



REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA

AT NAIROBI

JUDICIAL REVIEW MISCELLANEOUS APPLICATION NO. 497 OF 2018

IN THE MATTER OF AN APPLICATION FOR LEAVE FOR JUDICIAL REVIEW ORDERS OF PROHIBITION & CERTIORARI

AND

IN THE MATTER OF ARTICLES 2 (6) OF THE CONSTITUTION

AND

IN THE MATTER OF ARTICLES 29, 31, 32 AND 39 OF THE VIENNA CONVENTION ON DIPLOMATIC RELATIONS 1961

AND

THE MATTER OF SECTION 4 AND FIRST SCHEDULE OF THE PRIVILEGES & IMMUNITIES ACT CAP 179 OF THE LAWS OF KENYA

AND

THE MATTER OF SECTIONS 8 AND 9 OF THE LAW REFORM ACT , CAP 26, LAWS OF KENYA

AND

IN THE MATTER OF THE FAIR ADMINISTRATIVE ACTION ACT, 2015

AND

IN THE MATTER OF THE ORDERS DELIVERED ON 31/1/2018 AND 16/11/2018 IN MILIMANI CHILDREN CASE NO 1073 OF 2017

BETWEEN

AKK.....APPLICANT

VERSUS

CHILDRENS' COURT, MILIMANI.....RESPONDENT

SMM.....INTERESTED PARTY

RULING

Introduction

1. The Applicant herein is AKK, and he states that he is a citizen of [Particulars Withheld] and a diplomat. He filed a Chamber Summons application dated 19th December 2018, seeking leave to institute judicial review proceedings for orders of Certiorari and Prohibition in relation to proceedings in and orders issued by the Children's Court in Milimani (the Respondent herein), in **Nairobi Children Case No. 1073 of 2017 –SMM vs AKK**. This Court (Mativo J.) on 20th December 2018 gave directions that the Chamber Summons be argued *inter partes*.

2. SMM, who is the Interested Party herein, and who has sued the Applicant in **Children Case No. 1073 of 2017** for maintenance of a minor, thereupon filed a Notice of Preliminary Objection dated 21st January 2019. The Interested Party raised a preliminary objection challenging the jurisdiction of this Court in the following terms:

a. That this Honourable Court lacks jurisdiction to hear the suit as it is statute barred as it offends the provisions of section 23, 91, 92, 94, 96 98 and 99 of the Children Act, Article 20 of the African Charter on the Rights of the Child, and Article 18 of the Vienna Convention on the Rights of the Child;

b. The suit is time barred as it offends the mandatory provisions of Section 9 (3) of the Law Reforms Act and Order 53 Rule 2 of the Civil Procedure Rules 2010;

c. The application is an abuse of the Court as it does not meet the supervisory threshold of a judicial review court and the Applicant has other avenues to seek redress;

d. That the suit is misconceived, scandalous, frivolous, vexatious and a blatant abuse of the court process.

3. This Court gave directions that the Interested Party's Notice of Preliminary Objection be heard and determined first by way of written submissions, hence this ruling.

The Legal Arguments

4. Mudeshi Muhanda & Co Advocates, the Interested Party's Advocates on record, filed submissions dated 3rd April 2019. On the objection that this Court lacks jurisdiction to entertain this matter as it is statute barred, the Interested Party submitted that sections 23, 91, 92, 94, 96 98 and 99 of the Children Act deal with parental responsibility of a minor child and the maintenance of such child. It is submitted that judicial review only checks administrative actions and/or acts in excess of powers by public bodies, and that the 1st Respondent was acting well within the confines of the law and issued orders pursuant to the Children's Act. That, this Court's jurisdiction does not extend to challenging the validity of an order given pursuant to powers given by a statute, and the Applicant if aggrieved ought to have lodged an appeal with an appellate court and not file judicial review proceedings.

5. While citing the case of **Motor Vessel "Lillian S" vs Caltex Oil (Kenya) Ltd**, the Interested Party submitted that section 10 of the Magistrates Act provides for the opportunity to appeal decisions if parties feel aggrieved and that in this instance, the proper court would be the High Court (Family Division). Further, that this Court cannot enlarge its scope so as to entertain proceedings it has no powers to as held in the case of **Republic vs National Employment Authority & 3 Others Ex Parte Middle East**

Consultancy Services Limited (2018) e KLR.

6. On the second objection that the instant application is time barred as it offends the mandatory provisions of Section 9 (3) of the Law Reforms Act 6 and Order 53 Rule 2 of the Civil Procedure Rules 2010, the Interested Party cited Section 9(2) and 9(3) of the Law Reform Act and Order 53 Rule 2 for the argument that applications for leave for judicial review orders and in particular certiorari should be made within six months of the act or omission to which the application for leave relates. It was thus submitted that the foregoing provisions of the law the Applicant was locked out from instituting proceedings after the lapse of 6 months. Reference was further made to the case of **Rosaline Tubei & 8 Others vs Patrick K. Cheruiyot & 3 Others (2014) e KLR** in this regard.

7. On the last objection that that this application is an abuse of the Court as it does not meet the supervisory threshold of a judicial review court and the Applicant has other avenues to seek redress, the Interested Party cited the case of **Republic vs Public Procurement Administrative Review Board and 3 Others (2018) e KLR**, on the instances when a judicial review intervention can lie, and section 7(2) of the Fair Administrative Action Act which outlines the instances in which one may institute judicial review proceedings. It was contended that the instant application does not fall there under. Further, that Article 53 of the Constitution of Kenya gives paramount importance to the best interests of the child and the same ought to be protected.

8. Karuru Mwaura & Company Advocates, the Advocates on record for the Applicant, filed submissions dated 25th June 2019. The Applicant submits that the instant Preliminary Objection is without merit, and the issue raised therein are relate to factual analysis which ought to be argued within the judicial review suit. The Applicant cited the case of **Mukisa Biscuits Manufacturing Co. Ltd vs West End Distributors Ltd (1969) EA 696**, in which the nature of a Preliminary Objection is defined. **The Applicant also cited the Supreme Court case of Independent Electoral & Boundaries Commission vs Jane Cheperenger & 2 Others [2015] e KLR, in which the findings in The Mukisa Biscuit Case (supra) were affirmed.**

9. It was submitted that contrary to the Interested Party's assertions, the Children's Court is subordinate to this Court and therefore this Court has supervisory jurisdiction over it. The Applicant cited the case of Golden Line International Limited vs Bluesca Shopping Mall Limited & 3 Others [2016] eKLR for this position. On the subject of the application being barred by passage of time, the Applicant submits that the instant application arises from the order made on 16th November 2018. That, whereas the Applicant indeed seeks to quash the two orders of 31st January 2018 and 16th November 2018, the judicial review application is more on the Order of 16th November 2018 that enlarge the Court's jurisdiction. That, the Order dated 31st January 2018 is an attendant order that cannot be unmarried from the previous.

10. According to the Applicant, the Preliminary Objection that was dismissed on 16th November 2018 related to the Respondent lacking jurisdiction to entertain the matter due to the Applicant's status as a diplomatic agent and was anchored on the Vienna Convention on Diplomatic Relations. It is submitted that the 1st Respondent erroneously enlarged the exceptions as provide in Article 31 of the Convention to include children matters, thereby usurping the role of the General Assembly of the United Nations, hence acted *ultra vires*. The Applicant also cited the case of **Republic vs National Employment Authority & 3 Others Ex Parte Middle East Consultancy Services Limited (2018) e KLR**. In the circumstances, the Applicant submits that the instant Application was filed within time, as barely a month had elapsed from the 16th November 2018 and 20th December 2018 when the application was lodged.

11. The Applicant therefore submitted that the instant application is not an abuse of the Court's process, and that the issues raised in the Preliminary Objection are factual, and ought to be determined at the hearing of the application.

The Determination

12. The circumstances in which a preliminary objection may be raised was explained by the Court of Appeal in the case of **Mukisa Biscuit Manufacturing Co. Ltd vs West End Distributors Ltd (1969) EA 696**, as follows:

“a Preliminary Objection is in the nature of what used to be a demurrer. It raises a pure point of law which is argued on the assumption that all the facts pleaded by the other side are correct. It cannot be raised if any fact has to be ascertained or if what is sought is the exercise of judicial discretion.”

The effect of a preliminary objection if upheld, renders any further proceedings before the court impossible or unnecessary.

13. A preliminary objection cannot therefore be raised if any fact requires to be ascertained. In the case of **Oraro vs Mbaja, (2005) 1 KLR 141**, the court held that any assertion which claims to be a preliminary objection, and yet it bears factual aspects calling for proof, or seeks to adduce evidence for its authentication, is not, as a matter of legal principle, a true preliminary objection which the Court should allow to proceed. The Court of Appeal also stated in **Mukisa Biscuit Company -vs- West End Distributors Ltd (supra)** that a preliminary objection cannot be raised if what is sought is the exercise of judicial discretion.

14. The issues for determination herein therefore are whether the grounds raised in the Interested Party's preliminary objection raise pure points of law, and if so, whether the said preliminary objection has merit and should be upheld. If not upheld, the Court will then consider if the Applicant is deserved of extension of time. The Interested Party in this respect states that this Court has no jurisdiction to entertain the Applicant's application. I am in this respect guided by the case of **Owners of Motor Vessel "Lillian S" vs Caltex Oil (Kenya) Ltd (1989) KLR 1** where Justice Nyarangi JA (as he then was) held:

"I think it is reasonably plain that a question of jurisdiction ought to be raised at the earliest opportunity and the court seized of the matter is then obliged to decide the issue right away on the material before it. Jurisdiction is everything. Without it, a court has no power to make one more step. Where a court has no jurisdiction, there would be no basis for a continuation of proceedings pending other evidence. A court of law downs tools in respect of the matter before it the moment it holds the opinion that it is without jurisdiction."

15. A Court's jurisdiction flows from either the Constitution or statute or both or and by principles laid out in judicial precedent. It is thus clearly a pure question of law. As to whether the Interested Parity's preliminary objection has merit, it is not in dispute that the Applicant is seeking leave to commence judicial review proceedings in relation to proceedings in the Respondent Court, and specifically to quash orders made therein and stop the proceedings on the ground that the Respondent Court has no jurisdiction over him. This Court's judicial review jurisdiction in this respect flows from various laws, including Article 47 of the Constitution, the Law Reform Act, Order 53 of the Civil Procedure Rules and the Fair Administrative Action Act.

16. It is notable that the Applicant in his application has relied on section 8 and 9 of the Law Reform Act, and is also seeking leave to commence judicial review proceedings, which is regulated by for by Order 53 of the Civil Procedure Rules. It is not in dispute that the Applicant seeks to quash orders made by the Respondent on 31st January 2018 and 16th November 2018. Section 9(2) and 9(3) of the Law Reform Act in this regard provides as follows:

"2. Subject to the provisions of subsections (3), rules made under subsection (1) may prescribe that applications for an order of mandamus, prohibition, or certiorari shall, in specified proceedings, be made within six months, or such shorter period as may be prescribed, after the act or omission to which the application for leave related.

" 3. In the case of an application for an order of certiorari to remove any judgment, order, decree, conviction or other proceedings for the purpose of its being quashed, leave shall not be granted unless the application for leave is made not later than six months after the date of that judgment, order, decree, conviction or other proceeding or such shorter period as may be prescribed under any written law; and where that judgment, order, decree, conviction or other proceeding is subject to appeal, and a time is limited by law for the bringing of the appeal, the court or judge may adjourn the application for leave until the appeal is determined or the time for appealing has expired."

17. Order 53 Rule 2 of the Civil Procedure Rules also similarly provides as follows:

"2. Leave shall not be granted to apply for an order of certiorari to remove any judgment, order, decree, conviction or other proceeding for the purpose of its being quashed, unless the application for leave is made not later than six months after the date of the proceeding or such shorter period as may be prescribed by any Act; and where the proceeding is subject to appeal and a time is limited by law for the bringing of the appeal, the judge may adjourn the application for leave until the appeal is determined or the time for appealing has expired."

The instant application is therefore time barred in relation to any orders of certiorari to quash the orders made on 31st January 2018 as the application was made after six months from the date of the said orders, and this Court therefore has no jurisdiction to grant

any leave to bring judicial review proceedings to quash the said order.

18. While the Applicant has the right to move this Court for judicial review proceedings in relation to the remaining prayers of his application on the ground that the Respondent has no jurisdiction over him, it is notable and it is not disputed that this specific issue of the Respondent's jurisdiction was raised and heard by the Respondent Court. The Respondent dismissed the Applicant's preliminary objection on this issue after hearing the parties on the issue of its jurisdiction, and this was the subject of the order sought to be quashed that was made by the Respondent on 16th November 2018. This issue of whether or not the Respondent has jurisdiction is therefore *res judicata*. What the Applicant is seeking to do in the instant application is to reopen this issue for this Court to consider it afresh by judicial review proceedings, after it has already been considered on merit by the Respondent Court. This is clearly an abuse of the process of Court.

19. It is also notable that the supervisory jurisdiction of the High Court under Article 165 (6) of the Constitution can be exercised either by way of its appellate jurisdiction or its judicial review jurisdiction. The determinant factor on whether to proceed by way of appeal or judicial review is the nature of review sought. The judicial review jurisdiction is one that is exercised to review the decision making process by bodies undertaking a public function, and is highly circumscribed when it comes to merit review of the lawfulness of the decisions by the grounds of challenge of the decisions. For this reasons, the judicial review jurisdiction is ill equipped for resolving disputed facts, which are normally addressed during the initial decision making processes. Appeals on the other hand are exclusively merit reviews of decisions, made by judicial or quasi-judicial bodies, both on points of facts and law, and have no limitations on the grounds that can be raised.

20. The scope and parameters of judicial review jurisdiction has been addressed in various decisions as follows. The broad grounds for the exercise of judicial review jurisdiction were stated in the case of **Pastoli vs Kabale District Local Government Council & Others** [2008] 2 EA 300 at pages 303 to 304 thus:

“In order to succeed in an application for Judicial Review, the applicant has to show that the decision or act complained of is tainted with illegality, irrationality and procedural impropriety: See *Council of Civil Service Union v Minister for the Civil Service* [1985] AC 2; and also *Francis Bahikirwe Muntu and others v Kyambogo University*, High Court, Kampala, miscellaneous application number 643 of 2005 (UR).

Illegality is when the decision making authority commits an error of law in the process of taking the decision or making the act, the subject of the complaint. Acting without Jurisdiction or *ultra vires*, or contrary to the provisions of a law or its principles are instances of illegality.....

Irrationality is when there is such gross unreasonableness in the decision taken or act done, that no reasonable authority, addressing itself to the facts and the law before it, would have made such a decision. Such a decision is usually in defiance of logic and acceptable moral standards: *Re An Application by Bukoba Gymkhana Club* [1963] EA 478 at page 479 paragraph “E”.

Procedural impropriety is when there is failure to act fairly on the part of the decision making authority in the process of taking a decision. The unfairness may be in non-observance of the Rules of Natural Justice or to act with procedural fairness towards one to be affected by the decision. It may also involve failure to adhere and observe procedural rules expressly laid down in a statute or legislative Instrument by which such authority exercises jurisdiction to make a decision. (*Al-Mehdawi v Secretary of State for the Home Department* [1990] AC 876).”

21. In addition, the parameters of judicial review were addressed by the Court of Appeal in the case of **Municipal Council of Mombasa vs Republic & Umoja Consultants Limited**, Nairobi Civil Appeal No. 185 of 2001, [2002] eKLR as follows:

“The court would only be concerned with the process leading to the making of the decision. How was the decision arrived at" Did those who made the decision have the power, i.e. the jurisdiction to make it" Were the persons affected by the decision heard before it was made" In making the decision, did the decision - maker take into account relevant matters or did he take into account irrelevant matters" These are the kind of questions a court hearing a matter by way of judicial review is concerned with, and such court is not entitled to act as a court of appeal over the decider; acting as an appeal court over the decider would involve going into the merits of the decision itself-such as whether there was or there was not sufficient evidence to support the decision – and that, as we have said, is not the province of judicial review.”

22. It was also emphasized by the Court of Appeal in **Suchan Investment Limited vs. Ministry of National Heritage & Culture & 3 others**, (2016) KLR that while *Article 47 of the Constitution* as read with the grounds for review provided by section 7 of the Fair Administrative Action Act reveals an implicit shift of judicial review to include aspects of merit review of administrative action, *the reviewing court has no mandate to substitute its own decision for that of the administrator. The court can only remit the matter to the administrator and or make orders stipulated in Section 11 of the Act.*

23. I therefore find that the Applicant cannot invoke this Court's judicial review jurisdiction in relation to the orders by, and proceedings in the Respondent Court for the foregoing reasons. The Interested Party's Preliminary Objection dated 21st January 2019 is therefore found to be merited, and it is allowed. The Applicant's Chamber Summons dated 19th December 2018 is accordingly struck out, and the Applicant shall meet the costs of the Preliminary Objection.

24. Orders accordingly.

DATED AND SIGNED AT NAIROBI THIS 9TH DAY OF OCTOBER 2019

P. NYAMWEYA

JUDGE



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