



REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA

AT NAIROBI

JUDICIAL REVIEW NO. 325 OF 2016

IN THE MATTER OF CIVIL PROCEDURE, THE LAW REFORM ACT AND THE PUBLIC HEALTH ACT

AND

IN THE MATTER OF AN APPLICATION FOR LEAVE TO APPLY FOR AN ORDER OF CERTIORARI

BETWEEN

HIRAM MUIGAI.....APPLICANT

VERSUS

TIMOTHY MUTISO – PUBLIC HEALTH OFFICER

ONGATA RONGAI HEALTH OFFICE

KAJIADO NORTH SUB-COUNTY.....1ST RESPONDENT

DICKSON NTIKOISA – ENGINEER, ROAD- PUBLIC WORKS

COUNTY GOVERNMENT OF KAJIADO...2ND RESPONDENT

JUDGMENT

1. By an application dated 2nd August 2016 the exparte applicant **Hiram Muigai** seeks from this court Judicial Review orders of:
 - a) **CERTIORARI** to quash the decision of the 1st respondent **Ongata Rongai Health Officer, Kajiado North Sub County** issued vide a statutory notice referenced PH/RON/SN dated 10th May 2016 as well as the decision of the **Public Works Engineer, Kajiado County and Mr Dickson Ntikoisa** (the 2nd respondent) issued vide a document titled “*public notice*” dated 29th June 2016.
 - b) Spent
 - c) Costs of the application
2. The application is predicated on the supporting affidavit of Hiram Muigai sworn on 2nd August 2016 in Los Angeles County Azusa California USA, the statutory statement dated 18th July 2010 and verifying affidavit notarized on the same date of 18th July 2016.
3. The exparte applicant’s case is that he lives for gain in the USA and that on 7th April 2009 the 1st respondent issued to him a statutory notice in which it was alleged that the applicant was discharging waste waters from Plot No Kajiado/Ongata Rongai/45 and into the neighboring plot No. 49 Kajiado.Ongata Rongai. The said notice allegedly stopped the applicant from discharging the said waste into the public street and the neighbor’s plot, to fix the defective soak pit and avail the building plans for inspection.
4. The applicant asserts that the allegation levelled against him by the respondents were not true but that the 1st respondent caused the arrest and prosecution of the applicant’s agent Julius Mungai for allegedly discharging waste water or raw sewage into the complainant’s

plot No. 49 contrary to Section 115 and 118 (1) (b) (c) and (e) as read with Section 119 and 121 of the Public Health Act (Cap 242) Laws of Kenya; and failing to comply with a statutory notice to stop discharging waste waters onto plot No. 49 contrary to Section 120 of the Public Health Act cap 242 Laws of Kenya which charge vide Kajiado criminal case No. 175/2011 was, before the hearing commenced, the trial court ordered for a site visit upon which the court made remarks that the complainant's plot was badly kept, that the pit latrine was almost full and was still in use and that bathrooms on Plot No. 49 had no means of drainage. Further, that the said court directed Public Health Officers, National Environment Management Authority (NEMA) and Public Works Engineers to visit the site and assess possible origin of the waste waters.

5. It was further alleged that at the hearing of the said criminal case, the 1st respondent's witness told the court that he could not tell that the raw sewage was emanating from the applicant's septic tank since there was a pit latrine in the neighboring which was full of water and human faeces and a bathroom used by tenants staying on the plot.

6. Further, it was deposed that analyses of the samples taken by the 1st respondent from the septic tank on the applicant's plot *vis a vis* those taken from the boundary wall on the side of the plaintiff's wall were inconclusive.

7. The applicant further asserted that on 16th July 2013 the applicant's agent/caretaker was acquitted under Section 215 of the Criminal Procedure Code on all the charges initiated at the instance of the 1st respondent, on account that there was no conclusive evidence that the waste water that was on plot No. 49 owned by **Anne Wanjiku Wainaina** was emanating from the applicant's neighboring Plot No. 45. It is claimed that the trial court further held that drainage on Plot No. 49 was wanting as its toilets were full and bathrooms in use had no disposal point hence it was impossible to confirm beyond all reasonable doubt that the water that was on plot No.49 was emanating from the applicant's plot No. 45.

8. Further, the applicant claimed that there was no scientific evidence that if there was any leakage from the soak pit on his property, any foul water would have been filtered by the time it reached Plot No. 49 which is over 21 feet and would present itself as clean water.

9. It was therefore alleged that on 10th May 2016 the 1st respondent issued the applicant with another notice similar to the one which he had been issued with on 27th April 2009 with the same orders, which notice was to expire on 6th June 2016.

10. The applicant claimed that it is impossible to comply with that notice as he had not discharged any foul waters from his property and further, that the soak pit has been approved by all the relevant public authorities.

11. Further, that as a court of competent jurisdiction had ruled that there is no evidence to support the allegations of the 1st respondent, there was a real risk of having the applicant arrested and prosecuted for failure to comply with the said statutory notice hence these proceedings, to protect his fundamental constitutional rights from being violated.

12. The applicant claimed that the 2nd respondent also issued him with a similar notice "public notice" dated 29th June 2016 claiming that:

- 1) The applicant's building lacks an adequate liquid waste management system;
- 2) There is water discharging from the applicant's building named 'Faith House';
- 3) The percolation of liquid waste had posed a serious health hazard to the public; and
- 4) The said percolating water is weakening the foundation of the applicant's building thereby compromising its structural stability and in turn the safety of its tenants and its neighbors.

13. It was alleged that the 2nd respondent's notice raises issues that are purely Public Health in nature yet it is an Engineer of Public Works.

14. It was claimed that the 2nd respondent had threatened to close the applicant's building, evict his tenants and demolish his premises if the notices and orders were not complied with, even without hearing the applicant's story. The said notices were annexed together with proceedings from the criminal trial court.

15. Despite service of the notice of motion upon the respondent's severally, the 2nd respondent only filed a replying affidavit on 25th January 2017 sworn by **Timothy Mutiso** on 24th January 2017 contending that the application by the applicant is baseless, unfounded, speculative and an abuse of court process and that the applicant was using the court process to sanctify an illegality. It was contended that the dispute herein is a purely public health concern of violation of the Public Health Act due to nuisance arising from the applicant's plot No. 45 within Ongata Rongai Township.

16. Further, that despite the acquittal of the applicant's agent/caretaker on 16th July 2013 by the Magistrate's Court at Kajiado for lack of conclusive evidence that waste water was emanating from the applicant's plot No. 45 of Ongata Rongai, the said trial court visited the site with Public Health, **NEMA** and Public Health Officers and respective reports were filed in court as annexed.

17. That the 2nd respondent was the CEC of Public Works, Roads, Transport and incharge of approving building plans and issuance of certificates of occupation for private buildings such as that of the applicant.

18. That is was upon the site visit that the 2nd respondent issued a public notice notifying the public of danger being faced by tenants in the applicant's plot and the need for them to vacate the building to pave way for inspection.

19. However, it is contended that the applicant had failed to drain all the pits and water tanks as required and failed to avail all the statutory approvals from the approving authorities, and that he had not availed the details of the project consultants including contractors, architects, structural engineers that he used during the construction as required by the said notice.

20. It is further contended that the Public Health Officer also issued a statutory notice to the applicant notifying him of the urgent need to take the necessary steps to prevent a recurrence of the said nuisance but that the applicant had totally overlooked the said notice yet the effluent emanating from the applicant's plot is a major threat to the health and comfort of the residents of Ongata Rongai.

21. The 1st and 2nd respondents therefore claimed that the applicant was in breach of the law and that he had rushed to this court with unclean hands and therefore his application should be dismissed with costs for want of merit.

22. The 3rd respondent, **Ann Wanjiku Wainaina** who is the proprietor of land comprised in title No. Kajiado/Ongata Rongai/49 adjoining the applicant's plot No. 45 filed replying affidavit on 21st March 2017 contending, among others that the applicant's plot has a four floor business/residential flat known as "Faith House" while plot No. 49 had a few shops thereon.

23. That in early April 2009 after tenants moved into plot 45 premises, an incessant and steady leakage of foul effluent from the boundary wall pooled in her plot and that initial investigations led to conclusions that the foul effluent was emanating from septic tank of the applicant's house which seemed to be too small for the increased human density but that despite requests by the Public Health and the 3rd respondent, the applicant refused to abate the nuisance hence the Public Health Officer had no other option but to issue the applicant with the requisite statutory notices and that it was upon the expiry of those notices that the caretaker was arrested and charged in court in Public Health case No. 175/2011 at Kajiado Senior Principal Magistrate's Court.

24. The 3rd respondent contended that following recommendations by the Senior Principal Magistrate in her judgment of 16th July 2013 to visit the site and ascertain the root cause of the menace, the applicant filed Petition No. HCC Miscellaneous 590/2013 where the court (Mumbi Ngugi J) held that there were no violations of the petitioner's rights as alleged and that the learned Judge asked the 2 parties –applicant and the 3rd respondent to allow Public Health and NEMA Officers to visit the site and establish the source of the effluent that gave rise to the criminal prosecution and the Petition.

25. It was contended that the trial magistrate therefore visited the site with Public Health and Public Works officers and that the two officers filed their respective reports which concluded that the source of the effluent flow was septic tank on plot 45.

26. Further, that prior to all this, vide Kajiado Senior Principal Magistrate Civil Suit No.77/2010, the 3rd respondent had filed suit against the applicant seeking for damages suffered as a result of the foul effluent seepage and that the court found the applicant herein liable for the nuisance and ordered him to further cease the discharge within 30 days therefrom 24th December 2015 but that there had been no abatement of the said foul effluent.

27. It was further contended that Justice Mumbi Ngugi's judgment allowed Public Health Officers to intervene and issue notice of removal of nuisance to prevent recurrence thereof but that the applicant has done nothing to remove the foul smell and effluent which poses a danger to him and his tenants and to the public generally because the applicant's building sits on liquid waste for years which compromises its structural stability hence an imminent danger to its inhabitants and her tenants.

28. It was deposed in contention further that the applicant herein had produced a building plan for the said premises as evidence in civil case No. 77/2010 claiming that the same had been approved in 1998 but that the Public Works Engineer who is purported to have signed the plan recommending it for approval was not an employee of that office in 1998 and that he had been employed much later.

29. It was further contended that the exparte applicant had, despite requests, failed to provide his building plans to the Public Works Office and that such building plans are subject to compliance with the Local Government (Adoptive By-Laws)(Building Order, 1968) which (Adoptive By- Laws) (Building) Order 1968 which law along with Schedule 4 of the Constitution give ample latitude to the County Government (Successor to the Local Government) to bring order to the housing sector and reign in on errant developers.

30. It was deposed further that todate, the foul effluent continues to flow to the 3rd respondent's plot and that therefore the claim that the applicant resides in America are meant to violate the 3rd respondent's right to own her property quietly and peacefully and intended to intimidate public institutions from executing their lawful mandates in safeguarding public safety and health hence the court should not restrain the 1st and 2nd respondents from undertaking their public duties and obligations.

31. The applicant filed a further affidavit on 24th March 2017 in reply to the first and 3rd respondent's replying affidavits denying that there were only a few shops on LR plot 49 and asserting that there were many shops, stalls, make shift dwelling houses, an open bathroom and a pit latrine on plot 49 and that the pit latrine and bathroom are near the boundary wall dividing plots 49 and 45.

32. The applicant restated the evidence adduced in **Kajiado criminal case No. 175/2011 Republic vs Julius Mungai** where the 3rd respondent testified that there were several houses, pit latrine and bathroom. That when the public works, Public Health and NEMA officials visited the site, no excavation was done between the area covered by foul water and the pit latrine and the bathroom. That the Public Health report was clear that it is unlikely that the effluent being discharged was sourcing from the pit latrine and that the NEMA reports totally ignored this aspect of possible source of sewerage foul waste waters being from plot 49.

33. That in any event, he was never invited to be present during excavation hence the investigations were wanting. That the evidence of David Musau Suki was emphatic that when water goes through the soil the solids disappear and the water becomes clear.
34. That there is a 21 feet distance between the two plots and that the boundary wall was compacted with soil, sand, gravel and concrete as there are flats in between hence any water percolating through would exit as clean and clear water. That the decision in Kajiado Principal Magistrate's Court has been challenged vide Civil Appeal No. 1 of 2016 which is still pending.
35. That as the investigations made by Public Works, NEMA and County Government of Kajiado were incomplete and incorrect, the impugned decisions contained in the statutory notice of 10th May 2016 and 29th June 2016 were unjustified and unlawful and ought to be quashed.
36. The parties' advocates filed written submissions which they also canvassed orally by way of highlights.
37. The ex parte applicant's submissions were filed on 7th April 2017 setting out the background of the matter and heavily relying on the proceedings in Kajiado criminal case No. 175/2011 to back up his case. In that case, the applicant's agent/caretaker was acquitted as explained herein above and in the highlights adopting the written submissions, Mr Chege, counsel for the applicant maintained that the three reports relied on by the 1st and 2nd respondents to issue notices for compliance were flawed as they were made as a result of incomplete excavations between the two adjacent plots 45 and 49, yet the applicant was never invited to be present during the alleged excavation which had nonetheless been recommended by the court that tried his agent, in order to know where the foul waters were coming from.
38. It was maintained that the decisions reached were not correct because evidence of Musau in the criminal case was clear that filtration process would make the water come out clear. That the Public Health Officials made findings without the benefit of a report from the Government Chemist hence the decisions reached were devoid of the findings anticipated.
39. It was submitted that the report of the County Government says the building is structurally sound and that it shows no sign of failure yet a decision to demolish it was made hence the decisions were made without any logical or sound reasoning hence this court is bound to intervene as the decisions were ultra vires. It was also submitted that the 2nd notice was ultra vires because it was not issued under the Public Health Act and does not refer to any report as a basis.
40. Finally, it was submitted that the processes applied were wrong, and not based on fairness but oppressive hence the application should be allowed.
41. The 3rd respondent relied on the written submissions as filed without any highlights whereas the 1st and 2nd respondents did not appear at the hearing.
42. In the 3rd respondents submissions filed on 3rd May 2017, it was contended that the notices issued by the 1st and 2nd respondents were statutory notices issued under Section 119 as read with Section 115 and 118 of the Public Health Act which empowers the Medical Officer of Health if satisfied of the existence of a nuisance, to serve a notice on the author of the nuisance. Reliance was placed on **Republic vs Kenya Revenue Authority Ex parte Yaya Towers Ltd [2008] e KLR** relying on **Halsbury's Laws of England 4th Edition VOL(1)(1) paragraph 60** that the remedy of Judicial Review is concerned with reviewing not the merits of the decision but the decision making process itself.
43. In this case it was contended that what the applicant was seeking from the court was the merits of the decision as to whether it was correct or not.
44. On the allegation by the applicant that the notices amount to double jeopardy following the acquittal of his agent Julius Mungai in criminal case No. 175/2011, it was submitted that the applicant was not the accused person in the said case. Further that the trial magistrate directed excavations on site to determine the source of the effluent discharge which decision was upheld by Mumbi J.
45. Further, that in any event, the civil suit against the applicant for damages for nuisance had found the applicant herein liable for effluent discharge and directed him to stop the nuisance within 30 calendar days but that the nuisance had gone unabated.
46. It was submitted that as the merits of the cause of the nuisance had been dealt with the multiple fora, this court should not venture into such matters in this Judicial Review application.
47. Reliance was placed on **JR Miscellaneous Application No. 231 of 2013 Republic vs NCC ex parte Kwench Ltd.**
48. On the 2nd respondent's public notice, it was submitted that the 2nd respondent did not issue notice under the Public Health Act hence it cannot be ultra vires the Public Health Act capable of being quashed. It was further submitted that the said notice is pursuant to the Fourth Schedule to the Constitution which gives functions and powers to the County Governments to cater for basic services and amenities to the public while ensuring the public safety in the enjoyment of public or private amenities offered to them. Reliance was placed on Regulations 168, 205, 243 of the Regulations made under the repealed Local Government Act.
49. It was contended that the report of Public Works states more than the soundness of the structure unlike what the applicant had painted. That the findings and conclusions were to the effect that the ex parte applicant's building was in breach of several building by-laws and was thus a danger to the safety and health of the public.

50. That Regulations 25, 254 and 255 of the Local Government (Adoptive By-laws) Buildings Order 1968 allows the 2nd respondent to issue such notice prescribing the period which shall be allowed to rectify the contravention and to notify the Council in writing of compliance with the requirements of the notice, hence the 2nd respondent's public notice was within its mandate.

51. That the function of the 1st and 2nd respondents are to safeguard the public against any public nuisances and to regulate matters relating to public safety hence the institutions should be allowed to carry on with their work and not to be stopped from abating the spillage of effluent waste which has existed since 2009. The 3rd respondent urged the court to dismiss the *exparte* applicant's motion with costs to the respondents.

DETERMINATION

52. I have considered the foregoing and in my humble view, the main issues for determination in this matter are:

- 1) Whether the 1st and 2nd respondents had power to issue the notices which are impugned;**
- 2) Whether the judicial Review orders sought herein are available to the *exparte* applicant;**
- 3) What orders should this court make;**
- 4) Who should bear costs of these proceedings.**

53. On the first issue of whether the 1st and 2nd respondents had the power to issue the impugned notices, it is important to identify the said impugned notices. The notice dated 10th May 2016 issued to the *exparte* applicant refers to plot No. 46 Ongata Rongai Township. It is titled a statutory notice and issued on 10th May 2016 and expiring on 26th June 2016. It was issued under the Public Health Act Cap 242 Sections 118 by the Ongata Rongai Divisional Public Health Services, office, Kajiado North Sub County. The issuer is Timothy Mutiso. The notice stated that the Public Health Officer was satisfied that there was in existence of nuisance arising from:

- a) Discharging waste waters on the public street/neighbors plot;
- b) Defective septic/soak pit.
- c) Inadequate septic/soak pit.
- d) Flaked and worn out paintings .

54. The applicant was given 28 days within which to abate and prevent a recurrence of the said nuisance and to carry out certain activities listed there under namely:

- i) Stop the discharge;**
- ii) Repair defective septic/soak pit;**
- iii) Increase capacity of the septic/soak pit;**
- iv) Repair flaked/ worn out paintings of entire building internally and externally and avail the building plans for scrutiny.**

55. The notice was left to the agents at 2.57 p.m. It is important to note that the notice relates to plot 46 and not 45 as pleaded by the *exparte* applicant.

56. However, all the facts in this case point to plot No. 45 and the applicant alludes to plot 45 and since this court is vested with power to do justice without technical restrictions and restraints, and focus on substantive justice, it shall be deemed that the impugned notice relates to plot 45 and not 46.

57. The notice issued by the Public Health Officer dated 10th May 2016 and is a notice to comply pursuant to Section 118 of the Public Health Act and it is so clearly stipulated in the notice. The purpose for which the notice was issued is also stipulated therein in very clear terms.

58. In addition, the actions that the applicant was expected to take to abate the nuisance are also stipulated in the notice which is signed and with a date line for compliance.

59. Article 42 of the Constitution of Kenya, 2010 clearly stipulate that every person has the right to a clean and healthy environment which includes the right: To have an environment protected for the benefit of present and future generations through legislative and other measures, particularly those contemplated in Article 69; and To have obligations relating to the environment fulfilled under Article 70.

60. Section 115 of the Public Health Act on the other hand stipulates that: no person shall cause a nuisance or shall suffer to exist on way land or premises owned or occupied by him or of which he is in charge any nuisance of other condition liable to be injurious or

dangerous to health.

61. In addition, Section 118(1) of the Public Health Act sets out what constitutes a nuisance and they include: any dwelling or premises or part thereof which is or are of such construction or in such a state or so 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 infections disease and any act, omission or thing which is, or may be, dangerous to life, or injurious to health.

62. Under Section 118(2), the author of the nuisance means the person by whose act, default or sufferance nuisance is caused, exists or is continued, whether he is the owner of occupier or both owner and occupier or any other person.

63. Under Section 119 of the Act, 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 thinks it desirable (but not otherwise, specifying any work to be executed to prevent a recurrence of the said nuisance.

64. It follows that where a Medical Officer of Health is satisfied that there exist nuisance, he is empowered to notify the author of the nuisance to remedy the nuisance. The Act defines the author of the nuisance to mean the person by whose act, default, or sufferance nuisance is caused, exists or is continues, whether he is the owner or occupier or both owner and occupier or any other person.

65. The applicant is the owner of the premises upon which there is alleged to be nuisance which has pitied him with his neighbor owner of the plot 49 disputing in and out of court.

66. The trial court in the criminal case where the applicant's agent/caretaker was charged and acquitted nonetheless went ahead and recommended that investigations be carried out to establish the source of the nuisance. This was after the court visiting the site and seeing for itself the situation as it was.

67. However, the applicant who appears to permanently reside in the USA challenged the Magistrate's decision. The challenge by way of petition on account of violation of his rights proceedings was dismissed by Mumbi J.

68. The 3rd respondent also sued the applicant in a civil claim vide SPM CC 77/2010 at Kajiado for damages for the tort of nuisance and the court entered judgment in her favour. The applicant claims that he has challenged that decision by way of appeal on account that the magistrate did not have jurisdiction to hear and determine the claim, which appeal is still pending in court and until overturned, it remains a valid decision.

69. The applicant challenges the notice issued by the Public Health Officer on 10th May 2016 on account that it is not true that there is any nuisance on his plot or at all and blames the 3rd respondent for his woes. He claims that the notice was procedurally unfair and oppressive because there is no conclusive evidence that there is any nuisance on his plot.

70. Honourable Mumbi J in Miscellaneous Civil Application No. 590/2013 vide her judgment dated 31st July 2014 observed as follows, in dismissing the applicant's petition:

“In the circumstances, I find no violation of the Petitioners rights as alleged. The petitioner need not appear before the court seized of the matter under whose supervision the excavation, with the assistance of the various state officers, including NEMA, and Public Health is continuing, He has, however, an obligation, as does the 3rd respondent, should this be required, to co-operate with Public Health and NEMA officers in the process of establishing the source of the effluence giving rise to the criminal prosecution and the present litigation.”

71. The learned judge further observed that:

“Should any of the parties fail to co-operate then the medical officer of health can invoke once again the powers vested in him or her under the Public Health Act. In particular, as noted above, the Medical Officer of Health has the power under Section 119 proviso(11) to remove the nuisance and may do what is necessary to prevent the recurrence thereof.”

72. The 3rd respondent on realizing that nothing was being done to remedy the situation reported to the Public Health and Public Works as there was foul smell effluent posing a danger to the tenants and the public generally owing to the dense population in the area. The Public Health Officer visited the premises on 23rd April 2015 between 3.30-4.45 to determine the source of effluent as had been directed by the magistrate and after establishing the defects and condition of the premises, recommended that the septic tank be excavated immediately and be expanded to be able to cater for the building's liquid waste management; that there be overhaul repair of the whole building as may be necessary and other works be done to the satisfaction of the Public Health Officer; that the applicant produce approved building plans and any other policy documents as required by law and ensure frequent exhaustion of the septic tank.

73. The Public Health Officer concluded that the matter required immediate action to avoid any human catastrophe that could occur due to the prevailing unsanitary conditions. He also recommended immediate evacuation of tenants to pave way for the abatement of the nuisance as stipulated in the Public Health Act Section 118 and 119 thereof.

74. The court also notes that the joint inspection report in excavation works by NEMA dated 7th September 2015 shows a dire situation at the applicant's premises. The findings speak for themselves where even the building is said to be tilting towards one side as confirmed by the

architect on site. The foundation of the 4 storey building was said to be wet for a long time as evidenced by Green Algae. On digging, the trench produced effluent flowing to the pipe and effluent also flowed on the side of the wall. ***Samples were taken to establish levels of contamination and informal improvement comments given to address waste water management around the environment.***

75. Another report by Public Works of Kajiado County Government found that indeed there were serious issues with the applicant's plot among others – discharge from plot 45 flowing into plot 49; waste water was percolating from the foundation of the applicant's house to plot 49 and to the road reserve; which would weaken the foundation thereby compromising structural stability of the building and safety of the occupants and the public in general; that the applicant in order to conceal the problem extended concrete works to the foundation hence encroaching on the neighbors plot; the agent of plot 45 did not co-operate with the inspection team in giving the owner information on plot details and producing approved building plans; the septic tank was built without approval, that the applicant be subjected to penalty, the building be vacated to allow for inspection of septic tank; the current septic tank be demolished and a new one constructed to ensure all waste water being disposed of properly; the county officials, NEMA and Public Health Officers to inspect the building before it is deemed to be safe for occupation.

76. From the above position as brought out by the parties, I have no doubt that the respondents have the statutory mandate to safeguard the public against any threat to the public health and safety of the public and residents of a given area. Public Health and matters of physical planning are now devolved functions as stipulated in Articles 185, 186 and 187 of the Constitution and the Fourth Schedule to the Constitution on distribution of functions between the National Government and the County Government.

77. Under Part 2 of the Fourth Schedule to the Constitution, Section 3 is clear that the functions and powers of the County are: 3) County health services, including, in particular – control of air pollution, noise pollution, other public nuisances and outdoor advertising. County Planning and development including (d) housing; County public works and services including storm water management systems in built up area; and water and sanitation services. Regulations 25, 254 and 255 of the Local Government(Adoptive By-laws) Buildings Order 1968 allows the 2nd respondent to issue such notice prescribing the period which shall be allowed to rectify the contravention and to notify the Council (Now County Government) in writing of compliance with the requirements of the notice. Accordingly, the 2nd respondent's public notice to the exparte applicant on the need to comply with certain requirements regarding the condition of his building 'Faith House' was within its mandate.

78. There is sufficient evidence on record that the 1st and 2nd respondents have made concerted efforts, on invitation of the 3rd respondent, to make the applicant appreciate the gravity of the matters complained of but the applicant has developed a 'holier than thou' attitude. "He sees no evil and hears no evil;

79. Perhaps only nature can take its own course to make him understand what is on the ground namely, the day his building which is occupied by human beings will come down crumbling, is when he will learn his lessons. As for now, he can afford to battle it out in courts while he hibernates in a far off land in the USA. No court of law should be asked to ignore what is alleged to be a death trap.

80. The Notice issued by the Public Works officer was no doubt in accordance the constitutional mandate of the County Governments as stipulated above, even if there were no rules. Nonetheless, the county Government has power to ensure safety of buildings in the county and therefore it is important that the applicant appreciates that role and complies with the requests which in my view are polite enough. If the applicant has the documentation being requested for verification and in accordance with the decision of Mumbi J in the Petition, he has nothing to fear.

81. In the humble view of this court, the applicant has not demonstrated that he is ready to listen to the experts in public health and public works matters and to comply with the recommendations given by the two offices, and which recommendations are for his own benefit. He has not bothered, if at all he considers the recommendations given to be biased, to engage his own independent experts in public health and public works matters to assess the alleged nuisance to his own building wherein he derives benefits in the form of rent collection, and to assess the structural stability of his building, for purposes of carrying out some repair works as recommended, in order to abate the alleged nuisances so as to avert the risks involved. No doubt, an alleged nuisance which is not abated can lead to devastating consequences including fatalities.

82. I therefore find it very unfortunate that the applicant is challenging the jurisdiction of the 1st and 2nd respondents in matters of public health and public works. This court has no difficulty finding that the two offices have jurisdiction to deal with matters complained of and in issuing the impugned notices, which notices are meant to avert a catastrophe and not to vex or punish the applicant in any way. I see no arbitrariness or bad faith on the part of the respondents. It is upon the applicant to engage the two public offices for purposes of finding a lasting solution to the alleged menace. It is however regrettable that one can use courts to escape from environmental justice. There is a heavier price to be paid for evading environmental justice than evading judicial justice; I must say so without apologies.

83. Therefore, on whether the applicant is entitled to the Judicial Review remedies sought, I have no difficulty in finding that no such remedies would be available to an applicant whom this court has found, is using the judicial process to evade justice and justice in the sense of the protection of the environment.

84. I am in agreement with the holding by Odunga J on 31st March 2014 in **Republic vs Nairobi City County & another exparte Kwench Ltd [2014]e KLR:**

"23, Therefore, where the medical officer of health is satisfied that there exist nuisance he is empowered to notify the author of the nuisance to remedy the nuisance..."

28 As was held in Republic vs Kenya Revenue Authority Exparte Yaya Towers Ltd [2008] e KLR the remedy of Judicial Review is concerned with reviewing not the merits of the decision of which the application for judicial review is made, but the decision making process itself. It is important to remember in every case that the purpose of the remedy of judicial

review is to ensure that the individual is given fair treatment by the authority to which he has been subjected to and that it is no part of that pursue to substitute the opinion of the judiciary or of the individual judges for that of the authority constituted by law to decide the matter in question unless that restriction on the power of the court is observed, the court will, under the guise of preventing abuse of power, be itself, guilty of usurpation of power. (see Halsbury's Laws of England 4th Edition VOL (1) (1) paragraph 60"

85. The 1st and 2nd respondents have exercised their statutory and constitutional mandates to notify the applicant of the alleged nuisance on his premises and having specified what works to be executed to prevent recurrence of the said alleged nuisance, the applicant, not being an expert in such matters cannot be protected by this court from complying with the law.

86. Accordingly, I find and hold that the applicant's motion is devoid of any merit and the same be and is hereby dismissed with costs to the respondents.

Dated, signed and delivered in open court at Nairobi this 19th day of March, 2018.

R.E. ABURILI

JUDGE

In the presence of:

Mr Chege counsel for the exparte applicant

Mr Githuka counsel for the 3rd respondent and h/b for Mr Kaikai for the 1st and 2nd respondents

CA: Kombo