REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT NAIROBI

JUDICIAL REVIEW DIVISION

JR MISCELLANEOUS CIVIL APPLICATION NO. 445 OF 2016

(CONSOLIDATED WITH JR NOS. 464 AND 465 OF 2016)

REPUBLIC .....APPLICANT

VERSUS

THE CHIEF MAGISTRAT'S COURT

AT CITY HALL-NAIROBI……..……1ST RESPONDENT

THE MEDICAL OFFICER OF HEALTH.....2ND RESPONDENT

THE GOVERNMENT

OF THE REPUBLIC OF UGANDA…….....……..…….3RD RESPONDENT

EX PARTE:

ANGELLINA MBAABU T/A AVENUE PHARMACY & OTHERS

JUDGEMENT

1. This judgement arises from consolidated applications in Judicial Review Miscellaneous Application No. 445, 464 and 465 all of 2016 which were at the time of the consolidation directed to be heard and determined within the fie for JR No. 445 of 2016. The applications arose from the decision of the 1st Respondent herein on August 19, 2016 in Criminal Case No.1299A of 2014 (hereinafter referred to as "the Criminal Case") instituted by the 2nd respondent.

Applicants' Case

2. According to the applicants, they are tenants in respect of premises known as Uganda House, Plot No. 209/905 and 209/906-Kenyatta Avenue, Nairobi (hereinafter referred to as "the suit premises") in which the applicants are carrying out profitable businesses.

3. According to them, pursuant to the said Criminal Case, the 1st respondent, despite the fact that the applicants were paying rent to the landlord, granted orders dated August 19, 2016 by which the applicants

and other tenants were ordered to vacate the suit premises within 60 days with effect from 26th August 2016which orders were served on the said date through a letter by **Lilan & Koech Associates** representing the 3rd respondent herein (hereinafter referred to as "the Landlord"). According to the applicants the said orders were unlawful and adverse to them. By the said order, the 1st respondent

4. The Applicants averred that the landlord carried out repairs of the sewer system of the said premises during occupation of the suit premises.

5. It was the applicants' case that any eviction would result to great loss and damage because they would lose their customers yet the said orders were unlawful and ultra vires as they were not parties to the said Criminal Case yet the orders arising thereof directly and adversely affected them.

6. The applicants' case was that the respondents had colluded to unlawfully evict the Applicants and affect their protected leases without due process of the law in the right forum. They reiterated that they were condemned unheard because none of them was given an opportunity to respond to the allegations of the 2nd respondent in the said case.

7. The applicants further contended that the 1st respondent had no jurisdiction to issue eviction orders under section 120(9) of Cap.242, Laws of Kenya since there was no nuisance existing in the suit premises as alleged by the 2nd respondent. They therefore averred that the actions of the Respondents were illegal, ultra vires, irrational, unreasonable, irrational, malicious, illegal, biased, unlawful, capricious and against the rules of natural justice.

8. In response to the position adopted by the Landlord, the applicants reiterated that save for **African Boot Company Limited** which was summoned to attend Court on 19th December, 2014 in the said Criminal Case, they were not parties to the proceedings in the Magistrate's Court and were not served with any summons or otherwise notified to make representations on their behalf and there was no evidence on record to the contrary. It was however the case of the said **African Boot Company Limited** that it did not attend court on the 19th December 2014 as it did not have any issues with the state of the sanitary conditions of the suit premises it could not comment on the issues in the rest of the building.

9. On the issue that they had instructed firm of advocates to represent them in the criminal proceedings, the applicants denied having instructed any firm of advocates to do so and averred that the law firm of **Keengwe & Company Advocates** were strangers to them. The applicants disclosed that from the submissions filed by the said firm, I am informed by Hamilton Harrison & Mathews which information I verily believe to be true that they have obtained a copy of the submissions filed by the firm in court on 3rd February, 2016 and on 18th July, 2016 the said firm was clear that it was acting on their own behalf as a tenant in Uganda House and that they were not representing any other tenant.

10. To the applicants the fact that the Landlord who ordinarily ought to have been at the forefront in opposing the closure was supporting the same was clear evidence of collusion. The applicants asserted that it was a violation of their constitution right to property to purport to close down their businesses and interfere with the tenancy without making any provision for compensation for loss of business and interference with tenancy. The applicants concluded that from the contents of the Landlord's replying affidavit, that the 3rd Respondent's conduct supported their belief that the proceedings in the Magistrates Court were a mischievous scheme to get the tenants out of the premises or to obtain vacant possession of the building to facilitate major repairs without negotiating with the tenants so as to avoid paying compensation for interference with the tenancy and damages for loss of business.

11. The applicants took the view that if the building was in such bad state as alleged, then the Landlord ought to have been the one liable for allowing the building to fall into disrepair and the applicants ought not to suffer for such deliberate and mischievous omissions.

12. Based on the information obtained from their legal counsel based on the record of the proceedings in

the said criminal case, the applicants averred that though no hearing took place on 17th April, 2015 as the trial magistrate was attending a seminar, on 20th April, 2015, a hearing took place for which no notice was served.

13. The applicants insisted that all of them had paid rent and that they did not have any rent arrears outstanding. They reiterated that they were not heard and were therefore not given an opportunity to call any evidence as to whether any repairs necessary could have been carried out with the tenants continuing in occupation. Further, they were not given an opportunity to call any expert evidence as to whether or not there were any structural defects that would render the premises unfit for habitation.

14. With respect to the alleged meeting between the Landlord's Caretaker and the officials of the Ministry of Transport Infrastructure, Housing and Urban Development held on the 2nd December, 2016, the applicants averred that they were not invited thereat an were therefore not aware and were not part of any discussions held between the Landlord/Caretaker Uganda House and the officials of the Ministry of Transport Infrastructure, Housing and Urban Development. Accordingly, their views were not considered at the said meeting. They further averred that they were unaware of any inspection of the suit premises. They however noted that the report annexed to the further supplementary affidavit disclosed that "..the building shows no major structural defects …"; that "during the deliberation it was concurred that the building was structural safe …" and that the issues raised in the report related to the sunny canopy at the top floor and first floor canopy yet all the Ex-parte Applicants were based on the ground floor hence there was no basis for the making of the closure order as alleged.

15. The applicants therefore seek orders of certiorari removing into this Court for the purposes of being quashed the 1st Respondent's decision dated 19th August, 2016 in Criminal Case No. 1299A of 201 requiring them to vacate the premises known as Uganda House, Plot No. 209/905 and 209/906 – Kenyatta Avenue for the purposes of being quashed which decision is hereby quashed. They also seek order prohibiting the Respondents from implementing the said decision as well as the costs of the applications.

3rd Respondent's Case

16. In response to the application, the 3rd Respondent Landlord averred that in September 2014, its caretaker was issued with a Public Health Notice No.10477 by the Nairobi City County Public Health Department which notice required the Landlord to abate the nuisance existent in the subject remises i.e. Uganda House within a period (14) days. Upon receipt of the notice, he communicated the same to the Uganda High Commission, following which the Caretaker commenced efforts to comply with the said notice. However, due to reasons beyond its control, the Landlord was unable to comply with the notice with the time frame given and consequently, the Public Health Officer, through the Republic instituted Criminal Case No.1299A of 2014 against the said Caretaker.

17. Based on the information received from legal counsel, the Caretaker averred that all the tenants of the subject premises were summoned to appear before Court to participate in the proceedings in the said Criminal Case No.1299A of 2014 and/or to give their opinion on the sanitary condition of Uganda House and that despite proper service, none of the tenants obliged to the summons and that in fact when the matter case up on the 19th December, 2014, the Prosecution was forced to seek an adjournment in light of the tenant's absence in Court.

18. According to the applicants, a number of the tenants responded both orally as well as in writing indicating that they would not appear in the matter. Despite the foregoing, and following the subsequent court attendances, all the tenants were again issued with a hearing notice, wherein they were informed of the scheduled prosecution hearing which would take place on site i.e. at Uganda House premises. Consequently, the matter took off and the first Prosecution hearing took place on site on 20th April, 2016 and notably, none of the tenants attended the said hearing.

19. It was revealed that surprisingly, after Prosecution hearing had taken off, the tenants (having previously declined to attend Court) made an application to be enjoined as interested parties in the matter,

through the firm of **Keengwe & Co. Advocates** and on several occasions, the hearing of the matter was adjourned pending the ruling on whether the tenants would be enjoined as interested parties. On 30th September, 2015, the Court allowed the application and the firm of **Keengwe & Co. Advocates** officially came on record for the tenants. The tenants applied and were supplied with all the relevant documents in the matter from the court file and consequently, further Prosecution hearing resumed, and a total of five (5) Prosecution witnesses testified, four of whom were expert witnesses. However, the interested parties i.e. the tenants opted not to exercise their right of cross-examination during Prosecution hearing. Following conclusion of the Prosecution hearing, the matter awaited ruling on whether or not I had a case to answer which ruling was duly delivered on 3rd June, 2016, indicating that the subject premises were unfit for human habitation. The ruling further found that the said Caretaker had a case to answer, and he was thus placed on his defence.

20. It was averred that consequently, defence hearing took off on 13th June, 2016 and was finalized on 15th June, 2016 at which hearing the applicants were represented by the aforementioned firm of **Keengwe & Co. Advocates** fully and actively participated in the Defence hearing. Thereafter, on 19th September, 2016 judgment was delivered in the matter, by which judgment he was vindicated by holding that the time frame given in the Public Health Notice (i.e. a fourteen (14) day period) was not sufficient to allow for compliance with the notice and that the nature of the works to be carried out within the subject premises would require vacant possession of the premises. Consequently, the Court issued a temporary closure order provided for under section 120(9) of the ***Public Health Act***, Cap 242 of the Laws of Kenya (hereinafter referred to as "the Act"), so as to secure vacant possession of the premises and thereby allow him to comply with the Public Health Notice. It was emphasised that this closure order is merely temporary and the tenants will be allowed back to the premises upon full abatement of the existing nuisance and that upon their return, the tenancy agreements will resume from where they had stopped.

21. It was averred that the order embodying the aforementioned judgement was very elaborate and it by all standards secured the interests of the tenants in respect of their return to the premises, following conclusion of the intended works. The 3rd Respondent therefore denied that the aforementioned order does not stipulate a time line within which the required repairs should be completed as averred by the Applicants as the order categorically provides that the nuisance should be abated within a period of one hundred and twenty (120) days.

22. 3rd Respondent denied that the 2nd Respondent lacks jurisdiction to issue a closure order as averred by the Applicants and took the view that it is not true that the closure order prescribed for under section 120 (9) of the ***Public Health Act*** ought to be restricted to dwelling places in its strict meaning and that to the contrary, the closure order applies to commercial premises as well. In the 3rd Respondent's view, regardless of the specific provision of law by which the closure order was issued, the 3rd Respondent has jurisdiction to make any such orders it deems fit in a bid to ensure compliance with health standards. Such order includes those requiring tenants to vacate premises so as to allow for abatement of nuisance. According to the 3rd Respondent, there are numerous extraneous matters in which courts have issued closure orders for premises and/or buildings used for commercial purposes.

23. It was denied that section 20(9) of the ***Public Health Act***, Cap 242 of the Laws of Kenya infringes upon the applicant's constitutional rights to property as averred by the ***Public Health Act*** applicants and that to the contrary, the said section as well as the in general, is aimed at protecting the Rights to the highest attainable standards of health has enshrined in Article 43 (1) of the Constitution of Kenya.

24. The 3rd Respondent disclosed that in accordance with paragraph three (3) of the court order dated 26.08.2016, the 3rd Respondent has not demanded for rent for the two (2) moths which period is still currently running. Similarly, the Applicants and other tenants have not remitted the rent for the aforementioned period in compliance with the court order. For the handful that had remitted, they have been appropriately informed to make arrangements and collect the same.

Determinations

25. I have considered the foregoing.

26. Section 119 of the Act provides:

> ***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.***

27. Section 120 of the same Act provides:

> ***(1) If the person on whom a notice to remove a nuisance has been served as aforesaid fails to comply with is of the requirements thereof within the time specified medical officer of health shall cause a complaint relating to such nuisance to be made before a magistrate, and such magistrate shall thereupon issue a summons requiring person on whom the notice was served to appear before court.***
>
> ***(2) If the court is satisfied that the alleged nuisance exists the court shall make an order on the author thereof, or occupier or owner of the dwelling or premises, as the case may be requiring him to comply with all or any of the requirements of the notice or otherwise to remove the nuisance within a time specified in the order and to do any works necessary for that purpose.***
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> ***(3) The court may by such order impose a fine not exceeding two hundred shillings on the person on whom the order is made, and may also give directions as to the payment of all costs incurred up to the time of the hearing or making of the order for the removal of the nuisance.***
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> ***(4) If the court is satisfied that the nuisance, although removed since the service of the notice, was not removed within the time specified in such notice, the court may impose a fine not exceeding two hundred shillings on the person on whom such notice was served, and may, in addition to or in substitution for such fine, order such person to pay all costs incurred up to the time of the hearing of the case.***
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> ***(5) If the nuisance, although removed since the service of the notice, in the opinion of the medical officer of health is likely to recur on the same premises, the medical officer of health shall cause a complaint relating to such nuisance to be made before a magistrate, and the magistrate shall thereupon issue a summons requiring the person on whom the notice was served to appear before him.***
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> ***(6) If the court is satisfied that the alleged nuisance, although removed, is likely to recur on the same premises, the court shall make an order on the author thereof or the occupier or owner of the dwelling or premises, as the case may be, requiring him to do any specified work necessary to prevent the recurrence of the nuisance and prohibiting its recurrence.***
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> ***(7) In the event of the person on whom such order as is specified in subsections (5) and (6) not complying with the order within a reasonable time, the medical officer of health shall again cause a complaint to be made to a magistrate, who shall thereupon issue a summons requiring such person to appear before him, and on proof that the order has not been complied with may impose a fine not exceeding two hundred shillings, and may also give directions as to the payment of all costs up to the time of the hearing.***
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> ***(8) Before making any order, the court may, if it thinks fit, adjourn the hearing or further hearing of the summons until an inspection, investigation or analysis in respect of the nuisance alleged has been made by some competent person.***

(9) Where the nuisance proved to exist is such as render a dwelling unfit, in the judgment of the court, for human habitation, the court may issue a closing order prohibiting the use thereof as a dwelling until in its judgment dwelling is fit for that purpose; and may further order that rent shall be due or payable by or on behalf of the occupier of that dwelling in respect of the period in which the closing order exists; and on the court being satisfied that it has been rendered fit for use as a dwelling the court may terminate closing order and by a further order declare the dwell habitable, and from the date thereof such dwelling may be let or inhabited.

(10) Notwithstanding a closing order, further proceedings may be taken in accordance with this section in respect of same dwelling in the event of any nuisance occurring or of the dwelling being again found to be unfit for human habitation.

28. A strict reading of section 119 aforesaid clearly reveals that the person who is required to be served is the author of the nuisance or, if he cannot be found, the occupier or owner of the dwelling or premises on which the nuisance arises or continues. The said section therefore does not expressly require that the notice be served on the tenants of the premises unless the said tenants are the authors of the nuisance in question. However, according to section 7(1) of the 6th Schedule to the Constitution:

All law in force immediately before the effective date continues in force and shall be construed with the alterations, adaptations, qualifications and exceptions necessary to bring it into conformity with this Constitution

29. Accordingly, section 119 aforesaid must be construed as provided under section 7(1) of the aforesaid Schedule. Article 47 of the Constitution provides:

(1) Every person has the right to administrative action that is expeditious, efficient, lawful, reasonable and procedurally fair.

(2) If a right or fundamental freedom of a person has been or is likely to be adversely affected by administrative action, the person has the right to be given written reasons for the action.

30. Pursuant to the said Article, Parliament enacted the ***Fair Administrative Action Act, 2015*** which in section 2 thereof defines "administrative action" to include:

(i) the powers, functions and duties exercised by authorities or quasi-judicial tribunals; or

(ii) any act, omission or decision of any person, body or authority that affects the legal rights or interests of any person to whom such action relates;

31. The same section defines "administrator" as "a person who takes administrative action or who makes an administrative decision." Section 3 on the other hand provides:

(1) This Act applies to all state and non-state agencies, including any person

(a) exercising administrative authority;

(b) performing a judicial or quasi-judicial function under the Constitution or any written law; or

(c) <u>whose action, omission or decision affects the legal rights or interests of any person to whom such action, omission or decision relates.</u> [Underlining Mine].

32. From the provision of Article 40(2) of the Constitution, it is clear that the Respondents' decision amounted to deprivation of the applicants' legal rights and interests in the suit premises. It is therefore my view and I so hold that the Respondents were under a constitutional and statutory duty to afford the applicants an opportunity of being heard before the impugned decision was made. This must be so

because it is now appreciated that judicial review is an important control, ventilating a host of varied types of problems. The focus of cases may therefore range from matters of grave public concern to those of acute personal interest; from general policy to individualised discretion; from social controversy to commercial self-interest; and anything in between. In my view where the issue of enjoyment of fundamental rights and freedoms under the Constitution calls for determination, that removes the matter from purely a private affair as it then becomes a matter of "acute personal interest." This must be so because Article 19(1) of the Constitution recognises that the Bill of Rights as an integral part of Kenya's democratic state and as the framework for social, economic and cultural policies.

33. The question however is whether such opportunity was accorded. If as contended by the Respondents the applicants were accorded an opportunity and they failed to take advantage of the same, they cannot be heard to complain that their rights to be heard were infringed or violated. This was the position in **Union Insurance Co. of Kenya Ltd. vs. Ramzan Abdul Dhanji Civil Application No. Nai. 179 of 1998** where the Court of Appeal held:

> **"Whereas the right to be heard is a basic natural-justice concept and ought not to be taken away lightly, looking at the record before the court, the court is not impressed by the point that the applicant was denied the right to defend itself. The applicants were notified on every step the respondents proposed to take in the litigation but on none of these occasions did their counsel attend. Clearly the applicant was given a chance to be heard and the court is not convinced that the issue of failure by the High Court to hear the applicant will be such an arguable point in the appeal. The law is not that a party must be heard in every litigation. The law is that parties must be given a reasonable opportunity of being heard and once that opportunity is given and is not utilised, then the only point on which the party not utilising the opportunity can be heard is why he did not utilise it."**

34. In this case there is no evidence that apart from **African Boot Company Limited** any of the applicants was summoned. The Respondents however relied on the fact that the firm of **Keengwe & Co. Advocates** applied on behalf of the applicants that they be joined to the criminal proceedings as interested parties. The applicants however averred that they never instructed the said firm to appear for them in the matter. None of the parties hereto has exhibited the application in order for the Court to determine on whose behalf the said firm was purporting to act. In the submissions filed by the said firm in the said criminal case, it was expressly stated that the said firm did not represent all the tenants and that it only acted in the matter since it was also a tenant in the suit premises.

35. In the foregoing premises, there is no evidence on the record upon which this Court can find that the applicants apart from **African Boot Company Limited** were served.

36. Halsbury's Laws of England, 5th Edn. Vol. 61 page 539 at para 639 states:

> **"The rule that no person is to be condemned unless that person has been given prior notice of the allegations against him and a fair opportunity to be heard (the *audi alteram partem* rule) is a fundamental principle of justice. This rule has been refined and adapted to govern the proceedings of bodies other than judicial tribunals; and a duty to act in conformity with the rule has been imposed by common law on administrative bodies not required by statute or contract to conduct themselves in a manner analogous to a court. Moreover, even in the absence of any charge, the severity of the impact of an administrative decision on the interests of an individual may suffice itself to attract a duty to comply with this rule. Common law and statutory obligations of procedural fairness now also have to be read in the light of the right under the Convention for the Protection of Human Rights and Fundamental Freedoms to a fair trial which will be engaged in cases involving the determination of civil rights or obligations or any criminal charge."**

37. The minimum ingredients of fair hearing are provided in Article 47 of the Constitution. I say the minimum because under Article 20 of the Constitution every person is entitled to enjoy the rights and fundamental freedoms in the Bill of Rights to the greatest extent consistent with the nature of the right or

fundamental freedom and in applying a provision of the Bill of Rights, a court is enjoined *inter alia* develop the law to the extent that it does not give effect to a right or fundamental freedom and to adopt the interpretation that most favours the enforcement of a right or fundamental freedom.

38. It is my view that fair hearing must be meaningful for it to meet the constitutional threshold. On this aspect, ***Halsbury's Laws of England***, 5th Edn. Vol. 61 page 545 at para 640 states:

> **"The *audi alteram partem* rule requires that those who are likely to be directly affected by the outcome should be given prior notification of the action proposed to be taken, of the time and place of any hearing that is to be conducted, and of the charge or case they will be called upon to meet. Similar notice ought to be given of a change in the original date and time, or of an adjourned hearing…The particulars set out in the notice should be sufficiently explicit to enable the interested parties to understand the case they have to meet and to prepare their answer and their own cases. This duty is not always imposed rigorously on domestic tribunals which conduct their proceedings informally, and a want of detailed specification may exceptionally be held immaterial if the person claiming to be aggrieved was, in fact, aware of the nature of the case against him, or if the deficiency in the notice did not cause him any substantial prejudice…*Notification of the proceedings or the proposed decision must also be given early enough to afford the person concerned a reasonable opportunity to prepare representations or put their own case. Otherwise the only proper course will be to postpone or adjourn the matter.*"** [Underlining mine]

39. In **Geothermal Development Company Limited vs. Attorney General & 3 Others [2013] eKLR** it was held that:

> **"20. Article 47 enshrines the right of every person to fair administrative action. Article 232 enunciates various values and principles of public service including "*(c) responsive, prompt, effective, impartial and equitable provision of services*" and "*(f) transparency and provision to the public of timely, accurate information.*"**
>
> **28. As a component of due process, it is important that a party has reasonable opportunity to know the basis of allegations against it. *Elementary justice and the law demands that a person be given full information on the case against him and given reasonable opportunity to present a response*. This right is not limited only in cases of a hearing as in the case of a court or before a tribunal, but when taking administrative actions as well. (See *Donoghue v South Eastern Health Board* [2005] 4 IR 217). Hilary Delany in his book, *Judicial Review of Administrative Action, Thomson Reuters 2nd edition, at page 272,* notes that, "*Even where no actual hearing is to held in relation to the making of an administrative or quasi-judicial decision, an individual may be entitled to be informed that a decision which will have adverse consequences for him may be taken and to notification of the possible consequences of the decision.*"**
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> **29. Fair and reasonable administrative action demands that the taxpayer would be given a clear warning on the probable consequences of non-compliance with a decision before the same is taken; in this case, the Company should in no uncertain terms have received information as to the implication of the letter and the consequences of its failure to make good the payments demanded in the notice. (See Supreme court decision in *TV3 v Independent Radio and Television Commission* [1994] 2 IR 439).**
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> **30. In many jurisdictions around the world, it has long been established that notice is a matter of procedural fairness and an important component of natural justice. As such, information provided in relation to administrative proceedings must be sufficiently precise to put the individual on notice of exactly what the focus of any forthcoming inquiry or action will be. (*See Charkaoui v Canada* [2007] SCC 9, *Alberta Workers' Compensation Board v Alberta Appeals Commission (*2005) 258 DLR (4th), 29, 55 and *Sinkovich v Strathroy Commissioners of Police (1988) 51 DLR (4th) 750).*"**

40. Section 4(3) of the ***Fair Administrative Action Act, 2015*** provides as follows:

> ***(3) Where an administrative action is likely to adversely affect the rights or fundamental freedoms of any person, the administrator shall give the person affected by the decision-***
>
> ***(a) prior and adequate notice of the nature and reasons for the proposed administrative action;***
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> ***(b) an opportunity to be heard and to make representations in that regard;***
>
> ***(c) notice of a right to a review or internal appeal against an administrative decision, where applicable;***
>
> ***(d) a statement of reasons pursuant to section 6;***
>
> ***(e) notice of the right to legal representation, where applicable;***
>
> ***(f) notice of the right to cross-examine or where applicable; or***
>
> ***(g) information, materials and evidence to be relied upon in making the decision or taking the administrative action.***

41. In the absence of any concrete evidence that the applicants were afforded an opportunity of being heard apart from **African Boot Company Limited** the decision cannot stand. This was the position in **Onyango Oloo vs. Attorney General [1986-1989] EA 456** where the Court of Appeal expressed itself as follows:

> **"The principle of natural justice applies where ordinary people would reasonably expect those making decisions which will affect others to act fairly and they cannot act fairly and be seen to have acted fairly without giving an opportunity to be heard...There is a presumption in the interpretation of statutes that rules of natural justice will apply and therefore the authority is required to act fairly and so to apply the principle of natural justice...*A decision in breach of the rules of natural justice is not cured by holding that the decision would otherwise have been right since if the principle of natural justice is violated, it matters not that the same decision would have been arrived at*...It is improper and not fair that an executive authority who is by law required to consider, to think of all the events before making a decision which immediately results in substantial loss of liberty leaves the appellant and others guessing about what matters could have persuaded him to decide in the manner he decided...In the course of decision making, the rules of natural justice may require an inquiry, with the person accused or to be punished, present, and able to understand the charge or accusation against him, and able to give his defence. In other cases it is sufficient if there is an investigation by responsible officers, the conclusions of which are sent to the decision-making body or person, who, having given the person affected a chance to put his side of the matter, and offer whatever mitigation he considers fit to put forward, may take the decision in the absence of the person affected. The extent to which the rules apply depends on the particular nature of the proceedings...It is not to be implied that the rules of natural justice are excluded unless Parliament expressly so provides and that involves following the rules of natural justice to the degree indicated...Courts are not to abdicate jurisdiction merely because the proceedings are of an administrative nature or of an internal disciplinary character. It is a loan, which the Courts in Kenya would do well to follow, in carrying out their tasks of balancing the interests of the executive and the citizen. It is to everyone's advantage if the executive exercises its discretion in a manner, which is fair to both sides, and is seen to be fair...*Denial of the right to be heard renders any decision made null and void ab initio*."** [Emphasis mine].

42. This was a restatement of **Lord Wright's** decision in **General Medical Council vs. Spackman [1943] 2 All ER 337** cited with approval in **R vs. Vice Chancellor JKUAT Misc. Appl. No. 30 of 2007**

that:

> **'If the principles of natural justice are violated in respect of any decision, it is, indeed immaterial whether the same decision would have been arrived at in the absence of the departure from essential principles of justice. The decision must be declared as no decision."**

43. In **Ridge vs. Baldwin [1963] 2 All ER 66** at 81, **Lord Reid** expressed himself as follows:

> **"Time and again in the cases I have cited it has been stated that a decision given without the principles of natural justice is void."**

44. Sections 119 and 120 of the ***Public Health Act*** were considered by **Okwengu, J** (as she then was) in **Githui vs. Public Health Officer Crim. Application No. 141 of 1996** where the learned Judge pronounced herself as follows:

> **"In the instant case the mandatory requirements of section 119 and 120 of the Public Health Act were not complied with. No notice was served on the appellant. No formal complaint was lodged before the magistrate nor did the magistrate summon the appellant to appear before him. Instead a peculiar procedure was adopted through an *ex parte* chamber summons with the result that the appellant was condemned without being given any hearing…Clearly the trial magistrate erred in failing to comply with the mandatory legal provisions and also in acting contrary to the rules of natural justice."**

45. Wendo, J on her part in **Barclays Bank of Kenya vs. City Council of Nairobi Nairobi HCMA No. 4475 of 2005,** expressed herself as follows:

> **"Where charges are preferred against the applicants without being given a chance to explain their side of the events or story especially after the applicants requested for audience, the Respondents were in breach of that cardinal rule of natural justice that one cannot be condemned unheard and the matter would fall squarely under the purview of judicial review."**

46. In the instant case, section 120 of the ***Public Health Act*** as read with Article 47 of the Constitution and section 4 of the ***Fair Administrative Action Act*** clearly mandated the Respondents to afford the Applicants such an opportunity before an adverse order could be made.

47. Having considered the allegations made which allegations have not been controverted the inescapable conclusion I come to is that the proceedings against the applicants save for **African Boot Company Limited** were tainted with illegality and procedural impropriety. In other words the rules of natural justice were never complied with before the impugned decision was arrived. One of the grounds for impugning a decision is the commission of procedural improprieties and as was held in **Pastoli vs. Kabale District Local Government Council and Others [2008] 2 EA 300** that:

> **"Procedural Impropriety is when there is a failure to act fairly on the part of the decision-making authority in the process of taking a decision. The unfairness may be in non-observance of the Rules of Natural Justice or to act with procedural fairness towards one to be affected by the decision. It may also involve failure to adhere and observe procedural rules expressly laid down in a statute or legislative Instrument by which such authority exercises jurisdiction to make a decision."**

48. With respect to the issue of jurisdiction, **Oguk, J** in **Mohamed Saeed Khan vs. City Commission of Nairobi [1994] eKLR** expressed himself as follows:

> ***"I think, with respect, that the point which learned counsel for the applicant sought to introduce between "dwellings" and "premises", may at best be termed as a distinction without a difference. I do not think that it was the intention of the Legislature to restrict the powers of the***

courts to issue closing orders where a nuisance exists which renders a building inhabitable to only those premises which were being used as dwellings. Public health matters are so fundamental to the lives of the people in general that it could not have been the intention of the Act only to protect those human beings who were dwelling or sleeping in certain rooms in one building and not those in the same building who were carrying out business. It would be disastrous, so I believe, to accept the reasoning of Mr Shehmi, that once a business cum-residential building as was the case here is found to constitute a nuisance, then only those parts that are being used for sleeping or dwelling could be ordered closed. Once a building is condemned as unfit for habitation, it matters not that it is a residential or a business premises or both… **I may add that it is the health of those who occupy such premises either for purposes of dwelling or carrying out business that the Act aims to protect. If it becomes necessary to close any premises on health grounds, then a magistrate to whom such a complaint is lodged and who is satisfied that a nuisance exists that renders such premises inhabitable, may proceed in addition to any other penalties prescribed, issue a closing order.**

I am not prepared to give any narrower interpretation as was suggested by learned counsel for the applicant to s 120(9) of the Public Health Act so as to restrict its scope and operation to dwelling houses only. In my ruling, it applies to all premises whether used for dwelling or business. Given the prevailing shortage of decent housing in major urban centres in this country where rooms which were meant strictly for business are also used by occupiers thereof as dwellings, the Courts cannot afford to give section 120(9) of the Public Health Act any more restrictive application. It is common knowledge that many people in several towns in this country do live behind their business premises or *kiosks*, where such premises have no toilet facilities or running water such that the health of those working there or occupying such premises is endangered. In these circumstances the Courts in suitable cases could perfectly issue closing orders."

49. Nyamu, J *(as he then was) was however of a different opinion in* **Indo Company Ltd & 4 Others vs. Senior Resident Magistrate City Court [2008] eKLR** where he expressed himself as follows:

"It is not in dispute that the premises in question or building was at the material time being used as trade premises. However it is crystal clear to the court that the power for the lower court to grant a closing order only relates to dwellings. Section 2 of the Public Health Act Cap 242 defines "dwelling" as any house, room, shed, hut, cave, tent, vehicle, vessel or boat or any other structure or portion whereof is used by any human being for sleeping or in which any human being dwells. Trade or Business premises are therefore outside the purview of a closing order and are regulated by other laws."

50. It is trite, however that a judicial or quasi-judicial tribunal, such as the Board herein has no inherent powers. In **Choitram vs. Mystery Model Hair Salon [1972] EA 525**, **Madan, J** (as he then was) was of the view that powers must be expressly conferred; they cannot be a matter of implication. Similarly, in **Gullamhussein Sunderji Virji vs. Punja Lila and Another HCMCA No. 9 of 1959 [1959] EA 734**, it was held that Rent Restriction Board is the creation of statute and neither the Board nor its chairman has any inherent powers but only those expressly conferred on them.

51. It was in appreciation of the foregoing position that the Court in **Ex Parte Mayfair Bakeries Limited vs. Rent Restriction Tribunal and Kirit R (Kirti) Raval Nairobi HCMCC No. 246 of 1981** held that in testing whether a statute has conferred jurisdiction on an inferior court or a tribunal the wording must be strictly construed: it must in fact be an express conferment and not a matter of implication since a Tribunal being a creature of statute has only such jurisdiction as has been specifically conferred upon it by the statute. Therefore where the language of an Act is clear and explicit the court must give effect to it whatever may be the consequences for in that case the words of the statute speak the intention of the legislature. Further, each statute has to be interpreted on the basis of its own language for words derive their colour and content from their context and secondly, the object of the legislation is a paramount consideration. See **Chogley vs. The East African Bakery [1953] 26 KLR 31 at 33 and 34; Re: Hebtulla Properties Ltd. [1979] KLR 96; [1976-80] 1 KLR 1195; Choitram vs. Mystery Model Hair**

Salon (supra); **Warburton vs. Loveland [1831] 2 DOW & CL. (HL) at 489; Lall vs. Jeypee Investments Ltd [1972] EA 512 at 516; Attorney General vs. Prince Augustus of Hanover [1957] AC 436 at 461**.

52. It is therefore clear that a Tribunal's power must be conferred by the Statute establishing it which statute must necessarily set out its powers expressly since such Tribunals have no inherent powers. Unless its powers are expressly donated by the parent statute, it cannot purport to exercise any powers not conferred on it expressly. As has been held time without a number, where a statute donates powers to an authority, the authority ought to ensure that the powers that it exercises are within the four corners of the statute and ought not to extend its powers outside the statute under which it purports to exercise its authority. In **Republic vs. Kenya Revenue Authority Ex Parte Aberdare Freight Services Ltd & 2 Others [2004] 2 KLR 530** it was held that the general principle remains however, that a public authority may not vary the scope of its statutory powers and duties as a result of its own errors or the conduct of others.

53. Therefore where the law exhaustively provides for the jurisdiction of an executive body or authority, the body or authority must operate within those limits and ought not to expand its jurisdiction through administrative craft or innovation. The courts would be no rubber stamp of the decisions of administrative bodies. Whereas, if Parliament gives great powers to them, the courts must allow them to it, the Courts must nevertheless be vigilant to see that the said bodies exercise those powers in accordance with the law. The administrative bodies and tribunals or boards must act within their lawful authority and an act, whether it be of a judicial, quasi-judicial or administrative nature, is subject to the review of the courts on certain grounds. The tribunals or boards must act in good faith; extraneous considerations ought not to influence their actions; and they must not misdirect themselves in fact or law. Most importantly they must operate within the law and exercise only those powers which are donated to them by the law or the legal instrument creating them. See **Re Hardial Singh and Others [1979] KLR 18; [1976-80] 1 KLR 1090.**

54. It is in this respect that I associate myself with the position adopted by **Nyamu, J** in **Indo Company Ltd & 4 Others vs. Senior Resident Magistrate City Court [2008] eKLR** that trade or Business premises are outside the purview of a closing order and are regulated by other laws.

55. It is therefore my view and I hold that the 1st Respondent had no jurisdiction to issue the orders it purported to have issued.

Order

56. Accordingly, I find merit in these consolidated applications and I hereby issue an order of certiorari removing into this Court for the purposes of being quashed the 1st Respondent's decision dated 19th August, 2016 in Criminal Case No. 1299A of 201 requiring the applicants to vacate the premises known as Uganda House, Plot No. 209/905 and 209/906 – Kenyatta Avenue for the purposes of being quashed which decision is hereby quashed. I also prohibit the Respondents from implementing the said decision.

57. With respect to costs, as one of the applicants, **African Boot Company Limited**, was notified of the proceedings, the order that commends itself to me and which I hereby issue is that each party will bear own costs of the applications.

58. Orders accordingly.

Dated at Nairobi this 18th day of May, 2017

G V ODUNGA

JUDGE

Delivered in the presence of:

Miss Kariuki for the applicant in JR 464 of 2016

Miss Weneni for Mr Ochoo for the Applicant in JR 465 of 2016

Miss Olando for the 3rd Respondent

CA Mwangi