) (i) that require consideration if the administrative action was authorized by the empowering provision or not connected with the purpose for which it was taken and the evaluation of the reasons given for the decision. It

must be noted that even if the merits of the decision is undertaken pursuant to the grounds in Section 7 (2) of the Act, the reviewing court has no mandate to substitute its own decision for that of the administrator. The court can only remit the matter to the administrator and or make orders stipulated in Section 11 of the Act. On a case by case basis, future judicial decisions shall delineate the extent of merit review under the provisions of the Fair Administrative Action Act.

First it goes without saying that under Article 50 (1) of the constitution the power of each independent court or tribunal over its process and procedure is unfettered but within the confines of its constitutional and statutory jurisdiction. A factor which would no doubt weigh on the court or tribunal in the conduct of its proceedings is the right to a fair trial and due process accorded to the disputants under the maxim of equality of arms.

In the ambit of the requirement of the natural justice Lord Bridge of the House of Lords in the case of **Lloyd v McMahon [1987] AC 625 AT 702** stated as follows:

“My Lords, the so-called rules of natural justice are not engraved on tablets of stone. To use the phrase which better expresses the underlying concept, what the requirements of fairness demand when any body, domestic, administrative or judicial, has to make a decision which will affect the rights of individuals depends on the character of the decision making body, the kind of decision it has to make and the statutory or other framework in which it operates. In particular, it is well-established that when a statute has conferred on any body the power to make decisions affecting individuals, the courts will not only require the procedure prescribed by the statute to be followed, but will readily imply so much and no more to be introduced by way of additional procedural safeguards as will ensure the attainment of fairness.

Viewed in this light the question seems to be whether the facts of this fact raises sufficient merit to grant the writ of certiorari. This question profoundly can be answered from the reflections and self-explanatory affidavits on record. It's plain that the exparte applicant and interested party on 30.4.2019 appeared before the respondent for the hearing of their claim on dissolution of marriage. Where the exparte applicant on her own motion was heard and prayed for divorce with the interested party. Similarly she admitted

there is no dispute on dowry to be paid of Kshs.150,000 to the interested party refundable as condition for annulment of the marriage. It is on record also that the exparte applicant intimated to the court that the refund was to payable within three months from the 30.4.2019. This therefore marked an important settlement of the claim. The issues were determined, which is characteristic of a case comprised of admission of facts. The Learned Kadhi as the adjudicating officer had no power to withhold the remedies sought by the interested party against the exparte applicant, in terms of the constitution.

A distinction might perhaps be made according to the nature of the pleadings and the decision of the tribunal in this case. The Learned Kadhi, was justified to disregard any further taking of evidence where the merits of the claim have been compromised on admission and agreement on the issues in dispute by the claimants. In his sworn evidence, the exparte applicant discharged the burden of proof and due weight given to the evidence by the Learned Kadhi to prove a fact issue. Though the respondent would not finally elect not to testify is no ground that the case was never heard on the merit.

The respondent therefore exercised discretion under the powers conferred in Article 50 (1) of the Constitution to record and adopt the consent of both parties as an order of the court.

This is the essence of good and considerable administration of justice and the law should give effect to its application. A proper fair hearing always includes a fair opportunity to the litigants in controversy to ventilate the issues and their rights to be determined by constitutionally recognized tribunal or elect to have any of the alternative dispute resolution under Article 159(2), (D) of the constitution.

In the circumstances of this case some of the procedural steps to be preferred forum for conflict settlement on close of pleadings may have been dispensed with when the exparte applicant and interested party moved the court orally on 30.4.2019, to resolve the claim. Its significant to recognize that a hearing before a court of Law traditionally involves viva voce evidence through examination in Chief. Cross-examination and re-examination on the existence of facts in issue between the plaintiff and the defendant.

There was therefore nothing illegal, unreasonable or irrational on the part of the respondent to proceed to determine the dispute on dissolution of marriage after close of the case for the plaintiff.

When the oral hearing was taken by the respondent and the exparte applicant varied any right of being cross-examined on the issues which formed the basis of the divorce, It sufficed for the adoption of the consent as a court order.

I find no mistake of law made by the Learned Kadhi and as at the time the important consideration underlying the decision was the consent of both parties to the claim. What has been urged on this court on behalf of the exparte applicant is that this court ought to exercise its discretion to grant a writ of certiorari against the validity of the decision made by the trial court on 30.4.2019 is not available.

The rule in the administration of justice further which is applicable to this case is that once the defendant has been served with the claim and opts not to file any response but on the appointed day on oath responds to the claim, the essential requirements of an opportunity to be heard and due process of the Law have been certified. Its given that background in any opinion there was no error of law in the approach taken by the Learned Kadhi in this case to bring it within the scope of judicial review. In the case of **Captain Geoffrey Kujoga Murungi v Attorney General Misc. Civil Application No. 293 of 1993:**

“Certiorari deals with decisions already made Such an order (certiorari) can only be issued where the court considers that the decision under attack was reached without or in excess of jurisdiction or in breach of the rules of natural justice; or contrary to Law. Thus an order or certiorari is not a restraining order.”

On the other side of the picture any such proceeding or decision must be brought within the principles **Anisminic Ltd v Foreign Compensation Commission {1969} 1ALL ER 208, {1969} 2 AC 147:**

“..... there are many cases where, although the tribunal had jurisdiction to enter on the inquiry, it has done or failed to do something in the course of the inquiry which is of such a nature that its decision is a nullity. It may have given its decision in bad faith. It may have made a decision which it had no power to make. It may have failed in the course of the inquiry to comply with the requirement of natural justice. It may in perfect good faith have misconstrued the provisions giving it power to act so that it failed to deal with the question remitted to it and decided some question which was not remitted to it. It may have refused to take into account something which it was required to take into account. Or it may have based its decision on some matter which, under the provisions setting it up, it had no right to take into account. I do not intend this list to be exhaustive. But if it decides a question remitted to it for decision without committing any of these errors it is as much entitled to decide that question wrongly as it is to decide it rightly.”

Squarely within this application is the issue of the consent order in which the parties recorded and adopted by the respondent as a court order on the same day of the proceedings.

The philosophy of and importance of a consent order in the administration of justice has gained virtually complete legality in settling disputes brought before courts with finality. The key feature as the case of Edward **Acholla v Sogea Satoni Kenya Branch & 2 others Cause No. 1518 of 2013 (2014) eKLR** emphasises:

“A consent becomes a Judgment or order of the court once adopted as such. Once consent is adopted by the court, it automatically changes character and becomes a consent Judgment order with contractual effect and can only be set aside on grounds which would justify setting aside or if certain conditions remain unfulfilled which are not carried out.”

A similar principle on alternative dispute resolution mechanism is acknowledged by the constitution under 159 (2) (c) is understood to provide multidoor forums and their ability in extricably linked to the fulfilment of the court’s essential duty to decide on the rights of the litigants efficiently and within a reasonable time.

At a more concrete level at stake is the overall resolution of disputes on the merits and possibly to arrive at a fair and just outcome. Viewed in this light, it is perhaps surprising to find that at least some litigants disregard consent orders as much less important in managing conflict resolution and settlement of disputes.

Justice Havelock also bluntly observed in **Hansram Manted v Nairobi City County Civil Case no. 421 of 2013 [2013] eKLR:**

“further, I am of the belief that Article 159 (2) (c) of the constitution, 2010 is expressed in mandatory terms and this court is under a duty to promote alternative. Forms of dispute resolution. This is all the more so when the parties themselves have chosen the forum is the case here. This court as the defendant has pointed out in its submissions cannot rewrite the contract already entered into between the parties.”

The process of administration of justice would be self-defeating if parties are allowed to repudiate or impeach consent orders adopted as Judgments of the court without the striking features of mistake, duress, misrepresentation, that guide the privity of contract.

The value of the consent in the decision making procedure is that it gives each litigant a stronger voice in determining the final settlement of the claim. There is a real sense of ownership of outcome. This striking disparity between the court’s decision making process and the consent order/Judgment reinforces the key criterion in Article 10 of the Constitution on National Values and principles of governance. A variety of indicators are set out among in ADR, inclusivity and participation out of their free will to come up with the decision. Inclusivity, equity, social justice, transparency and accountability provide the necessary pillars to support in one way the concept of justice. Whether the dispute involves an important question of fact or law, the parties to the conflict to vigorously screen the issues and come up with the consent is both constitutional and statutory as a forum in the administration of justice. Therefore, consent Judgment acts as a complete bar to a fact finder to repudiate it and permitted to weigh in same evidence to have it set aside without meeting the threshold minima outlined above.

I have examined the proceedings and the jurisdiction exercised by the Learned Kadhi to determine questions affecting the exparte applicant and the interested party. He had a duty to judicially determine an important matter on divorce which had far impact on both parties to a marriage union. The respondent upon placing the parties in a witness stand to give evidence on oath was under a duty to reach a decision. It must be made clear that the court exist to administer justice through the various procedures provided in the Law.

It is important in administering justice that the suit in court as between two litigants or their counsels be determined on the merits looking at this matter it would not be just and reasonable to set aside the consent Judgment.

Although, the aim of the exparte applicant is to have the consent judgment set aside on grounds of coercion and duress, this being an evidential burden she failed discharge it in her deposition in the affidavits filed in support of the application.

In drawing the line as explained above and from the record the Learned Kadhi facilitated the parties to adopt the consent to meet the ends of justice in the matter.

This court finds it difficult to disregard the consent Judgment and have it nullified without a proper factual or legal basis. It would be just and untenable in all circumstances of the case to apply the judicial review remedy of certiorari to quash the impugned consent Judgment.

Moreover, be it as it may, the exparte applicant is in breach of the terms of the consent. Further, it's difficult to discern that the exparte applicant motion is about vindicating her rights and promote respect to the rule of Law. As the consent Judgment is clear on its terms that the exparte applicant is in default to pay the dowry as set out and agreed with the interested party.

It leaves the court to wonder whether there is mischief and an abuse of the court process that an omission to pay motivated the applicant to seek judicial review remedy.

That being my view of the matter the judicial review application by the exparte applicant falls flat on her face. The resultant consent Judgment of 10.4.2019 remains a binding covenant between the parties as of now capable of being enforced as a valid court order.

Each party to bear their own costs.

DATED SIGNED AND DELIVERED AT MALINDI THIS 15TH DAY OF APRIL 2020

.....

R NYAKUNDI

JUDGE

In the presence of

1. Ms. Mulwa for Mr. Mogaka for the Interested Party