Republic v Senior Resident Magistrate (Hon B Koech); HL (Ex parte Applicant); FL (Interested Party) (Miscellaneous Civil Application 3 of 2016) [2016] KEHC 4275 (KLR) (15 July 2016) (Ruling)

Republic v Senior Resident Magistrate Mombasa ex parte H L & another [2016] eKLR

Neutral citation: [2016] KEHC 4275 (KLR)

REPUBLIC OF KENYA

IN THE HIGH COURT AT MOMBASA

MISCELLANEOUS CIVIL APPLICATION 3 OF 2016

MJA EMUKULE, J

JULY 15, 2016

BETWEEN

REPUBLIC ..... APPLICANT

AND

THE SENIOR RESIDENT MAGISTRATE (HON B KOECH) ..... RESPONDENT

AND

HL ..... EX PARTE APPLICANT

AND

FL ..... INTERESTED PARTY

Children's Court has jurisdiction to uphold the rights of the child, regardless of whether the child resides outside the court's jurisdiction

The application revolved around the jurisdiction of the Children's Court. The instant court noted that section 80 of the Children Act, 2001, gave a general right of appeal from a decision of the Children's Court to the High Court, and from a decision of the High Court to the Court of Appeal. An appeal to the High Court was not a condition precedent to filing a judicial review application. The court further held that courts of Kenya had the jurisdiction to give effect to the rights of the child, irrespective of the origin of such child.

Reported by Nelson Tunoi & Silas Kandie

Jurisdiction *– jurisdiction of the Children's Court – jurisdiction to issue orders concerning children who were not Kenyans – whether the Children's Court had the jurisdiction to give effect to the rights of a child, irrespective of the origin of such child - Constitution of Kenya, article 53(2); Children Act, 2001, section 4(2).*

Judicial Review *– application for judicial review orders of certiorari and prohibition – application challenging the jurisdiction and the orders of the Children's Court – where the applicant sought leave to be exempted from*

the requirement to exhaust alternative remedies as required by provisions of the Fair Administrative Action Act - whether an appeal to the High Court was a condition precedent to filing a judicial review application against the decision of a Children's Court - Constitution of Kenya, article 165(6); Fair Administrative Action Act (cap 7L), section 7(2), 9 and 12; Children Act, 2001, section 80.

Brief facts

The applicant and the interested party were married in Dar-es-Salaam, Tanzania and were blessed with one issue (the child). They separated few years later and the interested party, a Kenyan citizen, moved to and resided in Mombasa, Kenya. By a settlement agreement dated December 20, 2010 between the applicant and the interested party, the interested party was granted sole primary custody of the child but that the interested party would consult the applicant if the child's school would be changed or if the interested party and the child were relocating from Mombasa. The settlement agreement granted the applicant access and visitation rights and the right to take the child during school holidays subject to prior agreement with the interested party, and that the interested party would be entitled to keep the child for at least two (2) weeks *per annum*, again subject to agreement on the appropriate dates when the child would be with the interested party.

The child went to stay with the applicant for the July, 2015 holidays, when the applicant made a decision that the child would remain with him, and proceeded to enroll the child at a school in Dar-es-Salaam. Few months later the child travelled alone to Mombasa from Dar-es-Salam to be with the interested party, expressing her desire not to return to Dar-es-Salaam since the applicant had subjected her to verbal abuse. The interested party filed proceedings at the Children's Court at Tononoka, Mombasa and by the orders of that court, the child was prevented from returning to her father or to her school in Dar-es-Salaam.

Consequently, the applicant filed a judicial review application before the High Court and sought for: leave to be exempted from the requirement to exhaust alternative remedies as required under section 9 of the Fair Administrative Action Act, 2015; an order of *certiorari* to quash the proceedings and orders issued on December 22, 2015; an order of prohibition prohibiting the Children's Court from further entertaining the proceedings in Children Case No. 496 of 2015; an order restoring *status quo ante;* and a declaration that the rights of *ex-parte* applicant and the intended interested party in so far as they related to the proceedings in Children Case No. 496 of 2015 be determined by the Tanzania Courts.

Issues

i. Whether the Children's Court had the jurisdiction to give effect to the rights of a child, irrespective of the origin of such child

ii. Whether an appeal to the High Court was a condition precedent to filing a judicial review application against the decision of a Children's Court

Held

1. A statute which restricted access to the courts must be construed strictly. What the Fair Administrative Action Act defined as administrative action, were decisions by authorities or quasi-judicial tribunals, which actions or decisions or omissions adversely affected the rights or interests of any person to whom the actions, decisions or omissions related. Such actions, decisions or omissions related to actions, decisions and omissions by such authorities as the rating authorities, rent tribunals, tax tribunals, and such like. With respect, they did not relate to judicial decisions by subordinate courts. Such actions or decisions were liable to appeal as of right or judicial review under article 165(6) of the Constitution in exercise of the court's supervisory jurisdiction and on the well-trodden common law grounds of illegality, irrationality or procedural impropriety (which had been given statutory underpinning by section 12 of the Fair Administrative Action. That Act was in addition to and not in derogation from the general principles of common law and the rules of natural justice), and the more extensive new statutory grounds set out in section 7(2) of the Fair Administrative Action Act.
2. Section 80 of the Children Act, 2001, merely gave a general right of appeal from a decision of the Children Court to the High Court, and from a decision of the High Court to the Court of Appeal.

An appeal to the High Court was not a condition precedent to filing a Judicial Review application. Consequently, under both article 165(6) of the Constitution and sections 7(2) and 12 of the Fair Administrative Action Act, the applicant had an unqualified right to commence judicial review proceedings. There was no need to seek exemption under section 9(4) of the said Act, to commence judicial review proceedings.

3. The Children Court Magistrate had the necessary jurisdiction to make the orders she made. The orders were in accord with the relevant law, the Children Act. The preamble to the Act provided that an Act of Parliament to make provision for parental responsibility fostering, adoption, custody, maintenance, guardianship, care and protection, to make provision for 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. Further, section 5 of the Children Act provided that no child shall be subjected to discrimination on the ground of origin, sex, religion, creed, custom, language, opinion, conscience, colour, social, political, economic, or other status, race, disability, tribe, residence or local connection**.**
4. Section 73 of the Children Act established the Children Court and section 76(1) of the Act conferred upon that Court a wide discretion. Section 76(1) provided that subject to section 4 where a court was considering whether to make one or more orders under the Act with reference to a child, it shall not make the order or any other orders unless it considered that doing so would be more beneficial to the welfare of the child than making no order at all.
5. The Courts of Kenya had the jurisdiction to give effect to the rights of the child, irrespective of the origin of such child. It did not matter that that child came from the howling sands and winds of the *Sahara* Desert, the depths of the *Congo* forests, the *Miombo* woodlands of Tanzania, the windswept *Drakensberg* mountains of the South of the continent, the steppes of outer *Mongolia* or the fringes of the world's oceans and seas, the Courts of Kenya would give shelter and succour to that child. Under the Constitution, the rights of the child were paramount. It would be unworthy of the Constitution if jurisdiction was denied to the Kenyan Courts.
6. The judicial review orders of *certiorari* and prohibition did not lie against the respondents. Thus the question of restorative orders to the *status quo ante* immediately prior to the grant of the order issued on December 22, 2015 did not arise. It was a matter that should be heard and determined in terms of section 4(4) of the Children Act, which provide that in matters of procedure affecting a child, the child should be accorded an opportunity to express his opinion, and that opinion should be taken into account as may be appropriate, taking into account the child's age and the degree of maturity.
7. A judicial review court was not the proper forum to hear and determine the evidence of the child. That was a question of merit, not process of decision-making. For instance the notice of motion dated and filed on May 12, 2016 seeking the production of the child before the court was incompetent because the judicial review court had no jurisdiction to hear evidence on merit and was a matter to be placed before the Children Court, and not the judicial review court.
8. The applicant had sought a declaration that the rights of the applicant and interested party, so far as they related to the matters in issue in the proceedings filed in the Children's Court Case at *Tononoka*, Mombasa, be determined by the Tanzania Courts. Having come to the conclusion that the Children Court at *Tononoka* had jurisdiction to determine matters of children, and the child in particular, and denied the orders of *certiorari* and prohibition, a declaration to the contrary would be a negation of those orders. In any event the matters before the Tanzania courts were divorce proceedings between the applicant and the interested party and had their own course to run. The instant court could not, therefore, issue any orders relating to that dispute.

Application dismissed.

Orders

Application dismissed with costs against the ex parte applicant; custody and welfare of the child to be determined by the Children's Court at Tononoka, Mombasa.

Citations

Cases

Kenya

1. *AOG v SAJ & another* Civil Appeal 188 of 2009; [2011] KECA 398 (KLR) - (Explained)
2. *Kenya School of Flying Ltd & another v Ace Ina Uk Ltd & another* Civil Case 542 of 2003; [2005] KEHC 2918 (KLR) - (Explained)
3. *Leisure Lodges Limited v Patcham Holdings Limited & Numised A.G* Civil Appeal 203 of 2009; [2016] KECA 790 (KLR) - (Explained)
4. *Owners of the Motor Vessel "Lillian S v Caltex Oil (Kenya) Ltd* Civil Appeal 50 of 1989; [1989] KECA 48 (KLR); [1989] KLR 1 - (Explained)
5. *Paulo Spiga & another v John Mkalasinga Khaminwa* Civil Suit 35 of 2009; [2011] KEHC 1608 (KLR) - (Explained)
6. *Raytheon Aircraft Credit Corporation & another v Air Al-Faraj Limited* [2005] KECA 312 (KLR) - (Explained)
7. *Republic v Attorney General & 4 others Ex-Parte Diamond Hashim Lalji and Ahmed Hasham Lalji* Miscellaneous Application 153 of 2012; [2014] KEHC 3713 (KLR) - (Explained)
8. *Roberta Macclendon Fonsille v James Otis Kelly III & 3 others* Civil Case 3727 of 1995; [2002] KEHC 671 (KLR) - (Mentioned)

United Kingdom

R v Panel on Take-overs and Mergers; Ex parte Datafin plc [1987] QB 815 - (Explained)

Regional Court

Karachi Gas Company Limited v Issac [1965] EA 42 - (Explained)

Texts

1. Gordon, R., (1996), *Judicial Review – Law and Procedure* University College, London, 1996, paragraph 2 - 033
2. Suppersone, M., & Gondie J., (Eds) (1992), *Judicial Review* Butterworth, 2nd Ed, chapter 3
3. United Nations Children's Fund (UNICEF) (2007), *Implementation Handbook (on the Rights of the Child in the Administration of Justice* UNICEF Regional Office for Europe: United Nations Children's Fund, 3rd Edn
4. William Wade, W., Forsyth, C., (Eds) (1994), *Administrative Law* Oxford: Oxford University Press 7th Edn p 712

Statutes

Kenya

1. Children Act (cap 141) sections 4, 5, 73, 76(1) - (Interpreted)
2. Children Act, 2001(Repealed) (cap 141) sections 4, 5, 73, 80, 76 - (Interpreted)
3. Civil Procedure Act (cap 21) section 6 - (Interpreted)
4. Civil Procedure Rules, 2010 (cap 21 Sub Leg) order 5, rule 21- (Interpreted)
5. Constitution of Kenya articles 22(3); 53(2); 165(6) - (Interpreted)
6. Fair Administrative Action Act (cap 7L) sections 2; 7 (2); 9 (4); 12 - (Interpreted)
7. Law Reform Act (cap 26) section 9(3) - (Interpreted)

Instruments

1. African Charter on the Rights and Welfare of the Child (ACRWC), 1990 article 16

2. United Nations Convention on the Rights of the Child (UNCRC), 1989 article 3(1)

Advocates

Miss Adagi holding brief Inamdar for Applicant
Mr. Makuto for Respondent
Miss Thongori for Respondent

RULING

Introduction

1. In order to better understand and appreciate the nature and complexity of the application herein, I find it appropriate to set out at the beginning of this ruling the *personae dramatis* in this matter and to also set out, albeit briefly the facts leading to the proceedings herein.

    (a) The parties

    (i) H L, the *ex parte* applicant, is a Canadian citizen and the child ("LL") the subject of the proceedings is also a Canadian citizen. So father and child are both citizens of Canada. Theapplicant lives and works for gain in Dar-es-Salaam, while the child at the time of the proceedings herein was attending [particulars withheld] School, Tanzania but had come to stay with the interested party.

    (ii) The interested party, the mother of the child is a Kenya citizen resident in Mombasa.

2. Prior to the proceedings filed by the interested arty in the Children's Court at Tononoka, Mombasa in Children Case No 496 of 2015, the child had been with the applicant, and was visiting the Interested Party over the Christmas vacation, and by virtue of the proceedings filed and the orders made by the Children's Court, the child has been prevented from returning to her father or to her school in Dar-es-Salaam.

The Application

3. Pursuant to leave granted to the *ex parte* applicant on January 11, 2016 counsel for the applicant filed on January 19, 2016 notice of motion of even date and sought the following orders –

    (1) that having regard to the exceptional circumstances of this matter, the court do exempt the applicant from any obligation to exhaust any statutory or other remedy before making this Application in terms of section 9(4) of the *Fair Administrative Action Act, 2015*;

    (2) that this court do grant –

        (i) an order of *certiorari* to remove into this court and quash the proceedings, the order issued on December 22, 2015 and/or any other consequential orders made in the Children's Court at Tononoka Mombasa in Children Case No 496 of 2015 between FL v HL;

        (ii) an order of prohibition prohibiting the Children's Magistrate Tononoka Children's Court from further entertaining the proceedings in the Children Case No 496 of 2015 between FL v HL;

(iii) an order restoring the status quo ante immediately prior to the grant of the said order issued on December 22, 2015;

(iv) an order declaring that the rights of the *ex parte* applicant and the intended interested party so far as they relate to the matters in issue in the proceedings filed in the Children's court at Tononoka Mombasa in Children Case No 496 of 2015 be determined by the Tanzania Courts.

(3) That the costs of this application be granted to the *ex parte* applicant.

4. The application was based upon the grounds on the face of it, the statutory statement attached to the chamber summons dated and filed on 8 January 2016 seeking leave of court to commence judicial review proceedings (being these proceedings), the affidavit Verifying the Facts sworn by the *ex parte* applicant on 8 January 2016, the supplementary affidavit of the applicant, the said HL, sworn on 24 March 2016 and filed on 8 March 2016. In addition to these pleadings, Mr. Inamdar, learned counsel for the Applicant made extensive submissions on the applicant's case. I will consider the applicant's case after setting out the basic positions of the respondent and the interested party.

5. The application was opposed by both the respondent and the interested party. The respondent's grounds of opposition dated 27 April 2016 were filed on 28 April 2016. I will refer to these while considering the submissions of counsel for the respondent.

6. The interested party's opposition was much more extensive. It comprised the replying affidavit of FL sworn and filed on February 8, 2016, the Further affidavit of FL sworn and filed on 8 April 2016, and the Supplementary Affidavit of FL sworn and filed on 13 May 2016 and introducing the Settlement Agreement dated 2 December 2010 between HL (the applicant) and F HL (NE), the interested party).

The *ex parte* Applicant's Case

7. The first leg of the applicant's counsel's submissions comprised of an attack on the Children's Court's jurisdiction. The applicant's case is largely based upon the contention that the Children's Magistrate (the respondent) erred in law and in fact in entertaining the proceedings and granting the orders issued on 22 December 2015, when it had no jurisdiction to do so. The applicant contends that the Children Court Magistrate had no jurisdiction because both the applicant and the child do not reside within the jurisdiction of the court, that is Kenya.

8. It was the *ex parte* counsel's further contention that the proceedings of the Children's Court fall within the parameters specified in order 5 rule 21 regarding the granting of leave to serve process on a foreign person residing outside the court's jurisdiction. Counsel contended that since order 5 of the *Civil Procedure Rules* has been incorporated into the *Children Act*, (cap 141, Laws of Kenya), the orders made by the Children Court Magistrate were made unprocedurally and unlawfully. This is particularly so, counsel contended, because leave to serve summons outside jurisdiction was duly sought after the orders itself had been issued by the Children's Court.

9. Consequently, counsel contended the Hon. Senior Resident Magistrate acted without jurisdiction or alternatively outside or in excess of statutory jurisdiction contrary to the said provisions of order 5 rule 21, and that the proceedings and orders issued on 22nd 21 December, 2015 are therefore incompetent, irregular, unlawful and/or null and void. In this regard counsel relied upon the decisions of the courts in *Karachi Gas Company Limited v Issac* [1965] EA 42 at 53 where Newbold, Ag VP said –

> " ... The two main issues which arise in this appeal are first, whether the Supreme Court had jurisdiction, and secondly, whether the contract was frustrated. As regards the first of these

issues the defendant was out of the jurisdiction and was neither domiciled nor ordinarily resident in Kenya. In such a case the courts of Kenya will not assume jurisdiction in relation to any matter arising out of contract unless the circumstances fall within the provisions of order 5 rule 21 of the Civil Procedure Rules (Relied) Rules 1948(K). This rule details the circumstances in which service of summons or a notice of summons may be allowed out of jurisdiction in order to give effect to the jurisdiction which the courts have assumed. In the case of a contract the courts of Kenya will assume jurisdiction, *inter alia*, if the contract is made in Kenya or if the proper law of the contract is Kenya law or if a breach is committed within Kenya..."

10. Counsel further relied on the cases of *Roberta Macclendon Fonsille v James Otis Kelly iii & others* [2002] eKLR, which case was also relied upon in the case of *Credit Corporation & another v Air Al-faraj Limited* [2005] eKLR.

12. It was also counsel's submission that the circumstances obtaining in this case do not fall within the provisions of order 5, rule 21 of the *Civil Procedure Rules* and the court could not exercise jurisdiction at all. Counsel relied on the case of *Leisure Lodges Limited v Patcham Holdings & another, consolidated with Numesid Ag v Patcham Limited & another* [2010] eKLR, where, following the decision in *Raytheon Craft Credit Corporation & another v Air-alfaraj (Limited)* (*supra*) where the court said. –

> "...the High Court assumes jurisdiction over persons outside Kenya by giving leave, on application by the plaintiff to serve summons or notice of summons, as the case may be, outside the country under order V rule 23 and after such summons are served in accordance with the machinery stipulated therein. In this particular case, as the USA is not a Commonwealth country, service on the first appellant if leave was given could only have been through diplomatic channels under rule 27 of order V."

13. Similar holding was made in *Kenya School Of Flying Limited and another v Ace Ina Uk Limited & another* [2005] eKLR.

13. In conclusion counsel argued that leave to serve summons out of jurisdiction should have been made on the outset and before orders were issued. It is what gives the court jurisdiction, and that issuance of orders involving the defendant were made when there was not even a party to the suit. Counsel relied on the case of *Paulo Spiga & another v John Mkalasinga* [2011] eKLR which followed the decision in the *Karachi Gas Company Limited* (*supra*). The proceedings and consequential orders were therefore a anullity, counsel contended.

Judicial Review

14. The second leg of the *ex parte* counsel's submissions related to the nature of judicial review and when the orders of certiorari and prohibition may be granted. On this limb counsel referred to the text, "*Judicial Review*" by Michael Suppersone QC and James Gondie QC, 1992 Edition Butterworth and in the particular chapter 3 thereof where the authors discuss the ambit of judicial review –

> "Judicial review is concerned with reviewing not the merits of the decision in respect of which the application for judicial review is made, but the decision-making process itself. In *Chief Of The North Wales Police v Evans*, Lord Brightman said –
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> > "Judicial review, as the words imply, is not an appeal from a decision, but a review of the manner in which the decision was made. He observed: Judicial review is concerned, not with the merits of the decision, but with the decision-making

process. Unless that restriction on the power of the court is observed, the court will, in my view, under the guise of preventing abuse of power, be itself guilty of usurping power."

15. In the same case, while commenting on the purpose of the remedy by way of judicial review under RSC Ord 53 Lord Hailsham said at page 1160 –

> " The remedy, vastly increased in extent, and rendered over a long period in recent years, of infinitely more convenient access than provided by the prerogative writs and actions for a declaration, intended to protect the individual against the abuse of power by a wide range of authorities, judicial, quasi-judicial, and, as would originally have been thought, when I first practised at the Bar, administrative. It is not intended to take away from those authorities the powers and discretions properly vested in them by law and to substitute the courts as the bodies making the decisions. It is intended that the relevant authorities use their powers in a proper manner."

16. The traditional test for determining whether a body of persons is subject to judicial review is the source of its power, that is, whether the power is derived from statute or prerogative. It is not the sole test however, and it may be helpful not just to look at the source of power, but at the nature of the power. For instance in *R v Panel on Take-overs and Mergers, ex parte Datafin PLC*, Lloyd LJ at 847 stated the position thus –

> " Of course the source of the power will often perhaps usually be decisive. If the source of power is a statute, or subordinate legislation under statute, then clearly the body in question will be subject to judicial review. If at the other end of the scale, the source of power is contractual, as is in the case of private arbitration, then clearly the arbitration is not subject to judicial review. *R v National Joint Council for the Craft of Dental Technicians (Dispute Committee, ex parte Neate* [1953]1QB 704.
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> But in between these extremes there is an area in which it is helpful to look not just at the source of the power but at the nature of the power. If the body in question is exercising public law functions, or if the exercise of its functions have public case law consequences, then that may be sufficient to bring the body within the reach of judicial review. ... the essential distinction, which runs through all the cases to which we referred is between a domestic or private tribunal on the one hand and a body of persons who are under some public duty on the other. Thus in *R v Criminal Injuries Compensation Board, ex parte Lain* [1967] 2QB 864, Lord Parker CJ, after tracing the developments of certiorari from its earliest days said at page 882 –
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> The only constant limits throughout were that the tribunal was performing a public duty. Private domestic tribunals have always been outside the score of certiorari since their authority is derived solely from contract, that is, from agreement of the parties concerned."

17. In summary, counsel for the *ex parte* applicant argued, the Children Court Magistrate acted in excess and outside its jurisdiction, and that to deny the Applicant the two orders sought is to grant the magistrate powers which it does not have. Counsel relied upon the decision of the court in *Owners of the Motor Vessel "lillian S" v Caltex Oil (Kenya) Limited* [1989] KLR I, which held that jurisdiction is everything without it, the court has no power to make one more step, and that where an issue of jurisdiction is raised, it must be determined immediately irrespective of the evidential material before the court. Counsel consequently urged that the entire proceedings before the lower court be quashed and the lower court be prohibited from conducting any further proceedings in this matter.

Restoration of Status Ante

18. Counsel further submitted that if the orders of certiorari and prohibition are granted, the court should proceed and make orders for restoration of the status ante, that is to say, that the dispute between the *ex parte* applicant and the interested party be determined by the courts of Tanzania. This submission was based upon the facts that the child, the subject matter of the proceedings herein was learning in Tanzania, and the divorce proceedings were seized by the courts of that country. Counsel for the *ex parte* Applicant contended that the lower court was misled, by the non-disclosure of the material facts, and there was no consideration of the welfare of the child, and in particular the Canadian Psychologist's Report was not considered, while the Report by the Mombasa based psychologist was perfunctory as it merely consisted of limited questions to the child.

Exemption from Alternative Remedies

19. Counsel sought to be exempted from leave to seek alternative remedies, under section 9(4) of the *Fair Administrative Action Act, 2015* on the grounds firstly that the *ex parte* applicant questioned the jurisdiction of the lower court to entertain these proceedings, hence he application for judicial review orders. Secondly, judicial review has much wider scope than in the Children Court. The applicant could as an alternative remedy have applied to set aside the proceedings and orders by the lower court, but that would have meant submission to the jurisdiction of the lower court which the *ex parte* applicant contests. Thirdly, counsel submitted, the *ex parte* applicant could have filed an appeal, but that this would have required an appeal under section 80 of the *Children Act*, and again submission to the jurisdiction of Children's Court are not automatic. In this regard counsel relied on the text *Judicial Review – Law and Procedure* by Richard Gordon QC visiting Professor in the Faculty of Laws, University College, London, 1996, paragraph 2-033 -

> "... the existence of an alternative remedy is not by itself, a ground for refusing relief. Such remedy may not be designed to achieve the same ends as judicial review. The right of appeal, for example, frequently relates to merits rather than legality. There are numerous instances where order 53 relief will be appropriate even if there is an independent remedy. Where however it is considered legally convenient to pursue an existing remedy judicial review may be refused. Section 9(3) of the *Law Reform Act* (cap 26, Laws of Kenya) reflects this thinking by providing that an application for leave may be adjourned if a right of appeal lies against an order, which is sought to be quashed by certiorari until the appeal is determined or the time limit for appeal has expired."

20. As stated by Richard Gordon (*supra*), at paragraph 6-012 –

> "...the conceptual difference between appeal and review is well established, yet is often overlooked. Essentially review is concerned with validity rather than merits; with the reasoning process rather than the correctness of the decision that has been reached... In *Chief Constable of the North Wales Police v Evans* (*supra*), Lord Brightman said ... judicial review, as the words imply, is not an appeal from a decision but a review of the manner in which the decision was made. ...the court sits in judgment not only on the correctness of the decision-making process but also on the correctness of the decision itself." (page 1174)

The Respondent's and Interested Party's Cases

21. I will consider the respondent's and the interested party's cases as one because Mr Makuto and Ms Thongori counsel for both the respondent and the interested party opposed every argument by the

applicant's counsel, or the applicant's case. I will therefore go straight into, I think the essential issues raised by the applicant's notice of motion. I will divide these into two aspects - (1) the procedural issues, and (2) the substantive issues or orders sought.

The Procedural Issues

22. On this limb, I will cover the applicant's case for leave to be exempted from the requirement to exhaust alternative remedies as required under section 9 of the *Fair Administrative Action Act, 2015* (No 4 of 2015) which provides –

> " 9(1) Subject to subsection (2), a person who is aggrieved by an administrative action may, without unreasonable delay, apply for judicial review of any administrative action to the High Court or to a subordinate court upon which original jurisdiction is conferred pursuant to article 22(3) of the *Constitution*.
>
> (2) The High Court or a subordinate court under sub-section (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.
>
> (3) 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)."

23. The limitation in my view against approaching the court for judicial review reliefs relates to an administrative action. Section 2 of the *Fair Administrative Action Act* defines "administrative action" as including –

> (i) the powers, functions and duties exercised by authorities or quasi-judicial tribunals; or
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> (ii) any act, omission or decision of any person, body or authority that affects the legal rights or interests of any person to whom such action relates.

24. I referred in paragraph 19 of this ruling to submissions as well as the authorities, relied upon by counsel for the applicant. I agree with submissions by counsel for the applicant that an appeal against the orders of the learned Magistrate would have amounted to submission to the jurisdiction of that court and against the applicant's cardinal ground that the Children Court Magistrate had no jurisdiction to entertain the proceedings. I also agree with counsel, and with the authors of *Wade on Administrative* (*op.cit)* that –

> " the long line of decisions brings out what the *dicta* ignore, namely that an appeal and review exist for different purposes, the first concerning merits and the second legality and that review of legality is the primary mechanism for enforcing the rule of law under the inherent jurisdiction of the courts. If an applicant can show illegality, it is wrong in principle to require him to exercise a right of appeal. Illegal action should be stopped in its tracks as soon as it is shown."

25. A statute which restricts access to the courts must be construed strictly. What the *Fair Administrative Action Act*, defines as "administrative action", are decisions by "authorities" or "quasi-judicial tribunals" which actions decisions or omissions adversely affect the rights or interests of any person to whom the actions, decisions or omissions relate. Such actions, decisions or omissions in my view relate

to actions, decisions and omissions by such authorities as, the rating authorities, the rent tribunals, the tax tribunals, and such like. With respect, they do not relate to judicial decisions by subordinate courts. Such actions or decisions are liable to appeal as of right or judicial review under article 165(6) of the *Constitution* in exercise of this court's supervisory jurisdiction and on the well-trodden common law grounds of illegality, irrationality or procedural impropriety (now also given statutory underpinning by section 12 of the *Fair Administrative Action Act*, (this Act is in addition to and not in derogation from the general principles of common law and the rules of natural justice), and the more extensive new statutory grounds set out in section 7(2) of the *Fair Administrative Action Act*.

26. Besides, section 80 of the *Children Act*, 2001, (No. 8 of 2001) merely gives a general right of appeal from a decision of the Children Court to the High Court, and from a decision of the High Court to the Court of Appeal. An appeal to the High Court is not a condition precedent to filing a judicial review application. Consequently, under both article 165(6) of the *Constitution* and sections 7(2) and 12 of the *Fair Administrative Action Act* 2015, the Applicant had an unqualified right to commence judicial review proceedings. I do not think there was need to seek exemption under section 9(4) of the said Act, to commence judicial review proceedings. The Applicant therefore succeeds on this procedural ground.

Of the Substantive Issues

(a) Jurisdiction

27. Learned counsel for the *ex parte* applicant spent considerable amount of time in arguing that the learned Children Court Magistrate had no power to assume jurisdiction over the respondent who was neither domiciled nor resided within the jurisdiction, not just of the courts of Kenya but of the Children Court in Kenya. Emphasis was placed upon essentially commercial cases involving persons resident out of jurisdiction on whom the court had no jurisdiction until, and unless a notice of summons under order V, rule 21 of the *Civil Procedure Rules 2010*, had first been served upon them, and in this particular case, the applicant. I have already referred to the cases of *Karachi Gas Company Limited v H. Issaq* (*supra*), and subsequent cases at paragraphs 9-14 inclusive of this Ruling. I agree with counsel for the *ex parte* applicant, and it is indeed trite law, that the courts of Kenya have no jurisdiction over persons out of Kenya's jurisdiction unless they submit to jurisdiction pursuant to a notice of summons issued under order V, rule 21, or the subject matter of the suit was for instance a contract, if such contract was made in Kenya, or if the proper law of the contract is Kenya law, or if a breach is committed within Kenya.

28. The rationale of first serving a notice of summons upon a defendant who is out of jurisdiction is to ensure that if any adverse orders are made against such party, they would be enforceable once the submission to the local or relevant jurisdiction is established. Whereas this is good law and principle in respect of contract or tort, it is however not correct in respect of children. The law in relation to children is sui generis. Article 53(2) of the *Constitution* declares that a child's best interest are of paramount importance in every matter concerning the child. In this regard, "every child has the right to parental care and protection which includes equal responsibility of the mother and father to provide for the child whether they are married or not..."

29. The application herein is essentially based on the ground that the orders complained of were issued in excess of or without jurisdiction by the Children Court, and such orders are therefore not binding upon a defendant such as the applicant herein who is out of jurisdiction. to determine this question, I will consider the contention, firstly from the factual aspect in relation to the Applicant and the Interested Party. Judicial review is about the decision-making process and not merits of a decision. It is however necessary to understand the circumstances under which the interested party went to the

Children's Court. The decision-making process is not by the applicant or interested party, but by the decision-maker, in this case, the Children Court. In *Republic v Attorney-General & 4 others, ex parte Diamond Hashim Lalji and Ahmed Hasham Lalji* [2014] the court said –

> "Judicial review applications do not deal with merits of the case but only with the process. In other words judicial review only determines whether 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 more 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 the normal forums where such matters ought to be resolved..."

30. The ultimate question is whether the Children Court had jurisdiction to grant the orders it did. To answer this question, I will explore, firstly the relationship between the applicant, the interested party and the child, the subject matter of the orders of the Children Court. Secondly, I will consider the law and judicial opinions on judicial review.

31. The facts in this case are not in dispute. The applicant and the interested party were married in Dar-es-Salaam, Tanzania on June 7, 2003. They were blessed with one issue, (LL). They separated in the year 2007 and the interested party, a Kenyan citizen, moved to and resides in Mombasa, Kenya. By a Settlement Agreement dated December 20, 2010, between the applicant and the interested party, the interested party was by Clause 2.1 (of the Agreement), granted "sole primary custody of LL but that the interested party would consult the Applicant if the child's school would be changed or if the Interested Party and LL were relocating from Mombasa". Clause 2.2 of the Settlement Agreement, granted the Applicant access and visitation rights and the right to take LL during school holidays subject to prior agreement with the Interested party, and that the interested party would be entitled to keep the child for at least two (2) weeks per annum, again subject to agreement on the appropriate dates when the child would be with the interested party.

32. It was also not contested that the child went to stay with the applicant for the July, 2015 holidays, when the applicant seems to have made a decision that the child would remain with him, and proceeded to enroll the child at [particulars withheld] School, Dar-es-Salaam. The interested party visited the child in Dar-es-Salaam in September, 2015, and that the child also visited the interested party in September, 2015, but that she took no action in order to allow the child "to experience the term in Dar-es-Salaam as I did not wish to disrupt her in the middle of the school term."

33. There is also no dispute that the applicant and the interested party agreed on the child's visitation to the applicant and the travel to Canada. What is not agreed upon are the circumstances under which the child underwent psychological tests while in Canada and San Diego in the USA, and subsequent return to Dar-es-Salaam, and the continued enrolment a [particulars withheld] School Dar-es-Salaam, and failure to return to Mombasa to go to [particulars withheld] School, Mombasa.

34. The interested party contends and there is no denial thereof that on 13 December 2015, the child travelled alone to Mombasa from Dar-es-Salaam to be with the Interested Party. The Interested Party contends that from the moment the child arrived in Mombasa, "she strongly expressed to her (the interested party), that she did not wish to return to Dar-es-Salaam, and that she wanted to remain with me" (the interested party), and that the applicant had subjected the child to verbal abuse, calling her "a fat and brainless pig".

35. Those are the pertinent facts which are necessary to understand the parameters under which the decision to file proceedings before the Children's Court was made. Notwithstanding the strenuous and spirited arguments by counsel for the Applicants, that the Children Court had no jurisdiction to entertain the proceedings brought by the interested party, I am of the firm opinion that the Children Court Magistrate had the necessary jurisdiction to make the orders she made. Firstly, the orders were in accord with the relevant law, the *Children Act*, (cap 141, Laws of Kenya), the preamble of which provides as follows -

> " An Act of Parliament to make provision for parental responsibility fostering, adoption, custody, maintenance, guardianship, care and protection, to make provision for 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."

36. Section 5 of the *Children Act* makes provision for "non-discrimination" and has no reference to domicile or citizenship and provides –

> " 5. No child shall be subjected to discrimination on the ground of origin, sex, religion, creed, custom, language, opinion, conscience, colour social, political, economic, or other status, race, disability, tribe, residence or local connection."

37. 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) Subject to section 4 where a court is considering whether to make one or more orders under this Act with reference 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 no order at all."

38. Thirdly, section 4 of the *Act* confers upon a child extensive fundamental rights -

> " 4(1) Every child shall have inherent right to life and it shall be the responsibility of the Government and the family to ensure the survival and development of the child;
>
> (2) In all actions concerning children, whether undertaken by the public or private social welfare institutions, or legislative bodies the best interests of the child shall be a primary consideration.
>
> (3) All judicial and administrative institutions, and all persons acting in the name of these institutions where they are exercising powers conferred by this Act shall treat the interests of the child as the first and paramount consideration to the extent that this is consistent with adopting a course of action calculated to -
>
> (a) safeguard and promote the rights and welfare of the child;
>
> (b) conserve and promote the welfare of the child;
>
> (c) secure for the child such guidance and correction as is necessary for the welfare of the child and in the public interest;

(4) In any matters of procedure affecting a child, the child shall be accorded an opportunity to express his opinion, and that opinion shall be taken into account as may be appropriate taking into account the child's age and the degree of maturity."

39. Fourthly, as stated in the heading or preamble thereto, the purpose of enacting the *Children Act* was 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*..." 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 declares as follows –

"3(1) In all actions concerning children, whether undertaken by public or private social welfare institutions, courts of law, administrative authorities or legislative bodies, the best interest of the child shall be a primary consideration."

40. As noted above this Article of the *Convention on the Rights of the Child* is given effect under Section 4 of the *Children Act*.

41. Fifthly, Article 16 of the *African Charter on the Rights of the Child, 1989*, provides for the child's legal protection against arbitrary and unlawful interference with his other privacy, fairly, home or correspondence and the right not to be subjected to "unlawful attack" on his or her honour or reputation.

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

"...the child's 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."

43. In the case of *A.O.G. v S.A.J. & another* [2011] eKLR, the Court of Appeal reiterated the importance of observance by the lower courts and this court of the provisions of Section 4 of the then *Children Act*, and cited the Explanation to section 6 of the *Civil Procedure Act*, (cap 21, Laws of Kenya), that the pendency of a suit in a foreign court shall not preclude a court from trying a case in which the same matters or any of them are in issue in such foreign court and said at paragraph *46* –

"... so that the child ZAJ was in Kenya under circumstances which were yet to be explained like all children however, he was protected under the laws of Kenya. There was a dispute on his custody and the applicant had already invoked the jurisdiction of Kenya courts which had made interim orders in respect of the child. In our view, and in compliance with section 6 above, subsequent suits which were substantially similar ought to have been stayed until the hearing and determination of the earlier suit. The Children's Court, like all other courts, is bound by the provisions of Section 4 above in exercise of its jurisdiction under Section 76 of the Act. As such it is competent as any other court to issue orders in respect of the child, the UK's court orders notwithstanding. The superior court held, correctly in our view that the Foreign Judgments (reciprocal enforcement of judgments) Act did not apply in the matter. There was no basis therefore to disregard the existing valid orders of the Kenyan Court and defer to orders of a foreign court. We so find."

44. The question here is not about the custody of the child. That question was settled by the Settlement Agreement of December 20, 2010 between the *ex parte* applicant and the Interested Party on both custody and visitation rights and access to the child. The fundamental question here is the rights of the child. Under the *Constitution of Kenya*, and the relevant legislation, namely the *Children Act* (cap 141, Laws of Kenya), which embodies and gives effect to the *international Convention on the Rights of the Child*, and the *African Charter on the Rights of the Child*, the courts of Kenya have the jurisdiction to give effect to the rights of the child, irrespective of the origin of such child. It does not matter that child came from the howling sands, and winds of the Sahara Desert, the depths of the Congo forests, the Miombo woodlands of Tanzania, the windsswept Drakensberg mountains of the South of the continent, the steppes of outer Mongolia or the fringes of the world's oceans and seas, the courts of Kenya will give shelter and succour to that child. Under our Constitution, the rights of the child are paramount. It would be unworthy of our Constitution if jurisdiction were denied to our courts.

45. For those reasons, the judicial review orders of certiorari and prohibition do not lie against the respondents.

46. Having come to that conclusion the question of restorative orders to the status quo ante immediately prior to the grant of the order issued on 22 December 2015 does not arise. It is a matter which must be heard and determined in terms of section 4(4) of the *Children Act* –

> "(4) In matters of procedure affecting a child, the child shall be accorded an opportunity to express his opinion, and that opinion shall be taken into account as may be appropriate taking into account the child's age and the degree of maturity."

47. The court of Judicial Review is not the proper court to hear and determine the evidence of the child. That is a question of merit, not process of decision-making. For instance the Notice of Motion dated and filed on May 12, 2016 seeking the production of the child before this court was incompetent because the judicial review court has no jurisdiction to hear evidence on merit and is a matter to be placed before the Children Court, and not this court.

48. Finally, *ex parte* applicant sought a declaration that the rights of the applicant and Interested party, so far as they relate to the matters in issue in the proceedings filed in the Children's Court Case at Tononoka, Mombasa, in Children Case No. 496 of 2015 be determined by the Tanzania Courts. Having come to the conclusion that the Children Court at Tononoka has jurisdiction to determine matters of children, and this child in particular, and denied the orders of certiorari and prohibition, a declaration to the contrary would be a negation of those orders. In any event the matters before the Tanzania courts are divorce proceedings between the applicant and the Interested Party and have their own course to run. I therefor decline to make such declaration.

49. The application having failed on all substantive grounds, the notice of motion dated and filed on January 19, 2016 is hereby dismissed with costs against the *ex parte* Applicant.

50. I direct that any matters concerning the custody and welfare of the child, "LL" be determined by the Children Court at Tononoka, Mombasa.

51. There shall be orders accordingly.

DATED, SIGNED AND DELIVERED IN MOMBASA THIS 15TH DAY OF JULY, 2016.

M. J. ANYARA EMUKULE, MBS

JUDGE

In the presence of:

Miss Adagi holding brief Inamdar for Applicant

No Appearance (Mr. Makuto) for Respondent

Miss Thongori for Interested Party

Mr. Silas Kaunda Court Assistant