REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT KIAMBU

JUDICIAL REVIEW MISC. APPLICATION NO. 14 OF 2019

IN THE MATTER OF AN APPLICATION FOR LEAVE TO APPLY FOR AN ORDER OF MANDAMUS AND CERTIORARI AND HABEAS CORPUS

IN THE MATTER OF LIMURU CHILDREN CASE NO. 5 OF 2017

BETWEEN

JMN VS MRK

IN THE MATTER OF THE RULING BY HON. E. OLWANDE (SPM)

BETWEEN

REPUBLIC.....APPLICANT

VERSUS

MRK.....1ST RESPONDENT

REGISTRAR OF BIRTHS AND DEATHS.....2ND RESPONDENT

KENYA NATIONAL

EXAMINATION COUNCIL.....3RD RESPONDENT

SENIOR PRINCIPAL

MAGISTRATES COURT LIMURU.....4TH RESPONDENT

R U L I N G

1. The Applicant **JMN** filed a Notice of Motion on 13th August 2019 seeking leave to apply for judicial review orders of mandamus, certiorari and habeas corpus. On 15th October, 2019, **MRK** ,the 1st Respondent filed a preliminary objection to the said application on grounds inter alia that the application offends Sections 65 and 80 of the Civil Procedure Act and Orders 42 & 45 of the Civil Procedure Rules, and lastly that the court lacks jurisdiction to entertain the same.

2. By consent, the parties agreed that the preliminary objection be disposed of first by way of written submissions. The 1st Respondent opened her submissions by taking issue with the fact that the application bears a date which falls one month after the filing date stamp. Counsel for the 1st Respondent submitted that a right of appeal lay from the impugned decision of the lower court and that such right of appeal ought to be exhausted before the Applicant approached this court. Relying on the case of **Republic vs Senior Resident Magistrate Mombasa ex parte H L & another (2016) eKLR** counsel urged that leave ought to be deferred where a right of appeal lies against an order which is sought to be quashed by certiorari, until the appeal is determined. The court was urged to uphold the preliminary objection.

3. The Registrar of Births and Deaths and the Kenya National Examination Council, the SPM's Court at Limuru (the 2nd, 3rd and 4th Respondents respectively) through the Attorney General also filed their written submissions in support of the preliminary objection. It was submitted that the Applicant ought to have filed an appeal and not a judicial review application as judicial review is concerned with the process and not the merits of a decision , as was held in the case of **Republic vs Kenya Authority Ex parte Yaya Towers Limited (2008) eKLR**.

4. Lastly, the Applicant filed his written submissions in opposition to the preliminary objection. He argued that the grounds in the objection by the 1st Respondent are not points of law as they raise matters of evidence which need to be ascertained. He asserted that the objection consists of mere technicalities. The court was urged to dismiss the preliminary objection.

5. The court has considered the rival submissions made in respect of the preliminary objection. The pith of the objection, which in my view is adequate to determine the objection is found in the second ground of the notice, and is to the effect that:

> **"… the instant application is premature, misconceived and ill-advised as it offends the provisions of Sections 65 and 80 of the Civil Procedure Act …. and orders 42 and 45 of the Civil Procedure Rules."**

6. The above provisions provide for appeals from any original decree of a subordinate court, on a point of law or fact or appeals from a decree of a Kadhi's Court or the review of such decree or order. As we shall see, appeals emanating from civil decisions of the Children Court are provided for under the Children Act and the Regulations made thereunder and are governed by the procedure in Order 42 of the Civil Procedure Rules.

7. As to what constitutes a preliminary objection, the Court of Appeal of Eastern Africa stated (per Sir Charles Newbold, President), in **Mukisa Biscuits Manufacturing Company Ltd v West End Distributors Ltd (1969) EA 696** at page 701:

> **"A preliminary objection is in the nature of what used to be a demurrer. It raises a pure point of law which is argued on the assumption that all the facts pleaded by the other side are correct. It cannot be raised if any fact has to be ascertained or if what is sought is the exercise of judicial discretion".**

8. In **Oraro v Mbaja [2005] e KLR Ojwang J (**as he then was) further elaborated on this definition observing in part, that:

> **"I think the principle is abundantly clear. A "preliminary objection," correctly understood, is now well identified as, and declared to be a point of law which must not be blurred with factual details liable to be contested and in any event, to be proved through the processes of evidence. Any assertions which claim to be a preliminary objection, and yet it bears factual aspects calling for proof, or seeks to adduce evidence for its authentication, is not, as a matter of legal principle, a true preliminary objection which the court should allow to proceed …. As already remarked, anything that purports to be a preliminary objection must not deal with disputed facts, and it must not itself derive its foundation from factual information which stands to be tested by normal rules of evidence**." (emphasis added)

9. While asserting that the grounds in the preliminary objection entail facts requiring proof and or that the grounds are "mere technicality and not points of law", the Applicant has not pointed out the alleged facts requiring proof or demonstrate how the grounds raised therein represent " mere technicality". The basic facts upon which the preliminary objection is founded are not in dispute. The Applicant and the 1st Respondent are the estranged parents of a child born on 7th July 2002 and named **EWWM**. The couple subsequently became estranged and in 2017 or thereabouts the 1st Respondent who had custody of the minor caused a change to her name by dropping the Applicant's name as her surname. She substituted therefor the 1st Respondent's name and changed the minor's maiden name from **"W"** to **"M"** so that her new name became **WMR**. The Applicant was aggrieved that his consent had not been sought and made a complaint to the police. Following investigations, the 1st Respondent was charged before the Kikuyu SPM's Court in **Criminal Case No. 637 of 2017,** in connection with the making of false alterations to the child's birth certificate. She pleaded guilty and was fined.

10. In the meantime, the child was registered for her national exams (Kenya Certificate of Primary Education and Kenya Certificate of Secondary Education) in her new name. There was an ongoing litigation between the Applicant and the 1st Respondent in **Limuru SPMs Court Children Case No. 5 of 2017.** The case has not been determined but the Applicant had unsuccessfully applied for an order against the 1st Respondent, the Registrar of Births and Deaths Limuru (the 2nd Respondent herein) and the Kenya National Examination Council (the 3rd Respondent herein) that the name of the subject minor be changed from **WMR** to **EWWM**. By her ruling delivered on 28th March 2019, the learned magistrate, despite noting that the Applicant was not consulted before the minor's name was changed, stated that no prejudice would be *"suffered by the Applicant if the surname of the minor is not captured in her academic papers."*

11. She further stated that:

> **"It is prejudicial and not in the best interest of the minor to burden her with a name which she does not identify with especially at this stage in her life when she should be preparing to sit for her KCSE.**
>
> **The issue as to whether or not she should use her surname can be addressed after the full hearing of the case."**

12. The key prayers contained in the Applicant's Notice of Motion dated 13th September, 2019 and filed herein on 13th August 2019 (another issue in contention) are prayers 3 and 4 which respectively seek leave for the Applicant to apply for an order of mandamus to compel the 2 nd and 3rd Respondents herein to vary the names of the subject minor appearing in academic certificates from **WMR** to the original name **EWWM;** and leave to apply for an order of certiorari to quash the ruling of the court in **Limuru SPM's Children's Case No. 5 of 2017.**The ruling of the lower court clearly indicated that the question of the change of the subject minor's name appearing in academic certificates would abide the full trial and final determination of the Children's Cause. It is not in dispute that the said cause had not been determined by the date of the filing of the instant application.

13. The Applicants motion is expressed to be brought under the provisions *inter alia* of Order 53 Rule 1(2) of the Civil Procedure Rules and the Law Reforms Act. This court's jurisdiction in judicial review is a jurisdiction *sui generis* and is derived from the provisions of Section 8

of the Law Reforms Act. The rules and principles regulating the exercise of the judicial review jurisdiction, made pursuant to Section 8 of the Law Reform Act are to be found in Order 53 of the Civil Procedure Rules and common law.

14. In **Cortec Mining (K) Ltd v Cabinet Secretary, Attorney General & 8 Others [2015] e KLR,** the Court of Appeal had this to say about the nature and scope of the judicial review jurisdiction: -

> **"There is considerable merit in the argument that judicial review proceedings are *sui generis;* that they are not criminal or civil in nature, and that they are not intended to deal with private rights… In general, where a matter of public law as opposed to private law is directly involved, proceedings for certiorari, mandamus and prohibition may be resorted to. It is important to appreciate that these are public law remedies. They issue against public officers or public bodies performing public duties. Certiorari issues to quash decisions for errors of law in making such decisions is far failure to act fairly towards the person who may be adversely affected by such decision. Prohibition is directed to an inferior tribunal or body and forbids such tribunal or body from continuing proceedings in excess of its jurisdiction or in contravention of the laws of the land. It lies not only for lack of jurisdiction or excess of it, but also for departure from rules of natural justice. The order of mandamus compels the performance of a public duty imposed by statute where the person or body in whom the duty is imposed fails or refuses to perform the same."**

15. Judicial review is not concerned with reviewing the merits of a decision which is the subject of an application but rather the review of the process by which the decision was arrived at. In exercising its jurisdiction, the court does not function as an appellate court and cannot substitute the impugned decision of the statutory body with its own decision. See **Municipal Council of Mombasa v Republic & Umoja Consultants Ltd. Civil Appeal No. 185 of 2001,** and **Republic v Kenya Revenue Authority Ex parte Yaya Towers Limited [2008] e KLR.**

16. The primary dispute before the SPM's Court Limuru being a children's case between the Applicant and the Respondent lay in the realm of private law, which case seemingly mutated after a miscellaneous application , filed by the Applicant before the court at Kikuyu, namely **Miscellaneous Case No. 32 of 2018 JMN v MRK & Registrar of Births and Deaths and the Kenya National Examination Council,** was transferred for hearing within the pending **Children's Case No. 5 of 2017** at the Limuru SPM's Court . While no specific prayer is sought against the 1st Respondent in the instant judicial review matter, it is quite evident from the prayers in the Motion , the grounds thereof and the Applicant's supporting affidavit, that what the Applicant is really seeking is the overturning of the ruling of the court delivered in **Children's Case No. 5 of 2017,** which decision principally maintained the subject minor's name **WMR**.

17. By the present proceedings, the Applicant seeks that , despite the pendency of the determination of the question of the minor's name before the Children's Court, the 2nd and 3rd Respondents be compelled to change the subject child's name from **WMR** to **EWWM** in all academic certificates issued by the said Respondents. The true purport of the application is captured in grounds **11, 12, 13, 14** of the Motion, which state in part that:

> **"11. THAT the 4th Respondent (Children's Court) in blatant disregard of the conviction at Cr. No. 637 of 2017 ignored the facts of the case and allowed the subject to continue registering for her K.C.S.E examinations using forged names WMR and/or WEMW which are both forged names and obtained without consent of the Applicant.**
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> **12. THAT the applicant is apprehensive that …. the subject will be registered or who has been registered using forged names …. will continue to use illegal names as they appear in her KCPE, KCSE certificates or in future and will cause irreparable harm to the Applicant as her biological father.**
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> **13. THAT it is within the best interest of the subject and the Applicant is her biological father that the names EWWM be reverted in her KCPE and KCSE certificates.**
>
> **14. THAT it is within the best interest of the Applicant that his daughter uses his surname M…A, for the purpose of identity and belonging of the minor to her biological father".** (sic)

18. Although they are the target of the judicial review orders to be applied for, there is no mention of the 2nd and 3rd Respondents in the grounds of the motion or reference made to their failures or misdeeds as public bodies which necessitated their enjoinment in this cause. In his supporting affidavit, the Applicant complains at paragraph 6 that the Children Court *"allowed the subject minor to register with forged names for KCSE, the names which as her father, did not consent thereby committing an illegality"* and that by *"allowing her (minor) to register with forged names the Senior Principal Magistrate abused, usurped and gave orders which are unlawful and not in accordance with the law"*. Again, no reference is made in the affidavit to the 2nd and 3rd Respondents and/or their errors or failure in the performance of their statutory duty.

19. It is my considered view therefore that this application is in part a disguised appeal from the decision of the Children's Court and that the primary dispute between the Applicant and the 1st Respondent is in the nature of a private law dispute regarding the name of their child (and soon to be adult). The law applicable in children matters is the Children Act. The Applicant by his application in the lower court was seeking to enforce his right as a parent, *inter alia* to determine the name of the subject minor as provided for in Section 23(2) (c) (ii) of the Children Act.

20. The Children's Cause in the lower court was essentially a civil proceeding by dint of Section 73 (a) of the Children Act. Section 80 of the Children Act (rather than the provisions of section 65 of the Civil Procedure Act cited by the Respondents) makes provision for appeals from decisions made by subordinate Courts under the Children Act. It provides that:

> **"Unless otherwise provided under this Act, in any civil or criminal proceedings in a Children's Court, an appeal shall be to**

the High Court and a further appeal to the Court of Appeal".

For purposes of civil decisions relating to parental responsibility and guardianship of children, the foregoing is reiterated in the respective Regulations made under the Children Act. Regulation 20 of the Children (Practice and Procedure Parental Responsibility) Regulations, 2002, in particular states that:

> **"Any person aggrieved by the decision of the Court under these Regulations shall have a right of appeal to the High Court within 30 days from the date of the decision".**

21. In my considered opinion, what the Applicant is inviting this Court to eventually do is to review the merits of the decision of the lower court concerning what should be the minor's proper name. Such review belongs to the realm of the appeal process envisaged in Section 80 of the Children Act or by way of an application for review before the trial court. Moreover, the prayer for leave to apply for an order of *habeas corpus* in respect of the minor child is misplaced and without a legal foundation, as Order 53 of the Civil Procedure Rules does not envisage the making of such an order.

22. In **R v Attorney General & 4 Others ex parte Diamond Hashim Lalji and Ahmed Lalji [2014]** the court observed that:

> **"Judicial review applications do not deal with merits of a case but only with the process. In other words, judicial review only determines whether the decision maker had jurisdiction, whether the persons affected by the decision were heard before it was made and whether in making the decision the decision–maker took into account relevant matters or did take into account irrelevant matters. It follows that where an Applicant brings judicial review proceedings with a view to determining contested matters of fact and in effect urges the court to determine the merits of two or some different versions presented by the parties, the court would not have jurisdiction in judicial review proceedings to determine such a matter and will leave the parties to resort to normal forums where such matters ought to be resolved."**

23. In this case, the Applicant is firstly seeking to challenge the merits of the ruling of the Children's Court. And secondly, he is seeking a determination of the question of the proper names to appear in the minor's academic certificates, thereby pre-empting an issue pending determination in the lower court. Thus, the application is both a disguised appeal and an attempt to pre-empt the final decision of the Children Court on pending issues.

24. That is not the proper purpose or application of judicial review proceedings and this Court is persuaded to uphold the preliminary objection, in the circumstances. Accordingly, the motion purportedly dated 13th September, 2019 and filed on 13th August, 2019 is hereby struck out. Parties will bear own costs.

SIGNED AND DELIVERED ELECTRONICALLY ON THIS 2ND DAY OF JULY 2020

C. MEOLI

JUDGE