



REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT BUNGOMA

CRIMINAL REVISION NO. 1 OF 2020

MICHAEL BARASA MANGENI.....APPLICANT

VERSUS

MINISTRY OF HEALTH AND SANITATION.....1ST RESPONDENT

FATUMA MOHAMED ABDI.....2ND RESPONDENT

R U L I N G

The applicant, Mr. Michael Barasa holds a lease on the premises located parcel East Bukusu/South Kanduyi/7010 for a period of 5 years beginning 27th May 2017. The 2nd Respondent is the landlady and owner of the premises. The 1st Respondent is a Government Department dealing in matters of Health & Sanitation.

That on 27th October 2019 the applicant received a sanitary inspection report of Mantos Super Lounge his business from Antony Juma, Public Health Officer of Khalaba Ward. The report identified several areas in the business that required remedial action in compliance with Public Health Act.

While the applicant was working to meet those requirements he learnt 2nd respondent was working with Antony Juma to evict the applicant from his leased premises.

That respondents moved the court on 6th December 2019 and obtained orders that the respondents can move in and close the business premises. The respondents also obtained orders on 30th December 2019 that the respondents take inventory of all furniture and movable items from the premises.

The applicant the moved to Chief Magistrate Court under Certificate of Urgency to challenge the orders issued but the magistrate's court ruled it lacked jurisdiction to vary the orders. The applicant then moved the High Court vide the current application under consideration. The applicant then filed this current chamber summons application dated 20th January 2020 seeking orders:-

1. **THAT this Honorable court lifts and sets aside the Orders of the Honorable G.O Omondi, Senior Principal Magistrate issued on 6th December, 2019 in criminal miscellaneous No. 355 of 2019.**
2. **THAT this Honorable Court lifts and sets aside the Orders of the Honorable C.A.S Mutai, Senior Principal Magistrate issued on 30th December, 2019 in criminal miscellaneous No. 355 of 2019.**
3. **THAT the public health officer in charge of Khalaba wards Mr. Anthony Juma is not a public prosecutor gazetted by the director of public prosecutions to prosecute any cases in any court and therefore the prosecution in criminal Miscellaneous No.355 of 2019 was ultra vires, null and void ab initio.**
4. **THAT this honorable court does issue any other orders that serve the ends of justice.**
5. **Costs of this application be provided for.**

The application is premised on the ground that the public health officer in charge of Khalaba wards **Mr. Anthony Juma** is not a public prosecutor gazetted by the Director of Public Prosecutions to prosecute any case on behalf of the Director of Public Prosecutions. That Public Health Officer is an impostor and a masquerader who acted without any legal authority. That the purported prosecutorial actions in Criminal Miscellaneous **No. 355 of 2019** prosecuted by **Mr. Anthony Juma**, the Khalaba ward Public Health Officer was over reaching, ultra vires, null and void ab initio and cannot stand.

The application was supported by supporting affidavit of Charles Anyanga Malala an Advocate of the High Court. He briefly stated that his client is the proprietor of a business known as **MANTOS SUPER LOUNGE** at the premises on **L.R No. E. BUKUSU/S. KANDUYI/7010**.

He deponed the respondents obtained punitive orders against his client without knowledge of him or him being heard on 6th December 2019 and 30th December 2019.

He stated that the Public Health Officer for Khalaba Ward who is not a public prosecutor acted without any legal authority in prosecuting his client therefore the purported prosecution in Criminal Miscellaneous No.355 of 2019 prosecuted by Antony Juma was over reaching, ultra vires, null and void ab initio. The 1st and 2nd Respondent opposed the application and filed respective replying affidavits. 1st Respondents Antony Juma stated that he is an employee of Public Health Body whose mandate is to safeguard the public from health hazards and with regard to that mandate it exercised its discretion.

He stated that orders were issued upon court being satisfied that the alleged nuisance existed, and compliance to act upon the notice had not been done. He stated prosecution was in accordance with Public Health Act. The 2nd respondent Fatuma Abdi stated in her affidavit that application is misapprehension of facts and law. She stated that the duty of this court is exercise its discretion under section 362 of the Criminal Procedure Code to the correctness of the order and not to rehear the matter.

By court direction the application was disposed of by way of written submission. Malala Counsel for the applicant submitted that the prosecution in lower court was carried out by an unqualified person and asked this court to set aside the orders issued.

He submitted that there was no fair hearing granted under article 50 of the Constitution of Kenya, 2010. He submitted that the applicant was adversely affected by the impugned orders and was condemned unheard. He submitted that application right to own property under article 40 of Constitution of Kenya had been infringed, that respondents rushed to court prematurely to obtain orders prior to expiration of 14 days statutory notice.

He submitted that the orders were obtained through fraud, misrepresentation and withholding of material facts.

The respondents submitted through their advocates on record Mr. Ocharo and Mr. Anrwar respectively. They submitted that the prosecution of Criminal Miscellaneous 355 of 2019 was right in law and as a regularity of proceedings on any such proceedings and relied on section 167 of the Public Health Act.

They submitted that Antony Juma is a Public Health Officer duly authorized by County Government of Bungoma relying on Section 2 of Public Health Act. They submitted that Director Public Prosecutor is not the only person authorized to institute criminal proceedings.

They submitted that notice to remove nuisance was issued upon both applicant and 2nd respondent and recommendation for compliance was to be worked on by the 2nd respondent.

They submitted that the current application does not qualify for revision and that the process was followed and applicant as heard by Public Health Officers before decision to lodge complaint in court. They submitted that statutory notice was issued and owing to noncompliance a complaint was filed in court.

This is an application to the High Court for revision. The powers of revision by High Court are stipulated in Section 362 of the Criminal Procedure Code Section 362 of The Criminal Procedure Code states: -

“The High Court may call for and examine the record of any criminal proceedings before any subordinate court for the purpose of satisfying itself as to the correctness, legality or propriety of any finding, sentence or order recorded or passed, and as to the regularity of any proceedings of any such subordinate court.”

Having considered the application and parties' respective submission the issue for determination before this court is whether this court should order revision of orders issued in criminal Miscellaneous No. 355 of 2019.

The impugned orders herein are orders issued by the Honourable G.P Omondi - PM, on the 6th December 2019 and orders issued by Honourable C.A.S Mutai - SPM issued on 30th December 2019 in criminal Miscellaneous 355 of 2019.

The impugned order issued on 6th December 2019 were in the following terms;

- 1. THAT the statutory notice gives 14 days to the respondent to comply.**
- 2. THAT the respondent has up to 11th December,2019 to comply**
- 3. THAT if by 13th December 2019 the respondent will not have complied, then the applicant can move in and close the business on plot No. E. Bukusu/S. Kanduyi/7010 and O.C.S. Bungoma Station to provide security.**

It upon the above orders that the respondents herein acted leading to the current application. It is the contention of the applicant that the orders were obtained irregularly and he was condemned unheard by an unauthorized person one Antony Juma.

The proceedings of Miscellaneous Criminal Application No. 355 of 2019 as can be discerned are as follows: -

REPUBLIC OF KENYA

IN THE CHIEF MAGISTRATE'S COURT AT BUNGOMA

CRIMINAL MISC. NO. 355 OF 2019

MINISTRY OF HEALTH &

SANITATION (BUNGOMA).....APPLICANT

VERSUS.

FATUMA MOHAMMED ABDI.....RESPONDENT

“3.12.2019

Before: G.P. Omondi (SRM)

Court: The Statutory Notice and the Affidavit be served upon the Respondent. Application be heard on 6/12/2019.

G.P. OMONDI (SRM)

03/12/2019

6.12.2019

Before: Hon. G.P. Omondi (SRM)

Court Assistant: Lupumoi

Applicant: Through Mr. Anthony Juma: Present

Respondent: Present

Antony Juma: The Respondent was served with statutory notice dated 27/11/2019. The Respondent has not complied with the notice. We pray that the premises, Mantos Super Longe be closed until she complies.

Respondent: I have not been able to meet the requirements of the notice because I am spending on medication but I have no objection to close it. I am ready to close the premises until I meet the requirements of the notice.

Court: The statutory notice gives 14 days to the Respondent to comply. That means the Respondent still have upto 11th December, 2019 to comply. If by 13th December 2019 the respondent will not have complied, then the applicant will be at liberty to move in and close the business and the O.C.S. Bungoma Station to provide security. I have not considered 12th December, 2019 because it will be a Holiday.

G.P. OMONDI (SRM)

6/12/2019

30.12.2019

Before: Mr. C.A.S. Mutai (SPM)

Court Assistant: Diana

Applicant/Respondent: Present

Applicant: I pray to prosecute application dated 30th December, 2019 under Certificate of Urgency.

Court: Application dated 3rd December, 2019 is in issue. I hereby fully considered orders sought Prayer 1 2 & 3 is granted as

sought.

C.A.S. MUTAI (SPM)

30/12/2019”

There is no contention that Fatuma Mohammed Abdi the 2nd Respondent is the owner of the premises known as plot no. East Bukusu/South Kanduyi/7010. The applicant Michael Barasa Mangeni is a tenant in those premises running a hotel and bar business known as Mantos Super Lounge. The applicant had entered in a lease agreement dated 27th May, 2017 for a period of 5 years.

The Public Health Officer I/C of Khalaba Ward Antony Juma visited and inspected the premises on 7th November, 2019. As a result of the inspection, he forwarded a report to the landlady dated 7th October, 2019 stipulating the areas that needed to be worked on to remove what he said was a possible Public Health Problem. He gave the landlady 14 days to rectify the areas highlighted on 13th December, 2019, Antony Juma the Public Health Officer issued a closure Notice to Fatuma Abdi the Landlady. The notice was on the following terms: -

“In reference to sanitary inspection report contacted on 7th day of November, 2019, served on 11th day of November, 2019 and follow up on 26th day of November. I made observation that you failed to comply with the recommendations. The period for your compliance elapsed on 11th day of December, 2019 based on statutory notice served to you on 27th day of November, 2019.

This is contrary to the Constitution of Kenya Article 42, 43(a) (b) (d) and Article 70 Public Health Act Cap 242 Section 11 Laws of Kenya regulations thereunder.

Based on Reference above and orders issued by Bungoma Law Court in reference to Criminal Miscellaneous No. 355 of 2019. I hereby move on and close the premises on 13th day of December, 2019.

The premise shall be closed down until you fully attend to the following: -

- 1. Present all food handlers without medical certificates, for medical examination and certification in government health facility.***
- 2. Provide protective garments for all food handlers.***
- 3. Refill all fire extinguishers and regularly service them based on fire and safety regulations to ensure that they remain in good working order and function correctly should there be need.***
- 4. Provide first aid kit and fire blanket in the kitchen.***
- 5. Repaint the entire internal part of the structure.***
- 6. Provide reliable portable source of water with outlets at all strategic point of the premise.***
- 7. Provide valid food hygiene license and liquor license.***
- 8. Scrape, plaster and paint the external wall.***

Note: I live loads shall be vacated in the premise to allow renovation.

Be informed, the premise is CLOSED DOWN until you filly adhere aforementioned a recommendations.”

The Public Health Officer appeared in court 3rd December, 2019 and the proceedings show the following: -

REPUBLIC OF KENYA.

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Court: The statutory notice gives 14 days to the Respondent to comply. That means the Respondent still have upto 11th December, 2019 to comply. If by 13th December 2019 the respondent will not have complied, then the applicant will be at liberty to move in and close the business and the O.C.S. Bungoma Station to provide security. I have not considered 12th December, 2019 because it will be a Holiday.

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6/12/2019

30.12.2019

Before: Mr. C.A.S. Mutai (SPM)

Court Assistant: Diana

Applicant/Respondent: Present

Applicant: I pray to prosecute application dated 30th December, 2019 under Certificate of Urgency.

Court: Application dated 3rd December, 2019 is in issue. I hereby fully considered orders sought Prayer 1 2 & 3 is granted as sought.

C.A.S. MUTAI (SPM)

30/12/2019”

The main issue raised by the applicant in the application and what is the issue for determination is whether Antony Juma the Public Health Officer I/C Township and Khalaba Wards in Bungoma County had powers to prosecute before the magistrate’s Court in Misc. Criminal Case Number 355 of 2019.

“Section 115 of Cap 242 prohibits the causing of nuisances

The impugned notice must have been preferred under S.115 which reads;

“No person shall cause a nuisance or shall suffer to exist on any land or premises owned or occupied by him or of which he is in charge any nuisance or other conditions liable to be injurious or dangerous to health”

The Section stipulates;

“S. 116 It shall be the duty of every Local Authority to take all lawful, necessary and reasonably practicable measures for maintaining its district at all times in clean and sanitary condition, and for prevention of the occurrence therein of, or for remedying or causing to be remedied any nuisance or condition liable to be injurious or dangerous to health, and to take proceedings at law against any person causing or responsible for the conditions of any such nuisance or condition.”

Section 118 specifically defines what amounts to a nuisance and lists the various kinds of nuisances from S.118 – I have picked out;

“Sec. 118 (1) The following shall be deemed to be a nuisance liable to be dealt with in the manner provided in this part;

(b) Any dwelling or premises or part thereof which is or are of such construction or in such a state or situated or so dirty or so verminous as to be, in the opinion of the Medical Officer of Health, injurious or dangerous to Health, or which is or are liable to favour the spread of any infectious disease

(l) any public or other building which is so situated constructed, used or kept as to be unsafe or injurious or dangerous to health;

(s) any act or omission or thing which is or may be dangerous to life or injurious to health.”

In the Report dated 7th October, 2019 the Public Health Officer highlighted several areas he noted which needed to be addressed. These includes the state of the kitchen, refuse disposal, ventilation sanitary facilities and disaster preparedness. These are defects which he deemed to be a nuisance under Section 15 and 18 of the Act.

The recommendations in the report dated 7th October, 2019 included those to be effected by the tenant which included medical examination of staff, uniform, hygiene and others for the landlord which includes plastering and painting of premises.

Section 119 of the Act provides as follows: -

“The medical officer of health, if satisfied of the existence of a nuisance, shall serve a notice on the author of the nuisance or, if he cannot be found, on the occupier or owner of the dwelling or premises on which the nuisance arises or continues, requiring him to remove it within the time specified in the notice, and to execute such work and do such things as may be necessary for that purpose, and, if the medical officer of health think it desirable (but not otherwise), specifying any work to be executed to prevent a recurrence of the said nuisance:

Provided that—

(i) where the nuisance arises from any want or defect of a structural character, or where the dwelling or premises are unoccupied, the notice shall be served on the owner;

(ii) where the author of the nuisance cannot be found and it is clear that the nuisance does not arise or continue by the act or default or sufferance of the occupier or owner of the dwelling or premises, the medical officer of health shall remove the same and may do what is necessary to prevent the recurrence thereof.”

This section gives authority to the Medical Officer of Health once satisfied that there exists a nuisance issue notice to parties involved to remove a nuisance within a specified time and if it not removed to file a complaint before a magistrate’s court, Section 2 of the Public Health Act defines a Medical Officer to mean: -

“(a) the Director of Medical Services; and

(b) in relation to the area of any municipality, the duly appointed medical officer of health of the municipality including a public officer seconded by the Government to hold such office; and

(c) in relation to any other area a medical officer of health appointed by the Minister for that area.”

Section 167 of the Act provides that a Health Authority may specifically authorize any of its officers in writing to prosecute any offence. It provides:- ***“Section 167: -***

(1) A health authority may, by any of its officers or by any person generally or specially authorized in writing by the authority, prosecute for any contravention of, offence against, or default in complying with, any provision of this Act or any rule made or deemed to be made thereunder, if the contravention, offence or default is to have been committed within or to affect his area.

(2) Where any officer or person has, under subsection (1), prosecuted any person for any contravention of, offence against or default in complying with any provision of this Act, or any rule made or deemed to be made thereunder, and the accused has been convicted of that contravention, offence or default, all fines and penalties imposed may be recovered by such officer or person as a civil debt recoverable summarily.”

The Health Authority, therefore, may prosecute any person who has committed an offence by any of the officers or any person specifically authorized in writing to prosecute the same. The person who is the prosecutor must be an officer or by any person specially authorized in writing.

Was Antony Juma such officer or person specially authorized to prosecute for offences under the Act?

A plain reading of section 167 shows that there are 2 categories of person who can prosecute a party who has not complied in court. The first one is an officer of the Health Authority if he is not an officer, then it must be a person specifically authorized in writing by the Health Authority to prosecute. If it is the former, my understanding is that he may be authorized by law or provision of the law appoint if it is the later, he must at all times produce a letter of authority from the Health Authority appointing him as a prosecutor. In this case no evidence has been tendered that Antony Juma, the Public Health Officer in charge Khalaba Ward was not the officer of the Health Authority envisaged in Section 167 to prosecute a complaint before a magistrate's court for the enforcement of the notice issued.

The sanitary inspection report dated 7th October, 2019 related to inspection of Mantos Super Lounge, Mantos Super Lounge was ran by the applicant Michael Barasa Mangeni who was the tenant of the 2nd respondent Fatuma Mohamed Abali. Indeed it is indicated that the applicant who was the tenant was served with a copy of the inspection report. The reason for such service was because of the 12 recommendations to remove the nuisance 8 was for action by the tenant and 2 scrape, plaster and painting of external and internal walls were for the action of the landlady.

The premises were re-inspected on 27th November, 2019 and report dated on same date showed that there was partial compliance. The public officer then issued a statutory Notice stating: -

“In reference to sanitary inspection report contacted on 7th day of November, 2019, served on 11th day of November, 2019 and follow up on 26th day of November. I made observation that you failed to comply with the recommendations. The period for your compliance elapsed on 11th day of December, 2019 based on statutory notice served to you on 27th day of November, 2019.

This is contrary to the Constitution of Kenya Article 42, 43(a) (b) (d) and Article 70 Public Health Act Cap 242 Section 11 Laws of Kenya regulations thereunder.

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- 4) Provide first aid kit and fire blanket in the kitchen.***
- 5) Repaint the entire internal part of the structure.***
- 6) Provide reliable portable source of water with outlets at all strategic point of the premise.***
- 7) Provide valid food hygiene license and liquor license.***
- 8) Scrape, plaster and paint the external wall.***

Note: I live loads shall be vacated in the premise to allow renovation.

Be informed, the premise is CLOSED DOWN until you fully adhere aforementioned a recommendations.”

The Public Health Officer gave the applicant 14 days to comply by notice dated 27th November, 2019. This notice was to expire 14 days later on 11th December, 2019. However, before the expiry of the notice, the public Health Officer filed the complaint in court by filling statutory notice and affidavit on 3rd December, 2019 and application was heard on 6th December, 2019 that applicant has failed to comply and that Mantos Super Lodge be closed until it complied the respondent Fatuma Mohamed Abdi the landlady said she had not objection to the closure.

From the proceeding it is clear that the 14 day period given to the applicant had not expired. Indeed the application was made six days after issuance of the notice and it was, therefore irregular to proceed before the expiry of the 14 days' notice which had been issued. This is an irregularity that is apparent on the face of the record of the proceedings of 6th December, 2019.

Under Section 262 of the Criminal Procedure Act, this court has jurisdiction to call for the record of the proceedings of the subordinate court

to satisfy itself of the correctness, legality or propriety of are finding sentence or order recorded. These revisionary powers are aimed at providing the High Court with supervisory jurisdiction over subordinate court to ensure compliance to the law and ensuring the legal process and provisions are complied with.

In this application, this court identified two errors, first that the matter proceeded before the expiry of the 14 days' notice issued to comply and secondly, that the person who was supposed to comply and to who was to be affected to the closure notice i.e. Mantos Super Lounge was not a party to the proceedings, as only the landlady was served to the exclusion of the person who was to comply with the other requirements in the notice.

For these reasons I find that this is a fit case for exercise of revisionary jurisdiction of this court. I, therefore, set aside the orders on closure issued by Hon. G. Omondi (SRM) issued on 6th December, 2019. The Public Health Officer to inspect premises and satisfy himself of the compliance to the notice issued on 27th November, 2019 and that are proceedings to include the part of the remedy by the landlady and those to be remedied by the proprietors of Mantos Super Lounge the tenant.

Dated at Bungoma this 30th day of October, 2020.

S N RIECHI

JUDGE