



IN THE COURT OF APPEAL

AT NYERI

CORAM: WAKI, NAMBUYE & KIAGE, JJA)

CIVIL APPEAL NO. 23 OF 2015

BETWEEN

O M S..... APPELLANT

AND

PRINCIPAL MAGISTRATE MARSABIT.....RESPONDENT

K B.....RESPONDENT/INTERESTED PARTY

*(An Appeal from the decision or Judgment of the High Court of Kenya at Meru (J. Makau, J.)
Dated 18th December, 2014).*

in

J. R. NO. 3 OF 2014)

JUDGMENT OF THE COURT

This is a first appeal arising from the judgment of J.A Makau, J dated at Meru on the 18th day of December, 2014.

The subject of the litigation resulting in this appeal was a minor when it was initiated way back in 1990; she is the biological daughter of the appellant and the interested party, born on the 8th day of October, 1994, she is currently an adult having attained the age of majority on the 8th day of October, 2012. She was hardly four (4) years old when the interested party **K B** filed Civil Suit No. 3 of 1998; in the Kadhi's Court at Marsabit seeking child support from the appellant **OM S** as her biological father. The merit disposal of the Kadhi's suit gave rise to two negative orders issued on the 20th day of April, 2002 namely:-

- a. *Father to take care of his child the time he gets money and when he has cleared the loan.*
- b. *No execution of salary will be effected till he proves that the defendant has cleared the loan."*

The interested party being dissatisfied with those orders moved to the Principal Magistrate's Court at Marsabit vide Children's Case No. 5 of 2002 which became home of the order made in the presence and

with the consent of the appellant and the interested party on the 3rd day of December, 2002 before **G. Aburili SPM**. It read as follows:-

“By consent, the respondent to be contributing Kshs. two thousand per month with effect from now”

The respondent in the said order meant the appellant herein. He apparently defaulted on that commitment. A warrant of arrest was issued on 30th May, 2003 against him. It appears not to have been executed at all. On the 22nd June, 2011, on the application of the interested party, the monthly sum was revised upwards to Kshs.5,000 effective that date. A notice to show cause was applied for and issued returnable on the 11th November, 2013, on which date both the appellant and the interested party appeared before **B. M. Ombewa Ag PM**. The court record reads:

“Plaintiff: I served the defendant. I pray courts help.

Defendant: I got N.T.S.C. I am only getting ksh.10,000/= per month. I have no ability to pay the money. The child in issue is 19 years old. I want to be given her to take care of her. The plaintiff has harassed me enough.

Court: The judgment debtor has not given a proposal on how to pay the decretal sum. If judgment debtor wishes to have the orders made on 22nd June, 2011 varied or reviewed he is at liberty to take appropriate action. For the time being the order is in force. It has not been varied or set aside and there is no application to do so. The judgment debtor is in arrears of paying the maintenance. He is committed to 30 days civil jail. The decree holder to pay for his subsistence.”

The appellant was aggrieved by those orders. He moved to the High Court at Meru and presented a Chamber Summons in Judicial Review Application No.3 of 2014 dated the 18th day of February, 2014 substantively seeking leave of court to apply for an order of *certiorari* to move to the High Court at Meru PMCC Children’s Case No.5 of 2002 and quash the orders dated 11th November, 2013 and other orders made by the Principal Magistrate Marsabit without jurisdiction. The leave sought was granted on the 21st day of February, 2014 paving the way for the presentation of the substantive Notice of Motion for Judicial Review dated the 28th day of February, 2014. The orders sought read as follows:-

“(a) That an order of certiorari do issue to call and quash proceedings in Principal Magistrates children’s Case No.5 of 2002, particularly orders dated 11th November, 2013 and all other orders made without jurisdiction.

(b) That an order of prohibition do issue to stop the implementation of the said orders accordingly.

(c) That costs be provided for”

The Judicial Review application was opposed by a Replying Affidavit of **K B** deposed on the 27th day of March, 2014 and grounds of opposition dated the 28th day of October, 2014. The merit disposal of the Judicial Review application is what resulted in the judgment of **J.A. Makau, J** of the 18th day of December, 2014 impugned herein, in which the appellant’s above Notice of Motion was dismissed with costs to the respondent and the interested party.

The appellant was aggrieved by that dismissal order. He is now before us on a first appeal raising five (5) grounds of appeal namely:-

“(1) The learned Judge erred in law by ruling that the Marsabit Principal Magistrates court could deal with a child’s case above the age of 19 years without the extension of parental

responsibility as per children's Act (sic) 2014.

(2) The learned Judge grossly misinterpreted the principle of res judicate as stated under section 7 of the Civil Procedure (sic) Rules.

(3) The learned Judge considered extraneous matters not before him and arrived at a wrong decision.

(4) The learned Judge wrongfully held that the appellant was challenging the merit rather than the process.

(5) That the learned Judge was wrong in all aspects of law presented before him”

In his submissions to us **Mr. Ondari** learned counsel for the appellant arguing all the five grounds of appeal as one urged us to allow the appeal on three major grounds. First, that the learned trial Judge fell into error when he failed to fault the orders made on 11th November, 2013 without jurisdiction on account of the subject having attained the age of majority being 19 years at the time and there having been no order extending the appellant's parental responsibility over the subject beyond the age of majority. Second, the learned trial Judge also erroneously disallowed the appellant's plea of *res judicata* considering that the Kadhis Court at Marsabit in Kadhi's Court Case No. 3 of 1998 had finally dealt with and determined the issue of maintenance for the said subject. Third, it was wrong for the learned trial Judge to *suo motu* import and overrule the Marsabit Kadhi Court's decision which was not before him on appeal.

Mr. Kiongo for the 1st respondent urged us to dismiss the appeal on the grounds that the appellant moved to attack the merits of the decision sought to be reviewed and not the process as was required by the law on Judicial Review. Second that the plea of *res judicata* was not available to the appellant as the learned trial Judge rightly held that the Marsabit Kadhi's Court had no jurisdiction to entertain issues pertaining to the maintenance of the subject. Three, the learned Principal Magistrate acted within the law when he moved to enforce orders of maintenance for the subject which orders the appellant had consented but neglected to comply with. Fourth, the said orders were enforceable up to the point the subject attained the age of majority.

To buttress their argument **Mr. Kiongo** relied on the case of *Municipal Council of Mombasa versus Republic & another [2002] eKLR* for the proposition that Judicial Review is concerned with the decision making process, not with the merits of the decision itself. The case of *Kenya Anti-corruption Commission versus Republic & 4 others [2013] eKLR* for the proposition that an order of prohibition issues from the High Court directed to an inferior Tribunal or body which forbids that Tribunal or body to continue proceedings therein in excess of its jurisdiction or in contravention of the law of the land. It lies not only for excess of jurisdiction or absence of it but also for a departure from the rules of natural justice. It does not however lie to correct the course, practice or procedure of an inferior Tribunal or a wrong decision on the merits of the proceedings. The case of *Kenya National Examination Council versus Republic exparte Geoffrey Gathenji Njoroge and 9 others Nairobi CA No. 266 of 1996 [1997 eKLR]* for the proposition that certiorari issues to quash a decision already made if the decision is made without or in excess of jurisdiction or where the rules of natural justice are not complied with or such like reasons.

Mr. Muia Mwanzia learned counsel for the interested party associated himself fully with the submissions of **Mr. Kiongo** and also urged us to dismiss the appeal. It was his argument that the interested party was in order when she moved to enforce the orders for the subject's maintenance because the appellant had consented to the making of those orders but then neglected to meet his part of the bargain/obligation. Second, since the orders were issued when the subject was still under age they were enforceable up to the date she attained the age of majority.

On *res judicata* **Mr. Mwanzia** argued that the learned trial Judge rightly rejected its application to the proceeding before him as the Marsabit Kadhi's Court had no jurisdiction to entertain a matter relating to maintenance of a child. On Judicial Review generally, he concurred with the submission of **Mr. Kiongo**

that it did not lie in favour of appellant as he had moved to attack the merits of the Children's Court's decision and not its process.

In reply to the submission of the 1st respondent and the interested party, **Mr. Ondari** urged that their application for Judicial Review was properly laid as they moved to attack the process of making the orders impugned and not the merits of those orders. He reiterated that the learned magistrate had no jurisdiction to make the orders impugned herein the moment the subject attained the age of majority, in the absence of a valid court order extending parental responsibility over the subject beyond the age of majority. Likewise any arrears of maintenance accrued but not paid as at that age also stood foreclosed.

This is a first appeal. We are therefore obligated to reconsider the evidence, re-evaluate re-analyze it and make our own conclusions on it bearing in mind that we should be slow in interfering with the findings of fact by the trial Court unless:

- a. It was based on no evidence; or
- b. It was based on a misapprehension of the evidence; or
- c. The Judge was shown demonstrably to have acted on wrong principles in reaching the finding he did.

See **Sumaria & another versus Allied Industries Limited [2007] eKLR 1.**

We have given due consideration to the totality of the Court record and considered it in the light of the rival arguments set out above, the conclusions reached by the learned trial Judge in the impugned judgment. In our view the following are the issues that fall for our determination.

1. Whether the Magistrates court was properly seized of the matter resulting in this appeal?
2. Whether the learned Judge misapprehended the principles governing the application of the doctrine of *res judicata*.
3. Whether the learned Judge took into consideration extraneous matters in reaching the impugned decision?
4. Whether the learned Judge misapprehended the facts in support of the appellant's application for review?
5. And lastly whether taking an overall view of the learned Judge's reasoning on the decision, the same is un supportable both in law and in fact.

With regard to issue No. 1, **Section 28(1) (2)** of the Children's Act (Supra) donates two ways of extending parental responsibility beyond the 18th birthday. In the 1st instance it may be at the instigation of persons listed in **subsection 2** of the section, that is a parent or a relative of the child; any person who has parental responsibility over the child; the director and lastly, the child. In the second instance it may be on the motion of the court itself. Nowhere in the said provision do we find a bar to the court entertaining any issues relating to such a child beyond the 18th birthday. We therefore, find as did the learned trial Judge after setting out and interrogating **section 28** of the Act (Supra) that there is jurisdiction in a Court of law properly so seized of such a matter to interrogate such matters beyond the 18th birthday of the subject child especially where such matters as in this appeal arose and remained settled before the 18th birthday.

On *res judicata* the applicable principles are well set out in **Section 7** of the Civil Procedure Act Cap.21 Laws of Kenya provides:-

“No Court shall try any suit or issue in which the matter directly and substantially in issue has been directly and substantially in issue in a former suit between the same

parties or between parties, or between parties under whom they or any of them claim, litigating under the same title, in a Court competent to try such subsequent suit or the suit in which such issue has been subsequently raised, and has been heard and finally determined by such Court”

This doctrine has been variously applied by this Court in numerous decisions. We cite a few by way of illustration. In **Green Haig versus Mallard (1974) 2 All ER 255, 257** the following was stated:-

“ ...res judicata for this purpose is not confined to the issues which the Court is actively asked to decide, but ... it covers issues or facts which are so clearly part of the subject matter of the litigation and so clearly could have been raised. That it would be an abuse of the Court to allow a new proceeding to be started in respect of them”

In **Nicholas Njeru versus Attorney General & 8 others [2013] eKLR** this Court laid down the following parameters for the application of this doctrine:

- i. The matter must be directly and substantially in issue in the two suits.**
- ii. The parties must be the same or parties under whom any of them claim, litigating under the same title; and**
- iii. The matter must have been finally decided in the previous suit.**

In **Benjoh Amalgamated Limited & another versus Kenya Commercial Bank Limited [2014] eKLR** this Court drew inspiration from a persuasive authority in **Management Corporation strata Tittle plan No. 301 versus Lee Tat Development Pte Ltd [2009] SGH C234** for the proposition that reasons for the application of this doctrine are twofold first, the interest of the community in the termination of disputes and in the finality and conclusiveness of judicial decisions; and second the rights of the individual to be protected from vexatious multiplication of suits and prosecution. The Court then went further and approved the following observations from the same decision:-

“The courts have never accepted res judicata as an absolute principle of law which applies rigidly in all circumstances irrespective of the injustice of the case. There is one established exception to this doctrine, and that is where the court itself has made such an egregious mistake that grave injustice to one or more of the parties concerned would result if the court’s erroneous decision were to form the basis of an estoppel against the aggrieved party....In such a case, the tension between the justice principle and the finality principle is resolved in favour of the former.

..... the general rule is that where a litigant seeks to re open in a fresh action an issue which was previously raised and decided on the merits in an earlier action between the same parties, the public interest in the finality of litigation (The finality principle) outweighs the public interest in achieving justice between the parties (the justice principle) and therefore the doctrine of res judicata applies. In such cases, it is usually immaterial that the decision which gives rise to the estoppel is wrong because a competent tribunal has jurisdiction to decide wrongly, as well as correctly and if it makes a mistake its decision is binding unless corrected on appeal”

In **CFC Stanbic Limited versus John Maina Githaiga & another [2013] eKLR**, this Court approved the exposition of this doctrine in Mulla Code of Civil Procedure 16th Edition Vol.1 where it is stated thus:-

“.....The general doctrine is founded on consideration of high public policy to achieve two objectives namely, that there must be a finality to litigation and that the individual should not be harassed twice over with the same count of litigation....the test is whether the claim in the subsequent suit or proceeding is in fact founded upon the same cause of action which was the foundation of the former suit or proceeding....”

In *Kenya Commercial Bank Limited versus Mulri Coffee Estate Limited & 3 others [2013] eKLR*, the following observation was made on the doctrine:-

“This Court has interpreted and applied the principle of *res judicata* in a litany of cases and one would be excused to make an assumption that the law in this area is straight forward and well settled. If that were so however, the courts would not still be battling with this issue on a daily basis. Although generally speaking the principles are well spelt out, it is important to consider the facts of each case in order to determine if a suit which has been the subject of litigation before has become *res judicata*. If a court of competent jurisdiction has adjudicated over a matter between parties or parties through whom they claim and determined the issue raised in such matters then the same parties or others litigating through them are barred from re-litigating the same issues before any other court. Such a determination inevitably includes any judgments or orders issued following consent of the litigating parties”.

Lastly See *E.T. versus Attorney General & another [2012] eKLR* where in it was observed thus:-

“The courts must always be vigilant to guard litigants evading the doctrine of *rejudicata* by introducing new causes of action so as to seek the same remedy before the court. The test is whether the plaintiff in the second suit is trying to bring before the court in another way and in a form of a new cause of action that which has been resolved by a court of competent jurisdiction....”

Applying the totality of the above principles to the rival arguments herein on the issue of *res judicata*, it is our finding that there is no dispute that the main disputants both in the Marsabit Kadhi’s Court Case No.3 of 1998 and the Marsabit Children’s Court Case No. 5 of 2002 are the appellant and the interested party. The subject matter in both was the same that is the maintenance of the subject. The only issue in controversy is which of the two forums had the jurisdiction to determine the said issue and second whether the issue was finally determined.

The learned trial Judge revisited and construed provisions of law creating both forums and found as a fact that **section 5** of the Kadhi’s Court Act donated to the Kadhi Court jurisdiction touching on the determination of questions of Muslim law relating to personal status, marriage, divorce or inheritance in proceedings where all the parties profess the Muslim religion but without divesting such jurisdiction over the same issues and parties from the High Court and all Subordinate Courts. This is clearly spelt out in the rider to that section, It provides:

“but nothing in this section shall limit the jurisdiction of the High Court or any Subordinate Court in any proceeding which comes before it,”

The rider therefore, donates concurrent jurisdiction to both the High Court and all Subordinate Courts over the same subject matter.

On the mandate of the Children’s Court, we are in agreement with the learned Judge’s findings that both the preamble and **section 73(d) (ii)** of the Children’s Act (supra) donated jurisdiction over maintenance of children of parties irrespective of their religious leanings. Second, that the Kadhi Court does not fall into the category of a Children’s Court as defined under the said Act. It therefore had no jurisdiction to handle the issue of maintenance of the subject. In other words it had no competence to make any pronouncement on the issue of maintenance of the subject.

On the issue of finality, we agree with the findings of the learned Judge that the orders of the Kadhi Court were ambiguous, vague, indefinite and hence not final. They were therefore not a bar to any future interrogation of any issues that gave rise to them in any other competent forum. We find as did the learned trial Judge that in the circumstances of this appeal and for the reasons given above the Children’s Court was properly seized of the matter before it. It also had the competence and the requisite mandate to handle it as was statutorily mandated.

With regard to the alleged learned Judge's consideration of extraneous matters not placed before him on appeal, we have revisited the record bearing the submissions that were made before the learned Judge and observed the following under the submissions of **Mr. Ondari**:-

“Application dated 28th February, 2014. We rely on to (sic) issues. 1st res judicata. Children case No 5 of 2002 is res judicata Kadhis court 3 of 1998. I refer to annexure SMS 02 proceedings before Kadhis court- issue of maintenance if (sic) over same child. They submitted themselves to Kadhi court. I submit judgment is valid and binding in children case No.5 of 2002. She did not disclose of the issue under section 34 of the Civil Procedure Act. She should have applied in same Kadhis court in execution or Review but not file a different suit.”

Mr. Kiongo never responded to the issue of *res judicata* but **Mr. Mwanzia** submitted on it thus:-

“.....issue of res judicata, Jurisdiction and service.

.....under Children Act 2001 between, the court of Kadhi which has jurisdiction over children matter. I say Children's Court under Children Act where interested party moved. Kadhi court moved in 2000 when the child was only 6 years....”

From the above extracts of the record that was before the learned Judge, it is evident that indeed the record of the proceedings in the Kadhi's Court were before it as an annexure. Two parties made submissions on the issue. This was a sufficient invitation to the learned Judge to interrogate the Kadhi's Court proceedings *vis a vis* those of the Children's Court Case No. 5 of 2002, in resolving the issue raised before him on *res judicata*. We find nothing extraneous in this as the material that the learned Judge assessed had been exhibited as an annexure to the appellant's application. Both **Mr. Ondari** and **Mr. Muia Mwanzia** made reference to this same material in their submissions as demonstrated above. We find the learned Judge made no error when he also interrogated them and made findings thereon in his judgment. There is no way the learned Judge could have responded to the appellant's plea on *res judicata* without interrogating proceedings in both forums as exhibited before him.

With regard to the merits of the Judicial Review decision impugned herein, both sides are agreed in their submissions that Judicial Review is concerned with the process and not the merits of the decision. The process resulting in the Magistrate's decision that the appellant sought to quash was initiated by the filing of Marsabit Children's Court Case No.5 of 2002. The appellant voluntarily participated in the said proceedings by being party to the consent entered therein on 3rd December, 2002 vide which he agreed to be remitting the sum of Kshs.2,000.00 monthly to the interested party for the upkeep of the subject which the appellant never honoured. This prompted the interested party to apply for warrants of attachment to issue against the appellant. These were issued on 30th May, 2002 for the attachment of his salary. This process bore no fruits. On the 22nd June, 2011 the interested party was back in court again seeking both the enhancement of the amount payable as well as its enforcement which orders were granted on the same date raising the monthly maintenance sum from Kshs.2,000 to Kshs.5,000. These revision orders were accompanied by other warrants of attachment.

The warrants of attachments yielded no fruits resulting in the issuance of a notice to show cause which was returned on the 11th November, 2013. On this day both parties were in attendance before the learned magistrate and the appellant intimated to the court that he had no ability to pay. The court rejected his explanation and ordered him committed to civil jail.

This is the order the appellant sought to quash through the writ of certiorari. As demonstrated by case law cited above, the writ of certiorari issues to quash a decision already made without or in excess of jurisdiction, or where the rules of natural justice are not complied with or for such like reasons. See ***Kenya National Examination Council versus Republic Exparte Geoffrey Gathenji Njoroje & 9 others (supra)***. From the outline set out above, it is evidently clear that the Children's Court had jurisdiction to handle the maintenance case and to enter the consent order between the appellant and the interested party.

The interested party was entitled to approach the same court for an enforcement order upon the appellant's default on his commitment to pay the monthly upkeep for the subject. When the interested party moved the court to increase the monthly maintenance, she gave reasons that expenses had risen as a result of the subject moving on to secondary school. Nowhere in the appellant's submissions both at the High Court and before this Court has he claimed that these were not genuine reasons. The trial magistrate found them plausible and that is why he endorsed them.

The subordinate court was perfectly in order when it issued an accompanying warrant of attachment to enforce the payment. It is on record that this process too did not yield any fruits and that is why a notice to show cause was taken out. It too was served on the appellant and he responded to it as required by law. When given a chance to respond to it he said he had no salary. That is when the order for committal to civil jail was issued. It was a lawful enforcement order.

From the above sequence of events, it is our finding that the process resulting in the orders the appellant moved to quash was procedural and within the permitted limits of the law. The alleged excess based on the fact of the subject being over 18 years as at the time the said orders were made does not hold as the record is clear that there were arrears that had never been paid. These were capable of being calculated up to the 18th birth day. There is nothing that the appellant demonstrated before the learned trial Judge or before us to show that the amount forming the notice to show cause in respect of which he was committed to civil jail had been calculated to include any sum that may have accrued beyond the 18th birthday. In the result and for the reasons given above, it is our finding that the writ of certiorari was not available to the appellant in the circumstances displayed herein and was rightly withheld.

As for the prohibition, the position in law is that it will issue from the High Court directed at the inferior Tribunal prohibiting the inferior Tribunal from acting in excess of its jurisdiction. In the circumstances of this appeal, all that the interested party did was to move the court to enforce the accrued arrears on the maintenance of the subject. Apart from mere allegations, there was no demonstration by the appellant either before the learned trial Judge or even before us that the amount forming the notice to show cause included sums accrued for any period beyond the 18th birth day. This notwithstanding, if any such a sum was included, it was not curable by an order of Judicial Review or by way of prohibition, but by way of an order of review and setting aside of the excess amount. In the result, we find no error in the learned Judge's refusal to grant this order.

The upshot of all the above is that there is no merit in the appeal. It is dismissed with costs to the respondent and the interested party both here and at the High Court save that the execution for the arrears accrued to be calculated up to the 18th birthday if necessary. Orders accordingly.

Dated and Delivered at Nyeri this 3rd day of February, 2016.

P. N. WAKI

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JUDGE OF APPEAL

R. N. NAMBUYE

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JUDGE OF APPEAL

P. O. KIAGE

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JUDGE OF APPEAL

I certify that this is a true copy of the original

DEPUTY REGISTRAR