REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT GARISSA

MISC. CIVIL APPLICATION NO. 9 OF 2019

BETWEEN

REPUBLIC……...EXPARTE APPLICANT/APPELANT

VERSUS

THE KADHI COURT AT WAJIR……1ST RESPONDENT

THE HON. ATTORNEY GENERAL……...2ND RESPONDNENT

JUDGEMENT

Introduction:

1. The Applicant herein filed the Chamber Summon Application dated 9th July, 2019 and filed on 12th July, 2019 seeking leave to file Judicial Review Application. This Court on 15th July, 2019 granted the sought leave and the applicant filed his Notice Motion dated 9th July, 2019 supported by an affidavit sworn by the exparte applicant Abdi Koriyoy Gabow seeking the following n Orders: -

> **1. A Judicial Review Order of Certiorari bringing into this Honorable Court the 1st Respondent's Orders issued on 3rd September, 2018 and 20/6/2019 for purposes of quashing and to quash the same in so far as the said orders relate to the custody, care and control of Children, and their maintenance.**
>
> **2. A Judicial Review Order of Prohibition Prohibiting the 1st Respondent from proceeding with Kadhi's Court Civil 174 of 174 of 2017 or executing any orders arising therefrom in so far as the said proceedings relate to the custody, care, control and maintenance of the children.**

2. In response to the application, the Interested party (Respondent) in Kadhi's Court Civil Suit No. 174 of 2017) filed a Replying Affidavit dated 1st August, 2019 and filed on 2nd August, 2019. The Attorney General on behalf of both respondents filed grounds of opposition dated 18th July, 2019 and filed on 22nd July, 2019**.**

3. The Applicant filed his written submissions dated 29th July, 2019 and filed on 5th August, 2019, whereas the Attorney General filed their written submissions on behalf of both Respondents dated 28th August, 2019 and filed on 3rd September, 2019.

Background:

4. The genesis of the instant application is the Kadhi's Civil Suit No. 174 of 2017 filed by one Hawa Salah Muhumed the Interested Party who was the wife of the exparte applicant seeking the prayers including dissolution of their marriage, return of dowry, custody of children, maintenance of children and the costs of the suit.

5. Upon hearing the suit between the parties, the Kadhi's Court dissolved the marriage and ordered return of dowry as per the Holy Quran and also made the following orders relating to the custody and maintenance of the children being that custody of the last three children of the marriage is granted to the Plaintiff while the other three remain in the custody of the father defendant, additionally the defendant should provide Kshs. 3000/= for each of the three children as monthly maintenance adding upto Kshs. 9000/= per Month and that the defendant has a right to access the Children under the custody of the Plaintiff for visiting in any suitable time.

6. Subsequent to the above decision of the Kadhi, the Interested Party herein commenced execution proceedings against the Applicant vide a Notice to Show Cause dated 20th June, 2019 necessitating the filing of the instant Application by the Applicant under Certificate of Urgency alleging that the Kadhi acted without Jurisdiction on matters relating custody and Maintenance of Children.

Applicants Case/Submissions:

7. The gist of the Applicant case is that the 1st Respondent Kadhi Court acted without jurisdiction in issuing orders touching on the custody, care, control and maintenance of children, arguing that the same was ultra vires in view of section 73 of the Children's Act 2001.

8. It is their argument that the 1st Respondent Jurisdiction under Article 170(5) of the Constitution and section 5 of the Kadhis Court Act is for determination of questions of muslim law relating to personal status, marriage, divorce or inheritance in proceedings in which all parties profess muslim religion. They argue that matters relating to child custody, care, control and maintenance are not within the purview of section 5 herein.

9. In addition he submitted that Jurisdiction question goes into the root of the court and it's not a mere procedural technicality as a court cannot arrogate itself jurisdiction it does not have and therefore the Kadhis Court cannot confer itself jurisdiction beyond what is conferred in the Constitution**.**

10. In this regard the applicant relied in the case of ***ABMM vs SMY & Another (2019) eKLR*** where this Court found that the Kadhis Court Jurisdiction under Article 170(5) and section 5 of the Kadhis Court does not extend to matters relating to custody and maintenance of children. They also relied in the cases of ***Salim Abdalla vs Swabra Abdulla (2018) eKLR*** and ***Hussein Hassan Maalimvs Osman Hassan Maalim (2019) eKLR*** where it was held that where a court has no Jurisdiction, it has no basis for judicial proceedings much less judicial decision or order and that a court cannot arrogate itself jurisdiction through the craft of interpretation, or by way of endeavors to discern or interpret the intentions of parliament where the wording of legislation is clear and there is no ambiguity.

11. On the prayer of certiorari, the applicant submitted that being conversant with Order 53, rule 2 of the Civil Procedure Rules, 2010 he has not challenged the rightness or wrongness of the 1st Respondent decision but the jurisdictions. And that the circumstances that the order may issue is settled as to include where an inferior court or public authority acted without jurisdiction or exceeded its jurisdiction or failed to comply with the rules of natural justice. It is his argument that the 1st Respondent acted in excess of jurisdiction and therefore an order of certiorari ought to be issued by this court. He relies in the cases of ***Kenya National Examination Council vs Republic ex Parte Geofrey Gathenji Njoroge and 9 Others (1997) eKLR*** and ***Republic vs Kadhis Court Nairobi & 2 Others Ex Parte TL (2018) eKLR.***

12. In respect to the second prayer of prohibition, the applicant submitted that this court ought to issue the same to prevent or forbid the 1st Respondent from continuing with proceedings therein in excess of jurisdiction or in contravention of the law of the land.

13. In response to the Respondent ground that the instant application is an appeal against the 1st Respondent decision disguised as a Judicial Review application, the applicant submitted that he has not challenged the merits of the decision but lawfulness or unlawfulness of the same, and that the jurisdiction of this court as invoked is supervisory in nature as was held in ***Republic v Kenyatta University ex parte Martha Waihuni Ndungu (2019)e KLR*** and also the case of ***Ethics and Anti-Corruption Commission v Horsebridge Networks Systems (EA0 Ltd & Another(2017) eKLR.***

14. On allegations that the applicant contravened section 9(2) of the Fair Administrative Action Act , in that he has not exhausted all the internal mechanisms prescribed therein, he argued that there are no internal mechanisms provides for under the Kadhis Court Act as the Chief Justice is yet to make rules provided for under section 8(1) of the Act. In this he relies in the case of ***Republic vs Machakos University ex Parte Dorcas Nyaoko (2018) eKLR.***

15. In respect to the contestation that the application is time barred as it ought to have been filed within six months as provided for under Order 53(2) of the Civil Procedure Rules, 2010 and section 9(3) of the Law Reform Act, arguing that the proceedings of the matter began on 3/9/2018 and the jurisdictional error arose on 20th June, 2019.

16. In sum the applicant urged the court to allow the application with costs.

Respondent's case/submissions:

17. The respondents through the Attorney general opposed the instant application vide the hereinabove grounds of opposition and submissions filed on 3rd September, 2019. The first ground addressed by the Respondents is on the applicant prayer for an order of certiorari, which they argued that it is time barred. They submitted that such an order should be sought within six months as provided for under Order 53 Rule 2 of the Civil Procedure Rule 2010. It is their position that the orders sought to be quashed by the applicant were issued on 3rd September, 2018 and thus six months has since lapsed and thus the instant application is a waste of court's time. In this rely in the case of ***Republic v Cabinet Secretary Lands; Elijah Muema Kitavi & Another (Interested Parties) Ex parte Raphael Kakene Muloki & Another (2019) eKLR*** where **Justice Odunga** held that applications for Judicial Review must be commenced within six months from the date when the ground for the application arose.

18. The second ground of opposition addressed by the Respondents is that the instant application does not meet the established grounds for Judicial Review arguing that the application is an appeal disguised as a Judicial Review Application. They submitted that the instant application does not fall within the established grounds for issuance of Judicial Review orders of Mandamus, prohibition or Certiorari which include illegality, impropriety of procedure or irrationality (the three 'I's) as settled in ***Re Bivac International SA (Bureau Veritas) (2005) 2 EA 43 and in the case of Pastoli vs Kabale District Local Government Council and Others (2008) 2 EA 300.***

19. It is their contention that Judicial Review is concerned with the process in which the resultant decision was reached and not the merit of the decision and that once a judicial review court gives a clean bill to the process; it ought to down its tools.

20. In this case they argue that the applicant has failed to demonstrate that the mistake goes into the jurisdiction of the tribunal, but the same relates to a misinterpretation of the law which cannot be a subject of Judicial Review but appeal mechanisms. In this they rely in the cases of ***Republic vs Kenya Revenue Authority Ex Parte Yaya Towers Limited (2008) eKLR, Seventh Day Adventist Church (East Africa) Limited vs Permanent Secretary, ministry of Nairobi Metropolitan Development & Another(2014) eKLR, Republic vs Kenya Revenue Authority & Another Ex Parte Bear Africa(k) Limited and Municipal Council of Mombasa v Republic & Another (2002) eKLR.***

21. The third ground of opposition to the application addressed by the Respondent is that the applicant has not exhausted all the remedies as prescribed under section 9(2) of the Fair Administrative Action Act, 2015 which stipulates:-

> **"The High Court or a subordinate court under subsection(1) shall not review an administrative action or decision under this act unless the mechanisms including internal mechanism for appeal or review and all remedies available under any other written law are first exhausted.**

22. In this regard they rely in the case of ***KrystalineSalt Limited vs Kenya Revenue Authority (2019) eKLR,*** where **Justice John Mativo** dismissed an application for offending the doctrine of exhaustion as provided for under section 9(2) of the Fair Administrative Action above.

23. I sum the Respondents submitted that the applicant failed to demonstrate any breaches of the law or procedure to entitle this court to exercise its discretion and issue the sought Judicial Review Orders and urged the court to dismiss the application with costs.

Interested Party Case:

24. The Interested Party only filed a replying affidavit dated 1st August, 2019 and filed on 2nd August, 2019. She confirmed that she was indeed married to the applicant and filed for divorce in the Kadhis Court where a decision was issued granting the divorce, and that she retains the three younger children of the marriage and the applicant retains the other elder three. In addition, the applicant was to provide Kshs. 3000/= for each of the children monthly, totaling kshs. 9000/= and an order of access to the children.

25. Further, she averred that the applicant mistreated the oldest of the children, a girl who was forced to trek for almost 50 kilometers to her grandparents' homestead, which incident she reported to the police. And that although the children are of school going age, the applicant has refused to take them to school as per the Parental Responsibly agreement and has refused to give the children their birth certificates for purposes of school registration.

26. She contested the applicant assertion that he did not have money, arguing that he since remarried and can afford an Advocate urging the court to take Judicial Notice of the applicant ability. She urged the Court to grant the following prayers: -

> **a) To compel the applicant to educate his children since it is his parental responsibility**
>
> **b) To compel the applicant to provide the Children birth certificate to enable for registration**
>
> **c) To compel the applicant to provide maintenance as per the decree of the court issued by the Senior Principal Magistrates Court Wajir dated 20-06-2019**
>
> **d) Any other relief this Honourable Court may deem fit to grant**
>
> **e) To dismiss this application with costs.**

Issues and Analysis:

In view of the foregoing, these are the issues that arise for determination: -

> ***a) Whether the application meets the tenets for Judicial Review***
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> ***b) Whether the application is time barred***
>
> ***c) Whether the application is bad in law under the doctrine of exhaustion.***
>
> **d) Whether the application meets the tenets for Judicial Review**

27. The Respondent herein has challenged the Applicant application alleging that the same is an appeal disguised as a Judicial Review application. The Applicant in response reiterates that he has not challenged the merits of the Kadhis Court decision insisting that his case is that the decision was made without Jurisdiction**.**

28. It is trite as was held in ***Republic vs Kenya Revenue Authority Ex-parte Yaya Towers Limited (2008) eKLR*** that the remedy of judicial review is concerned with reviewing not the merits of the decision of which the application for judicial review is made, but the decision making process itself.

29. Additionally, In the case of ***Municipal Council of Mombasa vs Republic & Umoja Consultants Ltd Civil Appeal No.185 of 2001*** it was held:

"Judicial review proceedings is concerned with the decision making process, not with the merits of the decision itself: the court would concern itself with such issues as to whether the decision makers had the 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…..The court should not act as Court of Appeal over the decider which would involve going into the merits of the decision itself such as whether there was or there was not sufficient evidence to support the decision."

30. Therefore, a decision made by a body without Jurisdiction can be subject to judicial review, and in this case the Applicant main focus is that the Kadhis Court acted without Jurisdiction in issuing the impugned orders. The applicant is seeking two orders, certiorari and Prohibition. The Court of Appeal in ***Kenya National Examinations Council vs. Republic Ex parte Geoffrey Gathenji & 9 Others Nairobi Civil Appeal No. 266 of 1996 [1997] eKLR*** stated that:

"...Only an order of certiorari can quash a decision already made and an order of certiorari will issue if the decision is without jurisdiction or in excess of jurisdiction, or where the rules of natural justice are not complied with or for such like reasons..."

31. The Applicant has submitted that the jurisdiction of the Kadhi's court is limited by Article 170(5) of the Constitution of Kenya to determination of questions of Muslim law relating to personal status, marriage, divorce or inheritance in proceedings but does not have the jurisdiction to determine matters relating to custody and maintenance of children**.**

32. This Court as cited by the Applicant in ***ABMM vs SMY & Another (2019) eKLR*** found that the jurisdiction of the Kadhi's court is limited by Article 170(5) of the Constitution of Kenya to determination of questions of Muslim law relating to personal status, marriage, divorce or inheritance in proceedings in which all the parties profess the Muslim religion and submit to the jurisdiction of the Kadhi's court, therefore if a party challenges the jurisdiction on an issue such a as the custody and maintenance of children then its Jurisdiction is denied.

33. In view of the above, it is finding that the grounds upon which the instant application as argued by the applicants meets the grounds upon which a court can issue Judicial Review Orders, in this case where a body or tribunal has acted without jurisdiction.

b) Whether the application is time barred:

34. The Respondents have argued that the instant application seeking a prayer of Certiorari cannot stand as it has been filed over six months after the delivery of the decision in breach if the law.

35. Section 9 (3) of the Law reform Act provides as follows: -

"In the case of an application for an order of certiorari to remove any judgment, order, decree, conviction or other proceedings for the purpose of its being quashed, leave shall not be granted unless the application for leave is made not later than six months after the date of that judgment, order, decree, conviction or other proceeding or such shorter period as may be prescribed under any written law; and where that judgment, order, decree, conviction or other proceeding is subject to appeal, and a time is limited by law for the bringing of the appeal, the court or judge may adjourn the application for leave until the appeal is determined or the time for appealing has expired."

36. The above provision is replicated in Order 53 Rule 2 of the Civil Procedure Rules, 2010 in the following words:-

"Leave shall not be granted to apply for an order of certiorari to remove any judgment, order, decree, conviction or other proceeding for the purpose of its being quashed, unless the application for leave is made not later than six months after the date of the proceeding or such shorter period as may be prescribed by any Act; and where the proceeding is subject to appeal and a time is limited by law for the bringing of the appeal, the judge may adjourn the application for leave until the appeal is determined or the time for appealing has expired."

37. The Applicant is arguing that the proceedings of the matter began on 3/9/2018 and the jurisdictional error arose on 20th June, 2019, that is when notice to show cause was, he issued after he failed to comply with the Kadhis Court decision. It is also notable that there was no application for enlargement of time.

38. In the circumstances, it is my finding that Justice looks at both ways as the rules of procedure are meant to regulate administration of justice and are meant not to assist the indolent. Therefore, filing of an application outside the stipulated statutory timelines cannot be a mere procedural technicality curable by Article 159(2) (d) of the Constitution, and neither does Article 159(2) (d) oust mandatory provisions of the law which allows the application of any other written law with regard to the limitation of time for instituting judicial review proceedings. And consequently, the applicant application ought to fail for being time barred.

c) Whether this suit is bad in law under the doctrine of exhaustion.

39. Counsel for the Respondents cited section 9 (2) (3) and (4) of the Fair Administrative Action Act which provides that where a statute prescribes a procedure, it must be followed. The Respondents herein allege that the applicant has not exhausted the available internal mechanisms provided for in law before filing the instant application for Judicial Review. The ex parte applicant rejoinder on this particular issue is that there is no alternative remedy available to the ex parte applicant, hence, this court ought to allow the application.

40. The Court of Appeal in ***Speaker of National Assembly vs Karume (1992) KLR 21*** noted in this regard that: -

> **"Where there is a clear procedure for redress of any particular grievance prescribed by the Constitution or an Act of Parliament, that procedure should be strictly followed. Accordingly, the special procedure provided by any law must be strictly adhered to since there are good reasons for such special procedures."**

41. It is trite that the question of exhaustion of administrative remedies arises when a litigant, aggrieved by an agency's action, seeks Judicial Review of that action without pursuing available remedies before the agency itself. The court must decide whether to review the agency's action or to remit the case to the agency, permitting Judicial Review only when all available administrative proceedings fail to produce a satisfactory resolution.

42. Section 9 (2) of the Fair Administrative action Act provides that the High Court or a subordinate court under subsection (1) shall not review an administrative action or decision under this Act unless the mechanisms including internal mechanisms for appeal or review and all remedies available under any other written law are first exhausted.

43. Additionally, section 9(3) of the Fair Administrative Action provides that "the High Court or a subordinate Court shall, if it is not satisfied that the remedies referred to in sub-section (2) have been exhausted, direct that applicant shall first exhaust such remedy before instituting proceedings under sub-section (1).

44. This Doctrine was justified by the Court of Appeal in ***Geoffrey Muthinja Kabiru & 2 Others vs Samuel Munga Henry & 1756 Others (2015) eKLR*** when it held:-

> **"It is imperative that where a dispute resolution mechanism exists outside courts, the same be exhausted before the jurisdiction of the Courts is invoked. Courts ought to be fora of last resort and not the first port of call the moment a storm brews…. The exhaustion doctrine is a sound one and serves the purpose of ensuring that there is a postponement of judicial consideration of matters to ensure that a party is first of all diligent in the protection of his own interest within the mechanisms in place for resolution outside the courts...This accords with Article 159 of the Constitution which commands Courts to encourage alternative means of dispute resolution."**

45. It is therefore apparent from the above that a party should approach the court for judicial review as a last resort after exhausting the other available mechanisms in which his dispute would be resolved and approach the court as the last resort. In this case, the available mechanism for the applicant under the law is to approach the High Court, which he has done and therefore in my view the doctrine of exhaustion cited herein does not apply in the circumstances of this case. The Constitution and the Kadhi's Court Act provides that appeals arising from the Court are filed in the High Court.

CONCLUSION

46. In Conclusion, it is my finding based on the foregoing that the instant appeal fails for the reason that the orders sought to be quashed were issued more than a year after it was issued, whereas the law as elaborated above provides that such Judicial review orders ought to be sought within six months after the decision is rendered. In sum, this application fails for being time barred and therefore the same is dismissed with no orders as to costs.

DATED, DELIVERED AND SIGNED AT GARISSA THIS 12TH DAY OF NOVEMBER, 2019.

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C. KARIUKI

JUDGE