



**REPUBLIC OF KENYA**

**IN THE HIGH COURT OF KENYA**

**AT NAIROBI**

**JUDICIAL REVIEW MISCELLANOUS APPLICATION NO. 152 OF 2018**

**IN THE MATTER OF AN APPLICATION FOR JUDICIAL REVIEW**

**AND**

**IN THE MATTER OF THE CHILDREN ACT 2001**

**AND**

**IN THE MATTER OF ARTICLES 1,10, 47, 50, 53, 159 AND**

**160 OF THE CONSTITUTION OF KENYA**

**AND**

**IN THE MATTER OF THE FAIR ADMINSTRATIVE ACTION ACT**

**BETWEEN**

**SIMON MUSYOKA KAINGO.....APPLICANT**

**VERSUS**

**HON. Z.W. GICHANA, SENIOR RESIDENT**

**MAGISTRATE NAIROBI CHILDREN COURT....1<sup>ST</sup> RESPONDENT**

**THE ATTORNEY GENERAL.....2<sup>ND</sup> RESPONDENT**

**AND**

**LILIAN NJOKI KIAMBUTHI.....INTERESTED PARTY**

**RULING**

**The Application**

The application before the Court is a Chamber Summons dated 10<sup>th</sup> April 2018 filed in Court on the same date. This Court, at a hearing held on 19<sup>th</sup> April 2018, directed that the said Chamber Summons be canvassed *inter partes*, and gave various direction towards this end. The hearing of the Chamber Summons was subsequently held on 3<sup>rd</sup> May 2018 by way of oral submissions. The Applicant is seeking the following substantive orders from the Court:

- a) That leave is granted to the Applicant to apply for an order of Certiorari to bring into the Court and be quashed the

orders issued on the 8<sup>th</sup> March 2018 and 13<sup>th</sup> March 2018 directing that the Applicant complies with interim orders made on 6<sup>th</sup> February 2018 and the notice to show cause dated 21<sup>st</sup> March 2018 and issued pursuant to the orders aforesaid.

b) That leave is granted to the Applicant to apply for an order of Mandamus directed to the 1<sup>st</sup> Respondent to set down for hearing the Applicant's application dated 19<sup>th</sup> February 2018 that sought to set aside the orders issued on 6<sup>th</sup> February 2018.

c) That the leave is granted do operate as a stay of the interim orders made on 6<sup>th</sup> February 2018, 8<sup>th</sup> March 2018 and 13<sup>th</sup> March 2018 by the 1<sup>st</sup> Respondent directing the Applicant to pay accumulated rent arrears on the family home and the notice to show cause dated 21<sup>st</sup> March 2018.

The application was supported by a Statutory Statement dated 10<sup>th</sup> April 2018, and a verifying and further affidavit sworn by the Applicant on 10<sup>th</sup> April 2018 and 18<sup>th</sup> April 2018 respectively. The main grounds for the application in summary are that the 1<sup>st</sup> Respondent has denied the Applicant audience with respect to his application dated 19<sup>th</sup> February 2018, and has not set the said application for hearing, and has instead directed the Applicant to comply with interim orders she issued on 6<sup>th</sup> February 2018.

The interim orders issued by the 1<sup>st</sup> Respondent on 6<sup>th</sup> February 2018 were in favour of the Interested Party, and directed the Applicant to pay accumulated rent arrears on the family home. The orders were made pursuant to an application filed on 2<sup>nd</sup> February 2018 by the Interested Party in Children's Cause No. 143 of 2018 at the Children's Court at Milimani Law Courts. The Applicant's application dated 19<sup>th</sup> February 2018 is seeking to *inter alia* stay, vary and/or set aside the interim orders issued by the 1<sup>st</sup> Respondent on 6<sup>th</sup> February 2018.

The Applicant claims that when his application of 19<sup>th</sup> February 2018 came up for hearing on 8<sup>th</sup> March 2018, the 1<sup>st</sup> Respondent denied the Applicant audience and directed that he complies with the interim orders of 6<sup>th</sup> February 2018, and that further, on 13<sup>th</sup> March 2018 the 1<sup>st</sup> Respondent reiterated her directions and did not set the Applicant's application for hearing. The Applicant also claimed that the Interested Party had since then served him with a Notice to Show Cause dated 21<sup>st</sup> March 2018 which he attached, and which he claimed was coming up for hearing on 13<sup>th</sup> April 2018.

These grounds were reiterated by the Applicant during the hearing of the present application before this Court. Reliance was placed by the Applicant on Articles 47 and 50 of the Constitution on his fundamental right to be heard and the application of the principles of natural justice. The Applicant also cited the Court of Appeal decision in **Kiai Mbaki & 2 Others vs Gichuhi Macharia & Another (2005) e KLR** in this regard. The Applicant in addition detailed out the issues in the applications before the 1<sup>st</sup> Respondent in his pleadings and oral submissions, which are not within the province of this Court as a judicial review Court, and which I shall therefore not delve into.

The Respondents did not respond to the Chamber Summons. The Interested Party on her part filed a Replying Affidavit she swore on 30<sup>th</sup> April 2018, in which she detailed out the proceedings before the 1<sup>st</sup> Respondent. She averred and submitted that from the proceedings it was evident that the Applicant has not been denied audience as alleged, but that the Court was awaiting DNA results so as to make appropriate directions in the matter, and there is thus no need to have this Court issue an order of mandamus.

The Interested Party also deponed and submitted as to the merits of her application before the 1<sup>st</sup> Respondent and the interim orders issued on 6<sup>th</sup> February 2018, which is not an issue in these proceedings, and which I shall also not dwell upon.

### **The Determination**

The applicable law on leave to commence judicial review is *Order 53 Rule 1* of the Civil Procedure Rules, which provides that no application for judicial review orders should be made unless leave of the court was sought and granted. On whether leave once granted should operate as a stay, Order 53 Rule 1(4) of the Civil Procedure Rules further provides as follows:

**“The grant of leave under this rule to apply for an order of prohibition or an order of certiorari shall, if the judge so directs, operate as a stay of the proceedings in question until the determination of the application, or until the judge orders otherwise.”**

The reason for the leave was explained by Waki J. (as he then was), in **Republic vs. County Council of Kwale & Another Ex Parte Kondo & 57 Others, Mombasa HCMCA No. 384 of 1996** as follows:

**“The purpose of application for leave to apply for judicial review is firstly to eliminate at an early stage any applications for judicial review which are either frivolous, vexatious or hopeless and secondly to ensure that the applicant is only allowed to proceed 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 and 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... Leave may only be granted therefore if on the material available the court is of the view, without going into the matter in depth, that there is an arguable case for granting the relief claimed by the applicant the test being whether there is a case fit for further investigation at a full *inter partes* hearing of the substantive application for judicial review. It is an exercise of the court's discretion but as always it has to be exercised judicially”.**

The substantive issues that therefore require to be determined is whether an arguable case has been shown for leave to be granted to the

Applicant to commence judicial review proceedings, and if so whether the leave should operate as a stay.

It is evident that the Applicant is directly affected by the decisions of the 1<sup>st</sup> Respondent as he is a party in the proceedings before the said Respondent, and subject to certain orders issued as a result of the said proceedings. He therefore has *locus* to bring the present proceedings. As regards whether the Applicant has an arguable case, this Court directed the Applicant to file a further affidavit annexing the proceedings before the 1<sup>st</sup> Respondent, so as to be able to establish the procedure employed by the 1<sup>st</sup> Respondent.

After a perusal of the said proceedings, I note that on the impugned decision of 8<sup>th</sup> March 2018, the Applicant's advocate was given audience on that day by the 1<sup>st</sup> Respondent, and he submitted that there were two pending applications dated 1<sup>st</sup> February 2018 (by the Interested Party) and 19<sup>th</sup> February 2018 (by the Applicant). The said Advocate further submitted that the Interested Party had not filed a response to the Applicant's application. Both parties were then directed by the 1<sup>st</sup> Respondent to file their responses to the pending applications that were before the 1<sup>st</sup> Respondent; to arrange for paternity tests for their youngest child; and the interim orders were extended. The matter was given a mention date of 13<sup>th</sup> March 2018.

On 13<sup>th</sup> March 2018, the proceedings show that the Applicant's Advocate was again given audience by the 1<sup>st</sup> Respondent, and he submitted that the parties had agreed on how the paternity tests were to be done, and asked to be heard on the nearest date on their application to discharge the orders. The 1<sup>st</sup> Respondent then ordered that the Applicant to comply with the interim orders and that the parties would have their day in Court. The consent as to the paternity test was adopted and a further mention date of 9<sup>th</sup> April 2018 was given. The matter was next mentioned by the 1<sup>st</sup> Respondent on 13<sup>th</sup> April 2018, when a mention of 22<sup>nd</sup> May 2018 was given, upon the 1<sup>st</sup> Respondent being informed that the present judicial review proceedings have been filed.

It is evident that the Applicant was given audience by the 1<sup>st</sup> Respondent on 8<sup>th</sup> and 13<sup>th</sup> March 2018, and there is no sufficient reason established as to why the decision of 8<sup>th</sup> March 2018 and 13<sup>th</sup> March 2018 should be brought up for quashing. In any event, the Applicant has not extracted and attached the decisions of 8<sup>th</sup> March 2018 that he seeks to quash, and only attached the orders issued on 13<sup>th</sup> March 2018.

In addition, the arguments raised by the Applicant mostly turn on whether the interim orders of 6<sup>th</sup> February 2018 that were the subject of the 1<sup>st</sup> Respondent's decisions of 8<sup>th</sup> March 2018 and 13<sup>th</sup> March 2018 are merited. This Court is in this respect mindful of the purpose of judicial review proceedings, which is to address defects in decision making processes by public bodies, and not to deal with the merits of the case.

It therefore follows that where an Applicant brings judicial review proceedings with a view to determining contested matters of facts and in effect urges the Court to determine the merits of two or more different versions presented by the parties, the Court would not have jurisdiction in a judicial review proceeding to determine such a matter. In my view, this is one such matter.

As regards the prayer for leave to seek orders of mandamus, the proceedings attached by the Applicant show that the 1<sup>st</sup> Respondent is willing to hear the parties, and was in the process of giving directions on the applications pending before it and had issued mention dates for this purpose, including on the Notice to Show Cause dated 21<sup>st</sup> March 2018. The Applicant clearly thus still has an opportunity to canvass his application dated 19<sup>th</sup> February 2018 and Notice to Show Cause dated 21<sup>st</sup> March 2018 before the 1<sup>st</sup> Respondent, which is the proper forum to address the issues and concerns he has raised as regards the interim orders issued on 6<sup>th</sup> February 2018.

It is must also be emphasized in this regard that it is neither the objective nor the purpose of judicial review proceedings to usurp the role of subordinate courts and tribunals that are properly seized of matters before them. On the contrary, judicial review proceedings are generally a course of last resort, and no exceptional circumstance has been shown by the Applicant to depart from the provisions of section 9(2) and(3) of the Fair Administrative Act which requires exhaustion of all alternative remedies, including the remedies available to him before the 1<sup>st</sup> Respondent.

I thus find that the Applicant has not established an arguable case for leave to commence judicial review proceedings to be granted as sought.

In the premises, I find that the Applicant's Notice of Chamber Summons dated 10<sup>th</sup> April 2018 is not merited, and it is accordingly dismissed with costs to the Interested Party.

Orders accordingly.

**DATED AND SIGNED AT NAIROBI THIS 16<sup>TH</sup> DAY OF MAY 2018**

**P. NYAMWEYA**

**JUDGE**

**DELIVERED AT NAIROBI THIS THIS 17<sup>TH</sup> DAY OF MAY 2018**

**J. MATIVO**

**JUDGE**