



REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT NAIROBI

JUDICIAL REVIEW MISC. APPLICATION NO. 231 OF 2013

In the matter of: Application by Kwench Limited for leave to apply for orders of prohibition and certiorari against the Nairobi City County and Interim Secretary of Nairobi City County

In the matter of: The Public Health Act, Cap. 242.

In the matter of: The Law Reform Act Cap. 26 Laws of Kenya and order 53 of the Civil Procedure Rules 2010.

BETWEEN

REPUBLICAPPLICANT

VERSUS

NAIROBI CITY COUNTY.....1ST RESPONDENT

INTERIM SECRETARY NAIROBI CITY COUNTY....2ND RESPONDENT

AND

KWENCH LIMITED.....EXPARTE APPLICANT

JUDGEMENT

INTRODUCTION

1. The applicant herein **Kwench Limited**, has moved this Court by a Notice of Motion dated 4th July, 2013, filed in Court on 5th July, 2013 seeking the following orders:
1. **THAT** an order of prohibition do issue against the Respondents prohibiting each one of them or their servants, agents or employees from prosecuting or commencing criminal proceedings or taking any other action against the Applicant pursuant to the notice to comply dated 14th June 2013 issued to the applicant by the Medical Officer of Health Nairobi City County under The Public Health Act cap 242 laws of Kenya requiring the Applicant to drain rain water flooding L.R. Nos.14970/233 and 235 Runda Estate and to provide infrastructure to permanently drain the said rain water.
2. **THAT** an order of certiorari do issue to remove into the High Court and quash the Notice to comply dated 14th June 2013 issued to the Applicant by the Medical Officer of Health of Nairobi County under the Public Health Act Cap. 242 laws of Kenya requiring the

Applicant to drain rain water flooding L.R. Nos.14970/233 and 235 Runda Estate and to provide infrastructure to permanently drain the said rain water.

3. THAT the costs of this Application be provided for.

APPLICANT'S CASE

2. The application was supported by a verifying affidavit sworn by **Esther Njeri Gakunju**, a Director of the applicant on 28th June, 2013.
3. According to the deponent, Applicant is a limited liability company engaged in various business activities including but not limited to owning, developing and selling of land and was the registered owner of the three parcels of Land being Land Reference Numbers 5989/13, 18 and 19 Kiambu Road (hereinafter called "the entire land"). However, around the year 1980, the Applicant applied for the amalgamation or consolidation and subsequent subdivision of the entire land (herein after called 'the subdivision scheme'). The approval for the subdivision scheme was done by the then City Council of Nairobi, the predecessor of the 1st respondent and the Commissioner of Lands.
4. According to the deponent, it was a term and condition of the subdivision scheme that the existing titles for the separate parcels of land be surrendered to the Commissioner of Lands in lieu of a new grant; that the drainage system of all existing buildings on the plots be reconstructed to the satisfaction of the Medical Officer of Health of the then Nairobi City Council; that the proposed roads serving the development be constructed to the adoptive standard including surface water drainage and street lighting and that plans and specifications were to be approved by the then City Council of Nairobi; that a comprehensive surface water drainage scheme be submitted and implemented to the satisfaction of the City Engineer; and that the drainage way leave to be provided as necessary.
5. According to the deponent, the applicant complied with all the terms and conditions of the subdivision scheme and upon compliance, the then City Council of Nairobi and the Commissioner of Lands approved the subdivision scheme which gave rise to many plots measuring approximately 0.2000 ha or half an acre which subdivision scheme was implemented in phases. Upon securing the approval of the then City Council of Nairobi that the terms and conditions of the subdivision scheme had been complied with, plots in each phase, according to her would be sold to third parties. The last phase of the subdivision scheme involved scheme involved among others LR Nos. 14970/230-243. It was deposed that the approval for the last phase of the subdivision scheme was granted by the then City Council of Nairobi on 19th April 2011 a position they communicated to Commissioner of land.
6. It was averred that upon the approval of the last phase of the subdivision scheme, the applicant's Advocates on record applied for the issuance of titles/grants by the Commissioner of Lands for Land Reference Nos. 14970/233,234,235,236, 237, 238 and 239 and on 6th September 2007, the Applicant sold Land Reference 14970/235 to **Joakim Kiarie Kamere** and **Gladwell Wanjiru Kiarie** who took possession of the same put up a residential house though the formal transfer is yet to be affected.
7. It was deposed that on 29th April 2010, the Applicant sold L.R. No. 14970/233 to Royal Gardens Limited who took possession of the same and put up a residential house. Similarly the Title for the Plot has been issued and the transaction is pending formal transfer to the purchaser though the purchaser has offered this property as security for a loan from Ecobank Kenya Limited.
8. It was therefore contended that the Applicant sold, parted with possession of and is not in control L.R. Nos. 14970/233 and 235 (hereinafter called 'the suit premises') prior to which sale the purchasers visited the area, inspected the same and satisfied themselves that the same were devoid of any defects and to date, these purchasers have never accused the Applicant of breach of contract of sale. However, on 16th May 2012 Royal Gardens Limited the proprietor of one of the suit premises complained to the applicant of flooding on its plot to which complaint the applicant's responded on 20th September 2012 that the Applicant was not responsible for the drainage system having complied with all the terms and conditions of the subdivision scheme and handed over the same to the then Nairobi City Council.
9. On 4th October 2012 the proprietors of the suit premises complained of flooding thereon to the

National Environmental Management Authority and asked for an environmental impact assessment. This was followed by another letter to the city engineer Nairobi city council asking him to take measures to drain the flood water on the suit premises. In this letter, the two proprietors confirmed that they were the owners of the suit premises and the flooding was as result of heavy rains. On 26th April, 2013, the Interim Secretary, Nairobi County wrote to the Applicant demanding compliance with the terms and conditions of the subdivision scheme to which demand the applicant responded that that the applicant could not heed the demands for the reasons that the subdivision scheme was implemented in phases strictly in accordance with the terms and conditions imposed by the then Nairobi City Council and the Commissioner of Lands; that the approval for the subdivision scheme and particularly the suit premises was granted on 19th April 2011 by the Nairobi City Council leading to the issuance of title deeds by the commissioner of Lands; that the City Council of Nairobi adopted all the infrastructural facilities constructed by the Applicant thus assuming responsibility for maintenance and repairs of the same; that it is the responsibility of the Nairobi County to remedy the problem of flooding on the suit premises and other adjacent properties; and that apart from the suit premises the flooding affects several other plots some belonging to the Applicant.

10. However, on 10th May 2013, the owners of the suit premises together with the owner of L.R. No 14970/232 threatened the Applicant with unspecified action and the applicant's Advocates advised them that the flooding problem was the responsibility of the Nairobi County and that they should cooperate with the Applicant to get the County to address the problem. However, on the same day, the Medical Officer of Health of the 1st Respondent issued a 14 days Notice to comply under the **Public Health Act Cap 242** requiring the Applicant to drain water flooding on the suit premises, to provide infrastructure to permanently drain the said water otherwise the Applicant would be prosecuted or criminal action initiated against it or some other action taken under the said Act. On 18th June 2013 the applicants responded to the said Notice explaining that the Applicant could not comply with the same and demanding its immediate withdrawal. However, the 1st respondent failed or neglected to withdraw the same and in the deponent's view, unless prohibited by this Honourable Court the 1st respondent will proceed and prosecute or initiate criminal proceedings or take some other action against the Applicant.
11. It was the deponent's position that since the finalization of the subdivision scheme and the sale of the suit premises, the problem of flooding occurred for the first time in 2012 due to heavy rains and affected a large area and this was much later after the applicant had complied with the terms and conditions of the subdivision scheme. As such it is the responsibility of the 1st respondent to deal with the problem.

RESPONDENTS' CASE

12. In opposition to the application the Respondents filed the following grounds of opposition:

- 1. THAT in issuing the Notice dated 14th June 2013 the Respondents was only exercising its statutory duty for maintenance of Public Health and Sanitation within its jurisdiction for the good of the general public.**
- 2. THAT Exparte Applicants claim that the said Notice was ultravires does not hold any water. The Exparte Applicant accepted service of the said Notice and indeed acknowledged that there premises were in dire need of the improvements instructed by the Respondents herein.**
- 3. THAT the Exparte Applicant blatantly failed and/or delayed to comply with The Notice from the Respondents through its lawful officers.**
- 4. THAT vide a Notice dated 14th June 2013, the Respondents through its lawful officers directed that the Exparte Applicants to repair the drainage system within their premises a directive which the Exparte Applicant's blatantly ignored.**

5. **THAT the Exparte Applicants cannot now come before this Honourable Court and dispute the legality of the Notice and attempts to deflect responsibility to the Original Proprietor. This is just an attempt to conceal the fact that the Exparte Applicants did not take the Respondents directive seriously and or have unduly delayed and carried out the improvements with a do-not-care attitude therefore putting the health of the general public at risk.**

6. **THAT it is only logical that the Respondents herein being an institution can only be represented by its officers to carry out its mandate, similarly, the officers who served upon the Exparte Applicants were legally mandated to carry out the duties delegated upon them by the Respondents, and the Exparte Applicants have not adduced any evidence to show that the officers were not authorized by law to do so.**

7. **THAT the Exparte Applicants should be ready to face the consequences of their own ignorance. The allegation that the sub divisions of the property were approved is not a defence or enough to make this court divert from the normal course of the law and procedure. The Exparte Applicant shall stand to bear the costs of compliance on grounds of their own misdirection and negligence.**

8. **THAT if this Honourable Court proceeds and grants orders of prohibition and certiorari to quash the notice issued herein dated 14th June 2013 under the Public Health Act, then the Respondents' mandate to enforce and maintain measures towards public health and sanitation for the public good shall be defeated at the expense of the general public.**

9. **THAT this Honourable Court should safeguard the mandate of the Respondents and should not allow the general public to be prejudiced on grounds of negligence and blatant ignorance of the Exparte Applicants.**

10. **THAT from the foregoing, it is clear that the Application is misconceived, unfounded and an abuse of the court process.**

11. **THAT the Notice dated 14th June 2013 is incapable of being quashed by way of Judicial Review as it does not amount to a decision of a Quasi Judicial body, nor a decision per se.**

12. **THAT the application is frivolous, vexatious and incurably incompetent. It ought to be dismissed with costs on a higher scale.**

APPLICANT'S SUBMISSIONS

13. On behalf of the applicant it was submitted that it was illegal to demand that the applicant drain off natural rain water flooding on land that does not belong to him in light of the fact that owners of the suit premises have undertaken developments on the suit premises which altered their state since the date of the sale hence it is illegal to hold the applicant accountable for activities undertaken by third parties on their land.

14. It was submitted that section 188 under which the notice was issued does not mention flooding natural rain water as one of the nuisances thereunder since rain water is an act of God.

15. It was submitted that in the definition of who is an author of nuisance, reference is made to the owner or occupier of the premises such that the nuisance has to be by the owner or occupier of the premises in question and the applicant is neither of these. Although section deals with situations where the author of the nuisance cannot be found, in the instant case no one can be said to be the author of the rain water hence the duty of draining flood water lies squarely on the 3rd Respondent and not the applicant.

16. It was submitted that under section 11 part 2 of the 4th Schedule of the Constitution as read with

section 5(2)(c) of the County Government Act No. 17 of 2012 it is the function of the 1st Respondent to provide public works and services including storm water management systems in built up areas. It was therefore submitted that by issuing the impugned notice the 3rd Respondent committed an error of law and the applicant relied on **Republic vs. Chief Magistrates Court Nairobi ex parte Simon Ngomonge & Another JR No. 170 of 2012** and **Director of Pensions vs. Cockar [2000] EA 38**.

17. It was further submitted that the City Council, the 1st Respondent's predecessor having approved the subdivision scheme giving rise to the titles in question, it was irrational and unreasonable for the 1st Respondent to claim that the Applicant had failed to comply with the subdivision requirements or conditions.
18. It was submitted that since the owners of the said plots have developed the same it was in bad faith to send the impugned letter on the basis of a complaint by the proprietors of the suit premises without investigating the same and contrary to the rules of natural justice. It was submitted that the threatened prosecution is meant to blackmail the applicant to undertake the duties of the 1st respondent hence is an abuse of the Court process. In support of this submission the applicant relied on **Ndarua vs. Republic [2002] EA 205** and **Republic vs. Chief Magistrate's Court ex parte Ngomonge** (supra).
19. Since the Respondents did not bother to explain why the notice was issued, it was submitted that the applicant's evidence is unchallenged hence the Respondents ought to be taken to have admitted the wrong doing.

RESPONDENTS' SUBMISSIONS

20. On behalf of the respondents apart from copiously reproducing the grounds of opposition there was nothing else added.

DETERMINATIONS

21. I have considered the forgoing and this is the view I form of the matter.
22. Section 115 of the ***Public Health Act*** provides that no person shall cause a nuisance or shall suffer to exist on any land or premises owned or occupied by him or of which he is in charge any nuisance or other condition liable to be injurious or dangerous to health. The relevant parts of section 118(1) of the said Act on the other hand enumerates what constitute nuisance and these 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 infectious disease and any act, omission or thing which is, or may be, dangerous to life, or injurious to health. Subsection (2) of the said Act provides that the author of a nuisance means the person by whose act, default or sufferance nuisance is caused, exists or is continued, whether he is the owner or occupier or both owner and occupier or any other person.
23. 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.

24. 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. The author according to the Act means the person by whose act, default or sufferance nuisance is caused, exists or is continued, whether he is the owner or occupier or both owner and occupier or any other person. From the aforesaid definition it is clear that the author of nuisance is not restricted to the owner or occupier of the premises in question but means the person by whose act, default or sufferance

- nuisance is caused, exists or is continued and may be the occupier or owner of the premises or any other person. The decision as to who is the author of nuisance rests on the medical officer of health. It is therefore incorrect for the applicant to contend that the mere fact that it had parted with possession of the suit premises, it was no longer capable of falling within the definition of “author” under the Act. If his actions omissions or sufferance, the nuisance was caused, existed or continued, he would still be liable to be served with a notice under section 19 of the Act. In this case, the applicant was the original proprietor of the suit premises and it is admitted he subdivided and sold the same. That subdivision and sale was obviously subject to it meeting certain conditions and from the record it would seem that it is being held liable for having not fully satisfied the said conditions. Therefore if as a result of the failure by the applicant to meet the stipulated conditions a nuisance was thereby caused, I do not see the reason why the applicant ought not to be called upon to abate the same.
25. The applicant, however contends that the alleged nuisance could have been caused by the actions of the developers of the suit premises. It was further contended that the flooding caused by natural rain water does not constitute nuisance under the Act.
26. There is a legal procedure provided under section 120 of the Act which is a judicial process. It is at that stage that the Court is empowered to make an inquiry as to the existence of the nuisance and in my view whether the nuisance was committed by the person against whom the charge is laid.
27. What the applicant wants the Court to determine is whether there in fact nuisance under the Act and whether the same was caused by the applicant. Having determined that a person other than the owner or occupier of the premises in question may be considered the author of the nuisance, it is my view that the rest of the issues are better determined by a magistrate as provided under section 120 of the **Public Health Act**.
28. As was held in **Republic vs. Kenya Revenue Authority Ex parte Yaya Towers Limited [2008] eKLR** 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 and that it is no part of that purpose 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) Para 60.***
29. In the premises it is my view and I so hold that apart from the issue whether a person other than the owner or occupier can be held to have caused nuisance under the Act, the other issues are prematurely before this Court.

ORDER

30. It follows that the Notice of Motion dated 4th July, 2013 fails and is dismissed with costs to the Respondents.

Dated at Nairobi this day 31st day of March 2014

G V ODUNGA

JUDGE

Delivered in the presence of:

Mr Thuku for the Applicant

Mr Ilako for the 1st Respondent