Case Number:	Civil Appeal 149 of 2013
Date Delivered:	22 Jan 2016
Case Class:	Civil
Court:	Court of Appeal at Nairobi
Case Action:	Judgment
Judge:	Alnashir Ramazanali Magan Visram, Hannah Magondi Okwengu, Sankale ole Kantai
Citation:	Nation Media Group Limited v Cradle - The Children's Foundation Suing Through Geoffrey Maganya [2016] eKLR
Advocates:	-
Case Summary:	-
Court Division:	Civil
History Magistrates:	-
County:	Nairobi
Docket Number:	-
History Docket Number:	JR Misc. App. No. 217 of 2011
Case Outcome:	Appeal allowed
History County:	Nairobi
Representation By Advocates:	-
Advocates For:	-
Advocates Against:	-
Sum Awarded:	-

IN THE COURT OF APPEAL

AT NAIROBI

(CORAM: VISRAM, OKWENGU & KANTAI, JJ.A)

CIVIL APPEAL NO. 149 OF 2013

BETWEEN

NATION MEDIA GROUP LIMITED.....APPELLANT

AND

CRADLE - THE CHILDREN'S FOUNDATION

Suing through GEOFFREY MAGANYA.....RESPONDENT

(An appeal from the Judgment of the High Court of Kenya at Nairobi (Githua, J.) dated 21st December, 2012

in

JR Misc. App. No. 217 of 2011)

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JUDGMENT OF THE COURT

1. Pursuant to leave granted on 7th September, 2011 the respondent instituted judicial review proceedings on behalf of persons with hearing disabilities seeking an order of mandamus compelling the appellant to comply with the provisions of ***section 39*** of the Persons with Disabilities Act No. 14 of 2003 (the Act).

2. The application was premised on the grounds that on 1st January, 2010 the Minister of the then Gender, Children and Social Services operationalized the provisions of ***section 39*** of the Act by Legal Notice No. 182 of 2009 which requires all television stations to provide a sign language inset or sub-titles in all newscasts, educational programmes and in all programmes covering events of national significance. Despite the foregoing and a request from the respondent to comply with same the appellant failed to do so without reasonable cause. As a result the appellant"s actions not only violated the right of persons with hearing disabilities to equality and freedom from discrimination as enshrined under

Article 27(1) & (5) of the Constitution but also violated various provisions of international instruments ratified by Kenya namely, ***Article 7*** of the ***Universal Declaration on Human Rights***; ***Articles 2(1) & 26*** of the ***International Covenant on Civil and Political Rights; Article 2(1)*** of the ***United Nations Convention on the Rights of the Child***; ***Article 4(1)(e), 5(1) & 5(2)*** of the ***United Nations Convention on the Rights of Persons with disabilities*** and ***Article 1*** of the ***United Nations Educational Scientific*** and ***Cultural Organization Convention Against Discrimination in Education***.

3. It was the respondent"s case that the intent of s***ection 39*** was to enable persons with hearing disabilities to keep abreast of current affairs and to further give them an opportunity to broaden their knowledge through various educational programmes that are aired by both public and private television stations so as to realize their full potential.

4. In response the appellant filed a preliminary objection and a replying affidavit sworn by its then Legal Officer, Mr. Sekou Owino. It was the appellant"s contention that it was a private entity and not a public body therefore it was not amenable to judicial review and consequently the court had no jurisdiction to issue the orders sought. The respondent lacked *locus standi* to institute the proceedings since the protection of the rights of persons with disabilities did not fall within the respondent"s objects which restricts the respondent"s mandate to protection and promotion of the rights of children.

5. Mr. Owino deposed that by dint of ***Article 21(3)*** of the Constitution the duty to address the needs of vulnerable groups within the society lay with the state hence the appellant was erroneously sued. ***Section 39*** of the Act is unconstitutional in as far as it seeks to compel broadcasters to conduct their broadcast in a particular fashion contrary to the provisions of ***Article 34(2)*** of the Constitution. He deposed that the appellant had taken steps to comply with ***section 39*** but the same had been hindered by the then impending digital migration and the enormous financial implication. Further, that the order sought by the respondent was discriminatory as it was only directed to the appellant yet there were more than 10 television stations in the country which had not complied with the provision in question and the same would have the effect of unfairly distorting competition.

6. The learned Judge in her judgment dated 21st December, 2012 found that in judicial review proceedings all an applicant requires to establish is that he has sufficient interest or stake in the matter in order to demonstrate *locus standi*; where an action challenges an administrative decision or seeks enforcement of constitutional rights an applicant is not required to demonstrate by way of affidavits or other documentation that he is representing the public interest hence the respondent had the requisite *locus standi*. The learned judge, however, conceded that the appellant was not a public or statutory body and was therefore not amenable to the judicial review process.

7. Being of the view that there is an interplay between administrative law on which judicial review is anchored and constitutional law, and that the respondent"s complaints were related to alleged violation of constitutional rights and freedoms, the learned Judge proceeded to determine the application before her as a constitutional petition for the enforcement of constitutional rights under ***Article 22*** of the Constitution. She went further to find that the appellant"s non-compliance amounted to indirect discrimination of the respondent"s constituents on the basis of their hearing disability. The learned Judge finally issued an order directing the appellant to comply with ***section 39*** of the Act within 90 days from the date of judgment.

8. It is against the said judgment that the appellant has filed this appeal on the grounds that the learned Judge erred by;

(i) Failing to strike out the respondent"s judicial review application despite finding that the appellant was not amenable to judicial review;

(ii) Converting the judicial review application into a constitutional petition;

(iii) Failing to take into account the necessary considerations before fundamental rights and freedoms are enforced horizontally as between private individuals;

(iv) Failing to conduct a proportionality assessment between the competing rights of the parties;

(v) Failing to find and hold that Section 39 of the Act is unconstitutional in so far as it compels the appellant to use sign language as it contravenes Article 34 of the Constitution;

(vi) Failing to find that compelling the appellant to singularly introduce sign language broadcasting amounts to discrimination against the appellant vis-à-vis other media houses;

(vii) Failing to take judicial notice of the fact that the appellant was in the process of digital migration following a government directive and as such installing the sign broadcasting within 90 days would have disastrous economic ramifications on the appellant's business;

(viii) Finding that the respondent was entitled to the orders granted.

9. Those grounds were compressed into three in written submissions which were orally highlighted by Miss Wanjiru Ngige who appeared for the appellant. On the first issue the appellant faulted the learned Judge for converting the judicial review application into a constitutional petition despite holding that the appellant was not amenable to judicial review. It was argued that the conversion had the effect of abridging the appellant"s right to know the case against it and consequently to respond appropriately, thus violating its right to a fair trial. Elaborating on this ground, Miss Ngige submitted that the respondent filed judicial review application which is primarily concerned with the **process** rather than the merits of a decision. Therefore, the parties were unable to address the court on the central questions of discrimination and the constitutionality of ***section 39*** of the Act given that their respective pleadings related purely to the judicial review application before the court. Further, the preliminary objection and the respondent"s substantive application were argued together, denying the appellant a fair hearing on the "conversion". To buttress that line of argument the appellant placed reliance on the case of ***AXA General Insurance Ltd. & Others -vs- The Lord Advocate & Others (Scotland) [2011] UKSC 46*** wherein the court concluded that pleadings serve various purposes and could not be interchanged without altering the jurisdiction and therefore the objectives of the court in the cause concerned. According to Miss Ngige, the learned Judge ought to have downed her tools after she found that the appellant was not amenable to judicial review. Consequently, the "conversion" was unconstitutional and unjust.

10. On the second issue, the appellant faulted the learned Judge for finding that there was discrimination against the respondent without conducting a proportionality assessment of the competing rights of the parties. It was argued that if a constitutional petition was properly before the trial Judge the substantive question would have been whether the failure to comply with s***ection 39*** of the Act was discrimination prohibited under ***Article 27(1) & (5)*** of the Constitution. Consideration of that issue would have given rise to several competing interests namely, the appellant"s freedom from state interference under ***Article 34*** of the Constitution, the right to use the language of one"s choice under ***Article 44(1)*** and the duty of addressing the needs of vulnerable groups vested in the state under ***Article 21***. In this regard the appellant cited the ***AXA General Insurance Ltd*** case;

"34. In Sporrong and Lonnroth -vs- Sweden (1982) 5 EHRR 35, para 69, the Strasbourg court declared that:-

„the Court must determine whether a fair balance was struck between the demands of the general interest of the community and the requirements of the protection of the individual"s fundamental rights. In Pressos Compania Naviera SA -vs- Belgium (1995) 21 EHRR 301, para 63 recalling this passage, the Commission said that fair balance must be regarded as upset if the person concerned had to bear an individual and excessive burden… there must be a reasonable relationship between the means employed and the aims pursued""

It was argued that the learned Judge failed to address herself on whether a fair balance had been struck between the interests of the community and the protection of the appellant"s fundamental rights before granting the orders which had the effect of compelling the appellant to bear an individual and excessive burden.

11. Further, that the learned Judge failed to address herself on whether the alleged differential treatment of deaf children by the

appellant amounted to prohibited discrimination. Placing reliance on the decisions in ***John Mwai & 3 Others -vs-Kenya National Examination Council & 2 Others*** ***(2011) eKLR*** and ***The President of the Republic of South Africa & Another -vs- John Phillip Hugo 1997 (4) SAICC*** the appellant argued that constitutionally prohibited discrimination must be unfair and prejudicial; requires a careful and thorough understanding of the impact of the discriminatory action upon the particular people concerned to determine whether its overall impact is one which furthers the goal of equality or not; is contextual and does not equal identical treatment in all circumstances. According to the appellant, there was no evidence placed before the learned Judge to demonstrate the impact, if any, of the alleged discriminatory action on the people concerned.

12. On the third and last issue the appellant faulted the learned Judge for not "downing her tools" once she found that the appellant was not amenable to a judicial review application. It was argued that at that point this matter ceased to be a public issue and became a private law issue, hence the question of the respondent"s *locus standi* was vital despite the relaxed provisions of ***Article 22*** of the Constitution. The appellant maintained that *locus standi* is derived from the stake or interest held by a person in a matter before court and at the very least the respondent ought to have demonstrated:-

a. There was a deaf member of its constituency or the public who was genuinely aggrieved by the actions or omissions of the appellant (and by implication by the entire sector) and who wished to seek redress for such actions and omissions; and

b. Why out of the entire media sector and its regulators, it is only the appellant against whom constitutional rights could be invoked and enforced.

13. The appellant also argued that the respondent had failed to demonstrate how it brought itself within the relaxed provision for *locus standi* under ***Article 22*** of the Constitution. It was the appellant"s position that the respondent had no *locus standi* to institute the suit. Miss Ngige urged us to allow the appeal.

14. Miss Faith Mutuku, holding brief for Miss Prudence Mutiso, for the respondent, in opposing the appeal relied on the respondent"s written submissions. It was submitted, on the first issue, that the "conversion" was proper because the Constitution itself recognizes the interplay between the so called traditional judicial review and the constitutional avenue of redress wherein a court considering an application for enforcement or violation of constitutional rights may issue an order of judicial review under ***Article 23***. In support of this contention the respondent cited the cases of ***Githunguri -vs- Republic*** ***(1986) 1 KLR*** and ***Sumayyah Mohammed -vs- Moraine & Another*** ***(1996) 3 LRC***. In further support of the "conversion" the respondent argued that it was the duty of the learned Judge to exercise her inherent jurisdiction to prevent the court"s process being used to perpetrate injustice or abuse.

15. On the second issue, it was the respondent"s case that the appellant never demonstrated the unconstitutionality, if any, of ***section 39*** of the Act. The respondent also cited ***Article 2*** of the ***Convention on the Rights of Persons with Disabilities*** which defines „discrimination on the basis of disability" as;

"means any distinction, exclusion or restriction on the basis of disability which has the purpose or effect of impairing or nullifying the recognition, enjoyment or exercise, on an equal basis with others, of all human rights and fundamental freedoms in the political, economic, social, cultural, civil or any other field. It includes all forms of discrimination, including denial of reasonable accommodation."

Further, „reasonable accommodation" is defined as;

"***means necessary and appropriate modification and adjustments not imposing a disproportionate or undue burden, where***

needed in a particular case, to ensure to persons with disabilities the enjoyment or exercise on an equal basis with others of all human rights and fundamental freedoms."

16. It was argued that the appellant"s conduct amounted to discrimination and violation of the rights of persons with hearing disabilities. To buttress this argument the respondent placed reliance on the decision of the Supreme Court of Canada in ***Elridge -vs- British Columbia 1998 ILRC*** wherein it was held that the failure to provide sign language where it is necessary for effective communication constitutes a *prima facie* violation. According to the respondent, the issue that arises in a case such as this is how the courts should approach a conflict between the rights of private citizens. In its view the courts need to engage in a more thorough and contextual analysis of some of the contested questions that arise in the field of horizontal rights application.

17. It was further submitted that consideration of proportionality necessitates an assessment of the balance between interests and objectives. The decision made must be proved to have been necessary to meet a legitimate aim and the most reasonable way of doing so. The respondent maintained that the learned Judge in arriving at her decision correctly addressed herself to the following three questions;

i. Whether the measure was suitable to achieve the desired objective.

ii. Whether the measure was necessary for achieving the desired objective.

iii. Whether, even so, the measure imposed excessive burdens on the individual affected.

18. On the third and last issue, it was submitted that orders could only be issued against a party to the suit; and the learned Judge correctly issued orders against the appellant. The respondent maintained that it had *locus standi* by virtue of ***Article 3*** of the Constitution which obligates every person to respect, uphold and defend the Constitution, *locus*, hence, bestows *standi* on anyone to institute proceedings seeking enforcement of the Constitution; ***Article 22(1) & (2)*** of the Constitution gives every person the right to institute proceedings claiming a right or fundamental freedom has been denied, violated or infringed and to sue in the public interest respectively. It was submitted that *locus standi* is not contingent upon a personal or direct injury to the party instituting the case. Further by dint of ***Articles 22 & 258*** of the Constitution any person could institute proceedings under the Bill of Rights on behalf of another person who could not act in their own name, or a member of, or in the interest of a group or class of persons, or in the public interest. Consequently, the respondent had locus to institute proceedings on behalf of children with hearing disabilities.

19. We are aware of our power under ***Rule 29 (1) (a)*** of the Court of Appeal Rules to re-appraise the evidence and to draw our own inferences of fact, on a first appeal. We are also conscious that the decision of the trial court is entitled to some measure of deference unless the conclusions made on the evidential material on record are perverse or the decision as a whole is bad in law.

20. Having found and correctly so that the appellant was not amenable to judicial review what then should have been the next step by the trial court" To put in another way was the learned Judge correct in converting the judicial review proceedings into a constitutional petition seeking enforcement of fundamental rights"

21. In converting the judicial review proceedings the learned Judge in the impugned judgment expressed;

"Although the applicant sought the enforcement of its constituents constitutional rights through a judicial review application, it is my view that there is some interplay between administrative law on which the remedy of judicial review is anchored and constitutional law. In the interest of administering substantive justice as envisaged in the new constitutional dispensation. I am of the firm view that the court should not be overly concerned with the way or manner in which litigants grievances are presented to the court provided that they are clear and justiciable.

In this case the applicant"s complaints were clearly set out and they relate to the alleged violation of constitutional rights and freedoms under the Bill of Rights. I think that the court has power under its unlimited jurisdiction to investigate the applicant"s grievances and make a final determination thereon irrespective of the inappropriate mode used to present the said grievances to the court. In making this finding, the court is guided by the precedent set by this court in Githunguri -vs- Republic (1986) eKLR where the court converted a judicial review application for an order of prohibition into a constitutional application which it proceeded to consider and determine."

21. In ***Mumo Matemu -vs- Trusted Society of Human Rights Alliance & 5 Others - Civil Appeal No. 290 of 2012*** this Court opined that it is trite that the jurisdiction of any court provides the foundation for its exercise of judicial authority. As a general principle, where a court has no jurisdiction, it has no basis for judicial proceedings much less judicial decision or order.

23. In this case the respondent sought and was granted leave to institute judicial review proceedings under ***Order 53*** of the Civil Procedure Rules for an order of mandamus compelling the appellant to comply with ***section 39*** of the Act. In judicial review, the High Court has special jurisdiction to issue orders ofmandamus, prohibition and certiorari as the remedies against acts or omissions by public entities. See ***Biren Amritlal Shah & Another -vs- Republic & 3 Others (2013) eKLR***. It is not concerned with reviewing the merits or otherwise, of a decision by a public entity, in respect of which the application for judicial review is made, but the decision making process itself. It is important to note in every case, that the purpose of judicial review is to determine whether the applicant was accorded fair treatment by the concerned public body, and that it is not within the remit of the court to substitute its own opinion with that of the public entity charged by law to decide the matter in question. See ***R -vs- Judicial Service Commission - Misc. Civil Application No. 1025 of 2003***.

24. In ***Emfil Limited -vs- Registrar of Titles Mombasa & 2 Others [2014] eKLR*** this Court (differently constituted) faced with a similar situation held,

"We have perused the Githunguri v Attorney General No. 2 [1986] KLR 1 (Githunguri case) which was relied upon by the learned judge. In the first place the constitutional reference leading to the Githunguri case was made under the former Constitution of Kenya (hereinafter referred to as the repealed Constitution). The holding criticizing the reference from the subordinate court to the Constitutional Court under section 67 of the repealed Constitution was made obiter as the court was not sitting on appeal in regard to the reference. The judges nonetheless expressed the view that the questions referred to the Constitutional Court under section 67 of the repealed Constitution ought to have been framed as an infringement of the applicant"s fundamental rights, thereby bringing the matter within section 84(1) of the repealed Constitution.

In addition, the deeming of the proceedings as dealing with enforcement of the Bill of Rights in the Githunguri case was not prejudicial to the accused, but was in his interest as evident from the following statement from that judgment:

"It seems to us that the application in these proceedings comes true appropriately as a fundamental right application under section 77(1) of the Constitution as referred to in sections 84(1) above.

Section 77 (1) is:

„if a person is charged with a criminal offence, then unless the charge is withdrawn ,the case shall be afforded a fair hearing within a reasonable time by an independent and impartial Court established by law."

In the interests of justice, we will treat the application before us as having been made, and to deem it amended and to have been brought under section 84(1)."

In the appellant"s case, the application for Judicial Review was made in August 2011 after the promulgation of the Constitution of Kenya 2010 (hereinafter the Constitution), which replaced the repealed Constitution. Article 23 of the Constitution, provides for an order of Judicial Review as an appropriate relief that may be granted in the enforcement of the Bill of Rights. Clearly, the appellant had the option to bring his application under Article 22 and 23 of that Constitution, but opted for Judicial Review proceedings under Order 53 of the Civil Procedure Rules.

The extract of the judgment of the High Court reproduced herein above (paragraph 13) reveals that the adoption of the constitutional reference proceedings under Article 22 and 23 by the learned judge was basically to expand the proceedings in order to include the issue of compulsory acquisition. But the appellant in the notice of motion only mentioned compulsory acquisition in passing. It was not a specific relief that was sought. Unlike the Githunguri case, it cannot be said that it was necessary to convert the applicant"s Judicial Review proceedings to a constitutional reference in order to allow the court the latitude in granting relief. The issue of compulsory acquisition was not before the judge for determination, such as to justify expanding the proceedings to accommodate it. …... The appellant having specifically moved the court for orders of Judicial Review, which were available to the appellant under Order 53 of the Civil Procedure Rules, the court had no business tampering with his application by turning it into an application for enforcement of the bill of rights under the Constitution." Emphasis added.

25. Similarly in this case the only relief sought by the respondent was an order of mandamus and the issue of enforcement of fundamental rights was not before the trial Judge for determination the applicant having invoked the special jurisdiction of the court under judicial review.

26. The learned Judge also sought solace in the provisions of ***Article 159*** of the Constitution which calls upon courts not to pay undue regard to procedural technicalities. We find that ***Article 159*** could not be a basis upon which the learned Judge justified the conversion. First, pleadings are a tenet of substantive justice, as they give fair notice to the other party. See ***Mumo Matemu case (supra)***. Jessel, M. R said in 1876 in the case of ***Thorp -vs- Holdsworth (1876) 3 Ch. D. 637*** at 639 held:

"The whole object of pleadings is to bring the parties to an issue, and the meaning of the rules…was to prevent the issue being enlarged, which would prevent either party from knowing when the cause came on for trial, what the real point to be discussed and decided was. In fact, the whole meaning of the system is to narrow the parties to define issues, and thereby diminish expense and delay, especially as regards the amount of testimony required on either side at the hearing."

27. Second, the Supreme Court in ***Patricia Cherotich Sawe -vs- Independent Electoral & Boundaries Commission (IEBC) & 4 Others [2015] eKLR***

"Although the appellant invokes the principle of the prevalence of substance over form, this Court did signal in Law Society of Kenya v. The Centre for Human Rights & Democracy & 12 Others,

Petition No. 14 of 2013, that "Article 159(2) (d) of the Constitution is not a panacea for all procedural shortfalls." Not all procedural deficiencies can be remedied by Article 159; and such is clearly the case, where the procedural step in question is a jurisdictional prerequisite."

See also this Court"s decision in ***Jaldesa Tuke Dabelo -vs- IEBC & Another – Civil Appeal No. 37 of 2014***. The jurisdiction of the High Court in judicial review and in a petition for enforcement of the bill of rights is invoked by the procedure a party pursues. In judicial review the special jurisdiction is invoked under ***Order 53*** of the Civil Procedure Rules while the jurisdiction of the court to enforce fundament rights is invoked under ***Articles 23 & 258*** of the Constitution. We find that the applicant invoked the jurisdiction of the High Court under ***Order 53*** hence it was not open for the learned Judge to convert and alter the proceedings.

28. Based on the foregoing we are of the view that the learned Judge lacked jurisdiction to make any other step after she found that the appellant was not amenable to judicial review. She ought to have struck out the respondent"s application. In ***Owners of the Motor Vessel „Lillian S" -vs- Caltex Oil (Kenya) Ltd (1989) KLR1*** Nyarangi, J.A held,

"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."

29. Having expressed ourselves as herein above we see no reasons to consider the other issues. In **Lemanken Aramat -vs- Harun Meitamei Lempaka & 2 Others [2014] eKLR**, the Supreme Court held,

"On the basis of the foregoing principle, this Court"s priority in the instant case is to ascertain the extent of the jurisdiction of the other Courts, at the time they made their determinations; and if they lacked jurisdiction, then their decisions would be null: and consequently it would not be necessary for this Court to examine such other questions as may have been the subject of the Orders of those Courts."

30. We find that the appeal herein has merit and is hereby allowed. We set aside the Judgment of the High Court dated 21st December, 2012 and substitute it with an order striking out the respondent"s notice of motion, with each party bearing its own costs, this being a public interest litigation.

Dated and Delivered at Nairobi this 22nd day of January, 2016.

ALNASHIR VISRAM

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JUDGE OF APPEAL

H. M. OKWENGU

…….…….

JUDGE OF APPEAL

S. ole KANTAI

…….

JUDGE OF APPEAL

I certify that this is a true copy of the original.

DEPUTY REGISTRAR