REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT NAIROBI

JUDICIAL REVIEW APPLICATION NO. 654 OF 2017

IN THE MATTER OF AN APPLICATION FOR ORDERS OF CERTIORARI AND PROHIBITION

BETWEEN

REPUBLIC..…APPLICANT

AND

THE CHIEF MAGISTRATES COURT AT NAIROBI…......1ST RESPONDENT

G N M (Suing on her own behalf and as Mother and Next

Friend of C G G (Minor)..2ND RESPONDENT

V W G..3RD RESPONDENT

EXPARTE APPLICANT: J G K

RULING

Introduction

1. Johnson Githii Karanja, the ex parte Applicant herein (hereinafter the Applicant") initially filed a Chamber Summons application on 16th November 2017 for leave to commence judicial review proceedings against the Respondents herein. The 1st Respondent is the Chief Magistrates Court at Nairobi, and which is seized of Miscellanous Civil Application No. 537 of 2017 which was filed by the 2nd and 3rd Respondents as against the Applicant. The 2nd and 3rd Respondent are the wife and child of the Applicant respectively.

2. Leave to institute judicial review proceedings was granted to the Applicant by this Court (Odunga J.) on 20th November 2017, and was to operate as a stay of proceedings in Miscellaneous Civil Application No. 537 of 2017 in the 1st Respondent Court. The Applicant subsequently filed the substantive Notice of Motion application on 27th November 2017 as directed by the Court.

3. On 19th December 2017, the 2nd and 3rd Respondents filed a Notice of Motion of the same date, seeking orders that the Applicant furnish security for costs in the sum of Kshs 1,000,000/= for the protection of the 2nd and 3rd Respondents, arising from orders given by the 1st Respondent in Miscellaneous Civil Application No. 537 of 2017 on payment of their expenses by the Applicant. Upon

hearing the said application, Odunga J. granted orders on the 30th January 2018 varying the stay orders granted on 20th November 2017 to the extent that the Applicant pays to the 2nd and 3rd Respondent Kshs 100,000/= per month pending the hearing and determination of these proceedings with effect from 10th February 2018 and on or before the 10th of each month . Further, that in default the stay shall be vacated.

4. Being aggrieved by this ruling, the Applicant moved this Court by way of a Notice of Motion application dated 12th February 2018, which is the application that is before this Court for ruling. The Applicant seeks the following orders in the instant application:

a) That the part of the Order of the Honourable Justice Mr G.V. Odunga granted on 30th January 2018 varying the stay orders granted on 20th November 2017 and requiring the ex parte applicant to pay the 2nd and 3rd Respondents Kshs 100,000/= per month pending the hearing and determination of these proceedings be reviewed, varied and or/set aside pending the hearing and determination of this application

b) That part of the Order of the Honourable Justice G.V Odunga granted on the 30th January to the 3rd Respondent be set aside

c) That the Honourable court be pleased to re-instate the stay orders granted on 20th November 2017 to the ex parte applicant pending the hearing and determination of this proceedings

d) That cost of the application be provided for.

The Application

5. The application was supported by the grounds on its face together with the affidavit in support sworn by the Applicant on 12th February 2018. The Applicant's advocates on record, Joseph Kiarie and Company Advocates, also filed submissions in support of the application dated 21st May 2018. The Applicant avers that on the day the court granted the orders, the advocate who had conduct of the matter had moved from the law firm representing him without notice, and the said orders were granted to the 2nd and 3rd Respondents in the absence of himself and his advocates.

6. He contended that the 3rd Respondent is a woman of means, gainfully employed as an advocate of the High Court and that he is not a man of means and is unable to pay Kshs 100,000/= per month to the 2nd and 3rd Respondents. Further, that he has been paying school fees for the 2nd Respondent and has also been supporting the 2nd Respondent with money for the upkeep and maintenance,. The Applicant stated that he is a polygamous man, with three wives and six children, and that the 2nd Respondent should take up her share of parental responsibility.

7. It was the Applicant's submission that an examination of the 2nd and 3d Respondent's application shows that the 2nd and 3rd Respondents wanted him to furnish security, but later on deviated during the hearing and misled the court to believing that they were seeking the payment of monthly allowances leading to the Applicant being served with Court orders that were different from the ones sought in the application. Reliance was placed on the case of **Independent Electoral and Boundaries Commission and Another vs Stephen Ndambuki Muli & 3 Others, (2014) eKLR** for the proposition that parties are bound by their own pleadings. And there for the applicant and his firm of advocates on record were shocked to be served with orders totally different form the ones sought.

8. The Applicant further submitted that then effect of a party being condemned unheard have dreadful consequences especially when the same has been occasioned by his or her advocates, and that his right to fair hearing and legal representations were extinguished contrary to the rules of natural justice. The

decision in **Rajesh Rughanni vs Fifty Investments Limited & Another (2016) eKLR** was cited for the proposition that mistake of a counsel shall not be visited on the litigant.

9. Lastly, the Applicant relied on the Court of Appeal decision in **CMC Holdings v James Mumo Nzioka and 3 Others (2014) eKLR** that the discretion of the court of law has in deciding whether or not to set aside *ex parte* orders was meant to ensure that the litigant does not suffer injustice or hardship as a result of among other things an excusable mistake or error.

The Response

10. The application was opposed by the 2nd and 3rd Respondents through a replying affidavit sworn by the 2nd Respondent on the 16th February 2018 which was accompanied by submissions dated 1st August 2018 filed by their Advocates on record, Abdullahi & Associates. The 2nd and 3rd Respondents contend that the Applicant's allegations are baseless, untrue, actuated by malice, made in bad faith with the intention of defeating the purpose of the orders issued on the 30th January 2018. They stated that the Applicant is a man of means earning more than a 100,000/= a month as evidenced by a copy of his *mpesa* statement that was attached to the replying affidavit.

11. They refuted the allegation that the Applicant was not heard, before the orders were granted, and observed that on 15th January 2018, the applicant failed to make any payment in blatant disregard of the court orders, towards maintenance and upkeep of the child Further, that the Applicant's advocate had knowledge of the hearing of their application dated 19th December 2017, as his advocate who held brief, were present in court when the hearing, but when it was being heard on the 30th January 2017 they did not show up.

12. Furthermore, that whereas the Applicant contends that his advocate was sick, no evidence has been adduced to indicate so, and he did not seek an adjournment on the said date and failed to reply to their application. The 2nd and 3rd Respondents contended that the non- attendance of the Applicant's advocates, cannot be a basis for the setting aside of the orders issued by the court, when they and the minor continue to suffer. In addition, that that the Applicant has a separate recourse for professional negligence against the advocates mistake and failure to file defence in time, and will not suffer any prejudice if the orders are not stayed, unlike the 2nd and 3rd Respondents.

13. These averments were reiterated in the submissions filed by the 2nd and 3rd Respondents, and it was urged therein that the orders of 30th January 2018 were granted in the best interest of the minor, and AS the Applicant has not endeavoured to comply with them, he deserves no audience before the court. Reliance was placed on the cases of **J.M.A vs R.G.O (2015) e KLR** and **PAK vs SAK (2015) eKLR** in this regard. Further, that it has been held in various decisions that any order made in the interest of the minor ought not to be stayed. The decisions in **NM vs SUWM (2013) eKLR , F.W.N.M vs S.M.M (2014) eKLR** were also cited.

14. According to the 2nd and 3rd Respondents, this Court had jurisdiction to grant orders now impugned by the Applicant, and has wide unfettered discretion to grant the orders sought under Order 53 rules 1(3) and (4) of the Civil Procedure Rules.

15. Lastly, it was submitted by the 2nd and 3rd Respondents that whereas it was a general rule advocate's mistake should not be visited on the clients, sometimes client must bear the consequences of the choice of their counsel. They relied on the decision of **Cheraik Management limited vs National Social Security Services Fund Board of Trustees & Another (2012) eKLR** and **Josphat Nderitu Kariuki vs Pine Breeze Hospital Ltd (2006) eKLR** for this proposition.

The Determination

16. The applicable law on setting aside of orders is in the provisions of section 80 of the Civil Procedure

Act and Order 45 Rule 1 of the Civil Procedure Rules, which avail an opportunity to any person who feels aggrieved by a decree or order of the court to apply to have the said decree or order varied or set aside. Section 80 of the Civil Procedure Act provides as follows:

> **"Any person who considers himself aggrieved—**
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> **(*a*) by a decree or order from which an appeal is allowed by this Act, but from which no appeal has been preferred; or**
>
> **(*b*) by a decree or order from which no appeal is allowed by this Act, may apply for a review of judgment to the court which passed the decree or made the order, and the court may make such order thereon as it thinks fit."**

17. Order 45 Rule 1 of the Civil Procedure Rules elaborates on the grounds on which a judgment or decree can be set aside as follows:

> **" (1) Any person considering himself aggrieved—**
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> **(*a*) by a decree or order from which an appeal is allowed, but from which no appeal has been preferred; or**
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> **(*b*) by a decree or order from which no appeal is hereby allowed,**
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> **and who from the discovery of new and important matter or evidence which, after the exercise of due diligence, was not within his knowledge or could not be produced by him at the time when the decree was passed or the order made, or on account of some mistake or error apparent on the face of the record, or for any other sufficient reason, desires to obtain a review of the decree or order, may apply for a review of judgment to the court which passed the decree or made the order without unreasonable delay."**

18. I have considered the arguments made by both the Applicant and 2nd and 3rd Respondents. Two grounds raised by the Applicant fall within the provisions of Order 45 Rule 1 of the Civil Procedure Rules. The first is the allegation that the orders granted by this Court on 30th January 2018 differed materially from the orders sought by the 2nd and 3rd Respondents in their application dated 19th December 2017. I have perused the orders sought in the said application which were as follows:

> 1. "**The ex parte Applicant, Mr. J G K do furnish or cause to be furnished to this Honourable Court security of Costs in the sum of Kshs One Million (Kshs 1,000,000/=) by cash deposit or by bank guarantee issued by a reputable financial institution, to be deposited in this Court and to be held by the Court until this suit is heard and determined.**
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> **2. The said sums of money or bank guarantee shall be deposited or furnished within fourteen (14) days from the date of this ruling.**
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> **3. In default of compliance with the orders hereinabove by the Ex Parte Applicant, the Ex Parte Applicant shall forfeit the right to proceed and prosecute the suit or at all.**
>
> **4. Any other or further order the Honourable Court may deem just and fit to grant in the circumstances."**

19. There was thus a specific prayer made for other orders that the Court in its discretion deemed fit and just to grant, and the Court is expressly granted this discretion by section 3A of the Civil Procedure Act. It is also notable in this regard for that the decisions of the Court of Appeal in **National Bank of Kenya Ltd vs Njau, (1995 – 1998) 2 EA 249** which was also followed in the case of **Nyamogo vs Nyamogo Advocates vs Kogo, (2000) 1 EA 173**, was that an error on the face of the record should be an obvious and patent mistake, and not something which can be established by a long drawn process of reasoning on

points of which may conceivably be two opinions. There was no such obvious mistake in the orders granted by Odunga J., as the same were supported by the 2nd and 3rd Respondents' application and the law.

20. The second ground raised by the Applicant is that of being not afforded a hearing before the impugned decision was made, which would fall under the rubric of "other sufficient reason" for review of the decision. I however find the ground to be insufficient for three reasons.

21. Firstly, the Applicant does not contest that he was served with the Applicant's Notice of Motion dated 19th December 2017, and the record shows that his advocates attended Court on 19th December 2017 and 15th January 2018 to take directions on the hearing of the same. Secondly, the record also shows that the date of the hearing of 30th January 2018 was given and agreed upon when the Applicant's advocate was present in Court on 15th January 2018. The hearing of 30th January 2018 and orders granted on that date were therefore not *ex parte* as alleged by the Applicant.

22. Lastly, as the Applicant does not dispute that the said Notice of Motion affected the interests and welfare of his minor child, under Article 53(2) of the Constitution and section 4 of the Children's Act, the minor's best interests are paramount and take precedence over the Applicant's interest and any prejudice he may suffer. This position has been restated in various judicial authorities, including the ones relied upon by the 2nd and 3rd Respondents.

23. In light of the foregoing findings, the Applicant's Notice of Motion dated 12th February 2018 is not merited, and is hereby dismissed with costs to the 2nd and 3rd Respondents.

24. Orders accordingly**.**

DATED AND SIGNED AT NAIROBI THIS 3RD DAY OF OCTOBER 2018

P. NYAMWEYA

JUDGE