



REPUBLIC OF KENYA
IN THE HIGH COURT OF KENYA
AT MOMBASA
CONSTITUTIONAL & JUDICIAL REVIEW DIVISION
MISCELLANEOUS APPLICATION NO. 10 OF 2015

IN THE MATTER OF: AN APPLICATION BY M N K FOR JUDICIAL REVIEW ORDERS OF
CERTIORARI

AND

IN THE MATTER OF: THE CONSTITUTION OF KENYA, THE JUDICATURE ACT, THE
MAGISTRATE'S COURT ACT, CHILDREN'S ACT, MARRIAGE ACT, ENVIRONMENT AND
LAND COURT ACT

BETWEEN

REPUBLIC.....APPLICANT

VERSUS

HON. B. KOECH, THE SENIOR RESIDENT MAGISTRATE

MOMBASA.....RESPONDENT

AND

1. Z H

2. K H K.....INTERESTED PARTIES

RULING

1. By a Notice of Motion dated 16th April, 2016 and filed on the same date the ex parte Applicant sought a host of orders -

(1) An order of certiorari to issue to remove to this Honourable Court for purposes of quashing forthwith the proceeding, pleadings, decisions/rulings and orders of 5th December, 2014, 11th December, 2014, 7th January, 2015, 8th January, 2015, and subsequent orders in MOMBASA CHILDREN'S CASE NO. 392 of 2014.

(2) That upon quashing the proceedings, pleadings, decisions/rulings and orders of 5th December, 2014,

11th December, 2014, 7th January, 2015, 8th January, 2015, and subsequent orders in MOMBASA CHILDREN'S CASE NO. 392 OF 2014; this Honourable court does make the following further orders in order to cure the mischief and damage caused by the orders issued in the Children Court:-

(a) A declaration that the Applicant is the lawful and absolute owner of the land known as L.R. Number [particulars withheld] (original Number Section [particulars withheld]/MN) Grant Number C.R. [particulars withheld] together with all buildings and structures erected hereon.

(b) An order of vacant possession of all that parcel of land known as L.R. Number [particulars withheld] (Original Number Section [particulars withheld]/MN) Grant Number C.R. [particulars withheld].

(c) An order of eviction of the First Interested Party together with her servants, workmen, agents, heirs, personal representatives or otherwise from the said land known as L.R. Number [particulars withheld] (Original Number Section [particulars withheld]/MN) Grant Number C.R. [particulars withheld].

(d) An order of permanent injunction do issue to restrain the First Interested by herself, her servants, workmen, agents, heirs, personal representatives or otherwise howsoever from dealing with, purporting to enter, access, remain on, getting ingress into, erecting any structures thereon or trespassing into or from in any way whatsoever and howsoever interfering with the Applicant's peaceful possession and enjoyment of the said land known as L.R. Number [particulars withheld] (Original Number Section [particulars withheld] /MN) Grant Number C.R. [particulars withheld].

(e) Any other relief the court deems fit to grant.

(3) Costs of the entire proceedings.

2. The Notice of Motion (hereinafter referred to as "*the Application*") was supported by the Statutory Statement and Affidavit Verifying the Facts of the Applicant both dated 14th April, 2015, the submissions of counsel for the Applicant dated 26th October, 2015 and filed on 27th October, 2015 and the cases cited in the said submissions.

3. The Applicant's case is premised upon the orders of the trial court (the Respondent herein), restoring the First Interested Party to the occupation of part of the matrimonial home, known as LR Number [particulars withheld] (Original Number Section [particulars withheld]/MN), Grant Number LR [particulars withheld] (the suit property) which order, the Applicant contends was issued without jurisdiction, and therefore seeks orders of certiorari, and consequential orders regarding the ownership of the suit property.

4. The Application was however opposed by the First Interested Party through her Replying Affidavit sworn and filed on 8th May, 2015 and stating *inter alia* that the trial court had the necessary jurisdiction to issue the orders made on 5th December, 2014 allowing the Interested Party's daughter to reside in the suit property and restrained the Second Interested Party from evicting the Interested Party and her child, aged 7 years from the suit property.

5. The facts herein are not denied. The First and Second Interested Parties were husband and wife, having contracted a marriage under Sharia Law. Their marriage was blessed with a child, a daughter aged seven (7) at the commencement of the proceedings herein. It is also a common fact that in the course or subsistence of that marriage the Second Interested Party fell in love with the ex parte Applicant, and had the suit property transferred to the ex parte Applicant. All this was of course done behind the back of the wife, the First Interested Party. The Second Interested Party even proceeded to file a Divorce Cause, KC DIV. CA NO. 2 of 2015 at Mombasa seeking dissolution of the marriage between him and the First Interested Party. That Divorce Cause is pending determination.

6. In light of the Divorce Cause, the Second Interested Party allegedly neglected the child, and the

First Interested Party filed Tononoka Children Court Case No. 392 of 2014, and proceeded to obtain the orders the subject of the proceedings herein. The question is whether the ex parte Applicant is entitled to the orders herein, and in particular the order of **certiorari** upon which the other consequential orders are sought.

7. In answer to this question counsel for the ex parte Applicant argued *inter alia*, that the main issue in controversy between the parties in Tononoka Children Court Case No. 392 of 2014 is legal custody, care, and control of the minor **H S**, and maintenance of the First Interested Party and the said minor. Counsel argued that by granting the orders in question, the Respondent had assumed the jurisdiction of the Environment and Land Court, and urged the court to so find and hold.

8. Counsel for the First Interested Party argued to the contrary. The Attorney-General who entered an appearance on behalf of the Respondent held the view that the contest was between the ex parte Applicant and the Interested Parties. The Second Interested Party took no part in these proceedings as he was said to be out of jurisdiction.

9. The starting point in determining this application lies in restating the principles of judicial review. I will do so by making reference to the decision of Lord Diplock in the case of the **CIVIL SERVANTS UNION VS. THE MINISTER FOR CIVIL SERVICE [1985]AC** where the Judge said –

“Judicial review has, I think developed to a stage today when one can conveniently classify into three heads the grounds upon which administrative action is subject to control by judicial review. The first ground I would call “illegality” the second, “irrationality”, and the third procedural “impropriety”. By illegality as a ground for judicial review I mean that the decision maker must understand correctly the law that regulates his decision-making power and must give effect to it.... By “irrationality” I mean what can now be succinctly referred to as “Wednesbury unreasonableness”. It applies to a decision which is so outrageous in its defiance of logic or accepted moral standards that no sensible person who had applied his mind to the question to be decided could have arrived at it. I have described the third as “procedural impropriety”, rather than failure to observe rules of natural justice or failure to act with procedural fairness towards the person affected by the decision.”

10. There are many other cases in the Kenya Law Reports on this subject. I will in this instance make reference to the decision of the Court of Appeal in **REPUBLIC VS. KENYA REVENUE AUTHORITY, ex parte YAYA TOWERS LIMITED [2008] eKLR**, where the court said –

“... 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. It is important to remember in such case that the purpose of the remedy of judicial review is to ensure that the individual is given fair treatment by the authority to which he/she has been subjected and that it is no part of that purpose to substitute the opinion of the judiciary or that of individual judges for that of the authority constituted by law to decide the matter in question.”

11. As stated in the decision in **Civil Servants Union vs. The Minister for Service** (supra), the remedy of judicial review and in particular, the remedy of **certiorari**, is founded upon the three “I’s”, “illegality”, “irrationality” and “procedural impropriety”, all summed in the doctrine of **Ultra vires**, and is intended and meant to correct the various improprieties which may be committed by those entrusted with the exercise of public authority. The **Yaya Centre** case (supra) expanded the Lord Diplock three “I’s” into –

- (i) abuse of discretion;
- (ii) irrationality;
- (iii) excess of jurisdiction;

- (iv) improper motives;
- (v) failure to exercise discretion;
- (vi) abuse of the rules of natural justice;
- (vii) fettering discretion;
- (viii) error of law.

12. In **REPUBLIC VS. ANTI-COUNTERFEIT AGENCY & 2 OTHERS, ex parte SURGIPHARM LIMITED [2011] eKLR** referring to Halsbury's Laws of England, 4th Edition Vol. III paragraph 12 at page 270, the court said –

“The remedies of quashing orders (formerly known as orders of certiorari), prohibiting orders (formerly known as orders of prohibition), mandatory orders (formerly known as orders of mandamus) ... are all discretionary. The court has a wide discretion whether to grant relief at all and if so, what form of relief to grant. In deciding whether to grant relief the court will take into account the conduct of the party applying, and consider whether it has not been such as to disentitle him to relief. Undue delay, unreasonable or unmeritorious conduct, acquiescence in the irregularity complained of or waiver to the right to object may also result in the court declining to grant relief.”

13. The application herein is essentially based on the ground that the orders complained of were issued in excess of or without jurisdiction of the Children Court, as such court has no jurisdiction to issue orders concerning proprietary or rights to ownership or title to land.

14. On this issue, the Children Court itself acknowledged that it had no jurisdiction to make orders regarding ownership of the suit land, but that it had power or jurisdiction to issue orders in relation to housing for the child, and ordered parties to seek relief over ownership rights at the appropriate forum.

15. The issue then becomes whether the order granting shelter or housing for the child, and its mother, the First Interested Party was *ultra vires*, the jurisdiction of the Children Court. With respect to contrary opinion, I am of the firm opinion that the orders made by the Children Court, were within (*intra vires*), her jurisdiction. The reasons are not far to find. **Firstly**, the title or preamble to the Children Act (Cap 141, Laws of Kenya) sets out the purpose of the Act –

“Act of Parliament to make provision for parental responsibility, fostering, adoption, custody, maintenance, guardianship care and protection, to make provision for the administration of children's institutions; to give effect to the principles of the convention on the rights of the child and the African Charter on the Rights and Welfare of the child and for connected purposes.”

16. **Secondly**, whereas Section 73 of the Children Act, establishes the Children Court, Section 76(1) of the Act confers upon that court a wide discretion –

“76(1) ...Where a court is considering whether or not to make one or more orders under this Act with respect to a child, it shall not make the order or any other orders unless it considers that doing so would be more beneficial to the welfare of the child than making the order at all.”

17. **Thirdly**, Article 3(1) of the Convention on the Rights of the Child is the key provision on the principle of best interests of the child, and reads as follows –

“In all actions concerning children, whether undertaken by public or private social welfare institutions, courts of law, administrative authorities or legislative bodies, the best interests of the child shall be a primary consideration.”

18. **Fourthly**, Article 16 of the Convention on the Rights of the Child 1989, provides for the child's right to legal protection against arbitrary and unlawful interference with his or her privacy, family, **home**, or correspondence and the right not to be subjected to "*unlawful attack*" on his or her honour or reputation.

19. **Fifth**, according to the Implementation Handbook, (on the Rights of the Child in the Administration of Justice), page 40 –

"... the child interests must be the subject of active consideration and it needs to be demonstrated that the children's interests have been explained and taken into account as primary consideration."

20. In this case, the court clearly expressed in its Ruling that it is not vested with jurisdiction to hear land matters, and thus being awake to the limits of its jurisdiction, the learned magistrate issued directions to the parties to refer the matter to the appropriate court. I find therefore no issue of jurisdiction in the contention that the learned magistrate dealt with matters outside her jurisdiction.

21. The orders made were in respect of the child whose home is the subject matter of the litigation before the Children Court, and before the Environment and Land Court, and will no doubt be affected by the Divorce proceedings before the Kadhi's Court. To protect the rights of the child to a home, and to ensure that the child's right to shelter was not violated, the learned magistrate properly exercised her discretion under Section 76 of the Children Act. That provision (*supra*) requires a court faced with making an order with respect to a child to make such an order as is more beneficial to the welfare of the child than making no order at all.

22. I therefore find no merit in the Notice of Motion dated and filed on 6th April, 2015, and dismiss the same with costs to the First Interested Party.

23. Having come to this conclusion, the other prayers sought in the Notice of Motion are equally dismissed as they are out of place in an Application for Judicial Review for being premised on merit and disputes over ownership of a matrimonial home (the suit property).

24. There shall therefore be orders accordingly.

Dated, Signed and Delivered in Mombasa this 13th day of May, 2016.

M. J. ANYARA EMUKULE, MBS

JUDGE

In the presence of:

Miss Ake holding brief Mr. Rajab for Interested Party

Mr. Makuto holding brief Miss Lutta for Respondent

Mr. S. Kaunda Court Assistant