REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT MACHAKOS

MISC. APPLICATION NO. 152 OF 2011

B M M……1ST APPLICANT

E K ……2ND APPLICANT

VERSUS

THE RESIDENT MAGISTRATE, MWINGI

LAW COURTS ……...1ST RESPONDENT

THE OFFICER COMMANDING STATION

MWINGI POLICE STATION …….2ND RESPONDENT

THE ATTORNEY GENERAL ……..……3RD RESPONDENT

RULING

1. **B M M** and **E K** by an application dated the 15th June, 2011 sought leave of the court to apply for orders of prohibition prohibiting their arrest, charging and/or prosecution of the offence of neglecting **M M** under the **Children's Act** and an order of certiorari to remove to this court for purposes of quashing the order of the Senior Resident Magistrate Mwingi made on the 3rd June, 2011.
2. Leave was granted by the court on the 20th June, 2011 by Kihara Kariuki J*(as he then was).*
3. Subsequently they filed a Notice of Motion dated 21st day of June, 2011 seeking orders as follows:

- *That an order of prohibition do issue prohibiting arrest, charging and/or prosecution of **B M M** for an offence under Section **127** of the **Children's Act** for having neglected **M M.***
- *That an order of prohibition do issue prohibiting the trial and/or prosecution of **E K** for the offence of child neglect contrary to **Section 127(1) (b)** of the **Children's Act No. 8 of 2001** now pending before the Resident Magistrate's Court at Mwingi in **Criminal Case Number 362 of 2011, Republic versus E K.***
- *That an order of certiorari do issue removing to the High Court for purposes of being quashed, the order of the Senior Resident Magistrate's Court made on the 3rd June, 2011 in Children's Case Number 11 of 2011, Republic verses M M.*

4. Grounds upon which the applicants relied that were included in the statement of facts dated the 15th day of June, 2011 are that; The order of the lower court made on the 3rd June, 2011 violates the applicants' fundamental rights and offends rules of natural justice; the lower court acted ultra

vires jurisdiction in issuing the orders of 3rd June, 2011; the court acted in error of the law when it issued the order of 3rd June, 2011; the applicants will be exposed to prejudice, hardship and great loss as their trial shall be flawed and unprocedural and that the order was an abuse of judicial power.

5. In a verifying affidavit sworn by **B M M,** it is deponed that he married E K in June, 1996 after they were blessed with an issue, **M M** on 8th April, 1996. In November, 2000 they mutually separated and he had custody of the child. He has provided the child with basic requirements. He educated her until she joined secondary school. She became difficult and was not willing to continue learning in a boarding school. He contacted the 2nd applicant and they enrolled her in a Day School, [Particulars Withheld] Secondary School. Thereafter she changed her mind and they enrolled her at [Particulars Withheld] Girls Secondary School, a boarding school. Thereafter she escaped from her mother's house. They notified the police and the children's officer. Consequently she was presented to court as a child in need of Care and Protection in Children's Case No. 11 of 2011.
6. The child was placed in custody of the 2nd applicant but soon after they reached home she disappeared. Although they are not to blame for their daughter's conduct they were surprised to learn that they were to be prosecuted for the offence of neglecting the child. He concluded by stating that the man who was found cohabiting with his daughter, one **George Mogaka** was also charged in court.
7. The 2nd applicant swore a verifying affidavit confirming what was deponed by the 1st applicant.
8. In a replying affidavit, H.M. Nyaberi the Senior Resident Magistrate, Mwingi, deponed that having read the social inquiry report filed by the Children's Department in **Criminal Case No.1 of 2011- Republic Verses M M** he granted care and custody of the minor to her mother who was economically able to cater for her needs which were identified as Education, Rehabilitation, Guidance and Counseling.
9. Despite the order the minor ran away and was found living with one George Mogaka who was arrested and charged with the offence of defilement. The minor was remanded at Mwingi police on the 14th April, 2011 awaiting a vacancy at a Rehabilitation Centre. The child was at the police station from the 14th April, 2011 to May, 2011 but the applicants made no attempt to see her or have her released in their care.
10. Further, he stated that the applicants were economically stable, able to find the minor private counseling and rehabilitation but have neglected to do so leaving her in the care of the State. That is why he was prompted to make an order requiring their arrest and prosecution for neglecting the minor contrary to **Section 127** of **The Children Act**. Despite the orders made the applicants failed to appear before him on the mention date. Consequently warrants of their arrest were issued and the minor was committed to [Particulars Withheld] Girls Rehabilitation School for a period of three (3) years.
11. The applicant herein seeks prerogative orders of certiorari and prohibition. The same are to be issued against the order of a magistrate at Mwingi court. The order issued by H.M. Nyaberi is to this effect;

> ***"The orders made on 31st May, 2011 are hereby reviewed. The court hereby recommends that both parents of the subject be apprehended and be prosecuted for an offence of neglecting the subject contrary to section 127 of the Children's Act"***

12. It has been argued by the respondent that this court lacks authority to grant the relief sought which they claim can only be granted where there is an abuse of powers, where there has been breach of Natural justice or where the court acted *ultra vives*. They claim that this matter does not fall within the ambit of judicial review as the magistrate acted within the precincts of **Section 127** of **The Children Act**.
13. This court has the mandate to issue orders of Mandamus, Prohibition or Certiorari. (See **Section 8(2)** of the **Law Reform Act** and **Order 53** of the **Civil Procedure Rules**. The grounds upon which Judicial Review is applicable, includes breach of natural justice.
14. A perusal of the proceedings of the lower court shows that the applicants herein educated the minor and provided her with a home as provided by **Section 127** of **The Children Act**. The child

was taken to different schools at different times but because of her truancy she kept on being absent from school on her own free will and without legitimate excuse. The applicants were compelled to take measures including liaising with the OCS and The Children's Officer in an attempt to ensure the minor's welfare. They decided to have the minor presented to court as a child in need of Care and Protection which resulted into the minor being arraigned in court in Children Case Number 11 of 2011, Republic Verses M M. In the course of hearing of the matter, a social inquiry report was produced as well as a Probation Officer's Report. The trial magistrate invoked his jurisdiction as provided by **Section 127** of **The Children Act**. The court did recognize the fact that the minor even after being committed to her mother for care still exhibited her truancy by running away from home without permission from her parent. Subsequently the learned Magistrate made an order remanding her at the police station pending securing of a vacancy at a rehabilitation school.

15. An order was made committing the minor to [Particulars Withheld] Probation Girl's School. It however turned out that the institution was no longer admitting children in need of care and protection. On being notified of that fact the trial magistrate reviewed the earlier order and recommended the arrest and prosecution of the applicants *suo moto.* A parent contributing to a child being in need of care and protection is an offence. A court has the discretion to direct that a person be charged if there is evidence. Evidence presented before the court by the Social/Probation/Children's Officer absolved the applicants from blame. Failure to visit the child at the police station could be deemed to be neglect if conditions upon which the order was made were explained to the parents and they deliberately failed to comply.
16. It would therefore be unjust to claim that the applicants be prosecuted for not appearing in court. The applicants were therefore condemned unheard which is against the rules of natural justice. In the Court of Appeal case of **Prime Sart Works Ltd –vs- Kenya Industrial Plastics Ltd(2001) E.A 528** it was observed that:

> ***"…implicit in the concept of fair adjudication lie the cardinal principles namely that no man shall be judge of his own cause and no man shall be condemned unheard, that these principles of natural justice must be observed by the courts save where their application is expressly excluded".***

17. The order was made without any consideration of what the applicant would explain. This was indeed prejudicial to them and therefore against the rules of natural justice.
18. Be as it may, the Notice of Motion is brought pursuant to the provisions of **Order 53** of the **Civil Procedure Rules** which provides for applications for judicial review that emanate from a special jurisdiction. It has been argued and rightly so in my view that these proceedings are fatally defective for non-compliance with the mandatory procedural law. Judicial Review proceedings are neither civil nor criminal; they are by their nature special. That jurisdiction is donated to this court by **Sections 8 and 9** of the **Law Reform Act.** The laid out procedure must be followed. In the case of **Jotham Mulati Welamandi vs The Electoral Commission of Kenya. Bungoma H.C. Misc. Appl. No. 81 of 2002(2002) eKLR 486**. Ringera j *(as he then was)* expressed himself thus;

> ***"Prerogative orders are issued in the name of the crown and applications for such orders must be correctly intituled and however, as we have already demonstrated, judicial review proceedings do not fall in that category. Accordingly, the orders of Certiorari, Mandamus or Prohibition are issued in the name of the Republic and applications therefore are made in the name of the Republic at the instance of the person affected by the action or omission in issue and the proper format of the substantive motion for Mandamus is:-***
>
> ***"REPUBLIC……APPLICANT***
>
> ***V***
>
> ***THE ELECTORAL COMMISSION OF KENYA……..……..…RESPONDENT***

EX PARTE

JOTHAM MULATI WELAMONDI"

In another case of **Republic V Chairman, Kajiado Central Land Tribunal & 2 Others Exparte Timaiyo Kirtari (2012) eklr, Makhandia J. (as he was then)** held thus:

> **"This being as special jurisdiction and with a mandatory procedure, failure to comply with the mandatory procedural law is not a technicality that can be cured under either the constitution and or "the double O" principle. In any event the "the double O" principle would apply to civil proceedings."**

19. As stated in the aforestated persuasive authority the applicants in this case ought to have been "ex-parte applicants." The Applicant should have been the Republic as the orders to be issued would have been in the name of the State/Republic. This application having fallen short of the required mandatory procedure it must fail.
20. Accordingly, the application is dismissed with no orders as to costs.

Dated and **Delivered** at **Machakos** this **6TH** day of **MAY,** 20**15.**

L. N. MUTENDE

JUDGE