



REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT KISII

MISC. CIVIL APPLICATION NO.13 OF 2013 (JR)

**IN THE MATTER OF AN APPLICATION TO INSTITUTE JUDICIAL REVIEW
PROCEEDINGS IN THE NATURE OF PROHIBITION**

AND

IN THE MATTER OF PUBLIC HEALTH ACT CAP 242 OF THE LAWS OF KENYA

**IN THE MATTER OF SECTIONS 118, 119 AND 120 OF THE PUBLIC HEALTH ACT CAP 242
OF THE LAWS OF KENYA**

BETWEEN

REPUBLIC APPLICANT

VERSUS

1. THE MEDICAL OFFICER OF HEALTH - KISII COUNTY

2. THE PUBLIC HEALTH OFFICER – KISII COUNTY

3. THE RESIDENT MAGISTRATE’S COURT – KISII RESPONDENTS

AND

THE COUNTY SERVICE BOARD

KISII COUNTY GOVERNMENT INTERESTED PARTY

EX-PARTE

1. JOHN CHORE

2. VINCENT BAGWASI

3. CONSOLATA MORAA ONDARO

4. ERICK ONGECHI AKUNGA

5. BEN MANYEGA

RULING

1. The applicants herein were granted leave to institute Judicial Review proceedings vide an application dated 4th November 2013 for the writ of prohibition to prohibit the Respondents from proceeding with the proceedings in Kisii CMC Misc. Criminal Application No.60 of 2013 and/or setting in motion the procedures prescribed under the **Public Health Act** for removing the applicants' structures (stalls) from whenever they are situated. The leave so granted was also to act as a temporary stay for 7 days of the proceedings in the aforementioned Kisii CMC's Misc. Criminal Application No.60 of 2013.
2. Hon. Mr. Justice Muriithi ordered parties to appear on 11th November 2013 to present their arguments on whether or not the leave so granted should operate as a permanent stay of the proceedings in Misc. Cr. Application No.60 of 2013 now pending before the Chief Magistrate. Unfortunately Mr. Justice Muriithi was transferred to Mombasa in October 2013, and that is the reason why the matter is before me.
3. On the 11th November 2013, the matter could not proceed because Mr. Onsembe, counsel for the Respondents as well as the Interested Party's was not ready. However, the parties agreed to file and exchange written submissions. The written submissions were duly filed and came up for highlighting on 25th November 2013.
4. The gist of the applicants' submissions is that the Respondents did not comply with the provisions of **Section 119** of the **Public Health Act** requiring the respondents to serve a notice upon the applicants to remove any nuisance or execute such work and do such things as may be necessary and that only in the case of failure by the Respondents to comply with the notice under **Section 119** would action be taken against the applicants. That in the instant case, the orders issued by the CM's court were not based on evidence. That the Respondents had complied with the provisions of **Section 119** of the **Public Health Act**, hence the prayer for a permanent stay pending hearing of the main motion.
5. Both the Respondents and Interested Party's contend that the respondents were issued with the requisite notice as per the various annexures to the affidavit of Melitus Kabar sworn on 15th November 2013, and that since the issue of service of notice upon the applicants has not been disputed the court ought to admit the evidence of service as being true and uncontested.
6. Counsel for the Respondents also contends that the suit as filed is defective since the applicants have not indicated on the face thereof that they have brought the suit in a representative capacity.
7. Finally, it is contended that even if the applicants had shown by evidence that they were not served, there would not be any basis for issuing the stay order on a permanent basis because the Notice of Motion filed on 22nd November 2013 is both undated and unsigned and that in the circumstances, it would be in vain that the orders of permanent stay would be issued. It was also counsel's contention that there is neither supporting nor verifying affidavit to the substantive Notice of Motion.
8. Briefly, the facts of this matter are that the applicants herein were served with summons to appear in court and show cause why the structures in which they operated their business should not be removed by the Public Health Officer. The applicants allege that they were never served with any requisite notices under **Section 119** of the **Public Health Act** before the summonses were issued to them. The applicants thus contend that the issuance of the summons by the Chief Magistrate's Court in Kisii Misc. Cr. Application No.60 of 2013 were both unprocedural and premature and amount to a violation of their constitutional rights as enshrined under **Article 50 (2) (b) and (k) and 50 (3)** of the **Constitution**. In other words, the applicants contend that they were not given prior knowledge of the charge which they were required to answer through the summons; that they did not have the opportunity to adduce and challenge the evidence against them and finally that the information concerning this matter was not given to the applicants in a language that they understood.
9. I have now considered the pleadings and the submissions by all the parties in this matter. The only issue for determination is whether the temporary stay granted by this court on 4th November 2013 should

be made permanent.

10. In my humble view, and inspite of the fact that there is a likelihood that the Respondents did not comply with **Section 119** of the **Public Health Act**, I do not think that the temporary stay order granted on 4th November 2013 should be made permanent.

11. Why do I say so? The stay order is, in my view, intended to avert the mischief envisaged in the main application which seeks orders of judicial review in the nature of prohibition to prohibit the respondents from proceeding with the proceedings in Kisii Chief Magistrate's Court Miscellaneous Criminal Application No.60 of 2013 and/or setting in motion the procedure for removing the applicants' structures (stalls) from whenever they are situated. The Judicial Review application filed in court on 22nd November 2013 is in my view incompetent for the reason that it is neither signed nor dated by the advocate who drew it.

12. It is my considered view therefore that a pleading that is neither dated nor signed by the party presenting it is not a pleading and is a mere piece of paper which does not meet the requirements of **Order 2 Rule 16** of the **Civil Procedure Rules**. **Order 2 Rule 16** which is couched in mandatory terms provides as follows:-

“Every pleading shall be signed by an advocate, or recognized agent (as defined by Order 9 Rule 2) or by the party if he sues or defends in person.”

13. For the aforesated reason, the applicants' prayer for confirmation of the temporary stay order as per prayer 2 of the Ex-parte Chamber Summons dated 4th November 2013 is hereby declined.

14. Orders accordingly.

Dated and delivered in open court at Kisii this 26th day of February, 2014

R.N. SITATI

JUDGE

In the presence:

M/s Minda & Co. (absent) for Applicants

Mr. Mainga for Onsembe for Respondents and Interested Parties

Mr. Bibu - Court Clerk