REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT MACHAKOS

JUDICIAL REVIEW APPLICATION NO. 237 OF 2019

IN THE MATTER OF AN APPLICATION BY UGANDA MARTYRS CHILDRENS HOME FOR ORDERS OF JUDICIAL REVIEW ORDERS OF CERTIORARI AND MANDAMUS

AND

IN THE MATTER OF THE CHILDRENS ACT NO 8 OF 2001

AND

IN THE MATTER OF THE FAIR ADMINISTRATIVE ACTION ACT 2015

AND

IN THE MATTER OF ARTICLE 23, 47, 53, 258, 260 OF THE CONSTITUTION OF KENYA

AND

IN THE MATTER OF ORDER 53 OF CIVIL PROCEDURE RULES 2010 AND ALL OTHER ENABLING PROVISIONS OF THE LAW

BETWEEN

UGANDA MARTYRS CHILDRENS HOME

(Suing through the trustee)

ALPHONCE MONDIU.....APPLICANT

VERSUS

MACHAKOS COUNTY CO-ORDINATOR OF

CHILDREN SERVICES..... 1ST RESPONDENT

AREA ADVISORY COUNCIL KALAMA……..2ND RESPONDENT

RULING

1. This ruling is in respect of an application dated 2.8.2019 that arises from the Judgment of the High Court in High Court Judicial Review Application No.237 of 2019 passed on 25.7.2019.

2. The background to the instant application is that the respondent was an applicant in this Court by way of notice of motion dated 13.5.2019, brought under Order 53 Rules 3 and 4 of the Civil Procedure Rules, Section 7, 8 and 9 of the Fair Administrative Action Act, 2015, Section 3 (3) (4), 3B of the Children Act (Charitable Institution Regulations) 2005 and all other enabling provisions of the Law. He sought Judicial review reliefs of certiorari and mandamus quashing the decision of the 1st Respondent issued on 18.3.2019 to indefinitely close the applicant's institution and ordering the 1st and 2nd respondents to reopen the applicant's institution.

3. The matter was slated for hearing by consent on 25.7.2019 on which date the court noted that the respondents were absent and there was

no response to the application by the respondents. The court hence made an order that the application be allowed and the applicant extracted the final orders that were issued by this honourable court on 25.7.2019.

4. The applicants who were the respondents in the substantive application approached this court vide notice of motion dated 2.8.2019 that was brought under Section 80 of the Civil Procedure Act, Sections 1A, 1B and 3A of the Civil Procedure Act and Order 10 Rule 11, and order 51 of the Civil Procedure rules. The application sought the following orders

a) Spent

b) This honourable court be pleased to set aside the orders issued on 25.7.2019 and allow the respondents to file a response to the matter herein

c) Spent

d) The unmarked replying affidavit annexed to the application be admitted as duly filed

e) The costs of the application be in the cause.

5. The grounds of the application are set out in the motion as follows:

a) On 16.7.2019 when the matter came for mention, the replying affidavit was in the Principal Secretary's office awaiting signature and this occasioned the delay in filing the response to the application

b) Mr Munene was instructed to hold brief and request for more time however the matter was misdiarized as 25.6.2019 instead of 25.7.2019 when the court proceeded to issue orders in the absence of the input of the respondent.

c) As a result of the orders, the children's welfare is at stake if the institution is reopened as the same was closed due to malpractices that prejudiced the welfare of the children.

6. Also in support of the application is the affidavit of **Joyce Lumiti Chilaka,** indicated as state counsel in conduct of this matter deponed on 2.8.2019 reiterating the foregoing grounds. Annexed to the affidavit is a copy of the last registration certificate issued to the institution marked JLC1, a copy of a diary page marked JLC 2, a copy of the order issued on 25.7.2019 marked JLC 3 and a copy of the replying affidavit marked JLC4. There is what is indicated in the supporting affidavit as a copy of a judgement marked as JLC 5 but the same is not annexed. .

7. In reply to the application is a replying affidavit deponed by Alphonce Mondiu on 14.8.2019. He averred that the evidence advanced for failure to attend court on 25.7.2019 were not genuine. The deponent challenged the annexed replying affidavit as the same was not prepared in the name of the Principal Secretary, Ministry of Labour and Social Services but in the name of Ms Salome Muthama, the Machakos County Coordinator for Children Services hence the delay in filing the same was not excusable. It was averred that the institution in 2016 made an application for license renewal that was approved on 22.5.2017 and on 6.1.2016 a sanitary inspection was carried out and a report issued on the same date. It was averred that the delay in issuing a registration certificate was occasioned by the fact that the 1st applicant sought funding to conduct a 2nd inspection and funds of Kshs 8,000/- were sent to Emily Kimanzi as evidenced by the M-pesa statement dated 2.3.2017 marked AM4a & b. It was averred that the 2nd inspection was conducted and a report dated 14.3.2017 was prepared and that until the year 2018 the institution did not have a certificate of registration despite having approval for certificate of registration on 22.5.2017, therefore there was no basis to set aside the orders issued by the court on 25.7.2019.

8. The court directed that the application be canvassed vide written submissions that are on record. Vide submissions filed on 9.10.2019 by counsel for the applicant, it was submitted in placing reliance on the case of **Patel v E.A. Cargo Handling Services Ltd (1974) EA 75** that there was sufficient cause for non-attendance of court by the applicants and therefore meriting a grant of the orders sought. It was submitted in placing reliance on Section 3A of the Civil Procedure Act that the court had jurisdiction to hear the instant application and grant the orders sought.

9. In response, counsel for the respondent submitted that the exercise of discretion to set aside orders was to be exercised judiciously. Reliance was placed on the case of **CMC Holdings Ltd v Nzioki (2004) 1 KLR 173**. It was submitted that the delay in filing a response was not excusable. Learned counsel submitted that premising the instant application on Order 12 Rule 7 of the Civil Procedure Rules was an abuse of court process since the same did not apply to judicial review proceedings that are governed exclusively by Order 53 of the Civil Rules. Reliance was placed on the case of **Commissioner of Lands & Kunste Hotel Ltd (1997) eKLR** that was relied upon in **Stella Richard & 13 Others v DPP & 2 Others; Daniel Kyalo Lua & Another (Interested Parties) (2019) eKLR** where it was held that judicial review proceedings are neither civil nor criminal and therefore not a suit as defined under Section 2 of the Civil Procedure Act.

10. Before proceeding with my analysis, I wish to point out that in judicial review proceedings the court is not required to vindicate anyone's rights but merely to examine the circumstances under which the impugned act is done to determine whether it was fair, rational and or arrived at in accordance with rules of natural justice. The purpose of Judicial Review is concerned not with the decision but with the decision making process. Essentially judicial review involves an assessment of the manner in which a decision is made it is not an appeal and the jurisdiction is exercised in a supervisory manner, not to vindicate rights as such, but to ensure that public powers are exercised in accordance with the basic standards of legality, fairness and rationality. In the case of **R vs Secretary of State for Education and Science exparte Avon County Council (1991)** which was referred to in the case of the Commissioner of Lands vs Kunste Hotel Limited CA No 234/95, the Court held that,

> ***"…judicial review is not concerned with private rights or the merits of the decision being challenged, but with the decision making process. Its purpose is to ensure that the individual is given fair treatment by the authority to which he has been subjected."***

11. Having considered the pleadings and the applicable law, the issues to be resolved in the instant application are firstly **whether this court has jurisdiction to set aside its orders made on the 25.7.2019 and whether the reliefs sought by the applicant are available.**

12. Having noted that judicial review jurisdiction is sui generis, case law has posited that orders issued with finality in the exercise of the said jurisdiction namely *mandamus, prohibition* and *certiorari* are not amenable to recall, review and setting aside. See **Biren Amritlal Shah & another versus Republic & 3 others [2013] eKLR.** Further, the reliefs such as recall, review and setting aside are only available under suits that fall under the Civil Procedure Act procedures with the exception of Judicial Review. That jurisdiction the applicant had invoked to redress its grievances are not applicable to Judicial review as this is a special jurisdiction which is neither civil nor criminal. See **Stella Richard & 13 Others v DPP & 2 Others; Daniel Kyalo Lua & Another (Interested Parties) (2019) eKLR**

13. Section 8(5) of the Law Reform Act does state that:

> ***"Any person aggrieved by an order made in the exercise of the civil jurisdiction of the High Court under this section may appeal therefrom to the Court of Appeal."***

14. However, in **Aga Khan Education Service Kenya Versus Republic & 3 others civil Appeal No. 257 of 203**, the court cautioned that the exercise of the power of recall, review and setting aside of orders not issued in finality under the Judicial review Jurisdiction is a very restricted jurisdiction and will only be exercised very sparingly and in very clear- cut cases.

15. From the foregoing, I find that the orders issued on 25.7.2019 were final orders that dispensed with the application before the court and as such this court cannot review the same. The same can only be interfered with by the Court of Appeal in terms of Section **8(3)** as read with section **8(5)** of the Law Reform Act.

16. From the pleadings in the instant matter as well as the proposed replying affidavit of the applicants in the substantive judicial review application, it seems that the Respondents' gravamen is in the operation of the Respondent's Children Home and whether or not the said home has a right to continue operations despite being granted approval. I opine that the issue could also be dealt with in an ordinary civil suit where the issue of whether or not they should operate would be tried and resolved. The prerogative orders that were granted are not cast in stone and if the Respondents are able to convince the court in a civil suit as to why the Children home should not operate despite being given approval to do so, then the Respondents' will have the full backing of the courts to take action as deemed fit.

17. Turning to issue number two, in the light of my reasoning and finding with regard to issue number 1 above, I decline to allow the application to set aside the orders made on 25.7.2019 as the reliefs sought by the applicant are not available.

18. In the result the application dated 2.8.2019 lacks merit. The same is dismissed with costs.

Orders accordingly.

Dated and delivered at Machakos this 6th day of May, 2020.

D. K. Kemei

Judge