



**REPUBLIC OF KENYA**  
**IN THE HIGH COURT AT NAIROBI**  
**MILIMANI LAW COURTS**  
**JUDICIAL REVIEW DIVISION**  
**MISC. APPL. NO. 101 OF 2011**  
**CONSOLIDATED WITH**  
**MISC APPL. NO. 109 OF 2011**

**BETWEEN**

**REPUBLIC .....APPLICANT**

**AND**

**PUBLIC HEALTH OFFICER ..... 1<sup>ST</sup> RESPONDENT**

**THE RESIDENT MAGISTRATE,**

**KIKUYU COURT.....2<sup>ND</sup> RESPONDENT**

**THE TOWN CLERK**

**TOWN COUNCIL OF KIKUYU ..... 3<sup>RD</sup> RESPONDENT**

**AND**

**KEZIAH NJENJA ..... 1<sup>ST</sup> INTERESTED PARTY**

**GITAU KINUTHIA ..... 2<sup>ND</sup> INTERESTED PARTY**

**EUNICE WAMBAIRE ..... 3<sup>RD</sup> INTERESTED PARTY**

**WALTER ONDARI OMBIO.....4<sup>TH</sup> INTERESTED PARTY**

**PRESICION VALUERS ..... 5<sup>TH</sup> INTERESTED PARTY**

**TURNMED HEALTH**

**SERVICES ..... 6<sup>TH</sup> INTERESTED PARTY**

DOREO ..... 7<sup>TH</sup> INTERESTED PARTY  
JANE HARDWARE/PRINTING ..... 8<sup>TH</sup> INTERESTED PARTY  
MUG-MUGUGA ENTERPRISE.....9<sup>TH</sup> INTERESTED PARTY  
STANLEY KAMAU ..... 10<sup>TH</sup> INTERESTED PARTY  
MODERN FASHIONS ..... 11<sup>TH</sup> INTERESTED PARTY

***EX PARTE***

**GIAKKI HOLDINGS LTD**

**JUDGMENT**

1. The matters before the court concern a two storey building on the main street of Kikuyu Town in Kiambu County being Kiambu/Kikuyu Trading Centre/64 owned by the *ex-parte* applicant (“the applicant”). The building is let to tenants who are the interested parties herein.
2. The case arises from a notice issued by the 1<sup>st</sup> respondent to the tenants on 21<sup>st</sup> November 2011 which instructed the tenants to vacate the premises immediately. The notice stated as follows;

***TAKE NOTICE that under the building code provision of Public Health Act Cap 242 and regulations KIAMBU/KIKUYU TRADING CENTER PARCEL NO 64 made thereunder you are not allowed to occupy a building which poses any danger to human.***

***An inspection carried out revealed that the building you are occupying has lost stability and has major cracks that are injurious to health.***

***You are therefore required to IMMEDIATELY vacate the premises.***

***Failure to comply with this notice will constitute an offence punishable by law.***

***FOR; District Health Officer, Kikuyu***

3. On the same day, 21<sup>st</sup> November 2011, the Town Clerk of Kikuyu Town Council, served on the applicant a demand/order under Part V of the ***Physical Planning Act (Chapter 286 of the laws of Kenya)*** requiring the applicant to demolish its veranda or canopy on the ground that it was allegedly built without authority of the council. The Notice required the applicant to demolish the canopy “immediately.”
4. As a result of the action, the applicant filed ***Misc. Application No. 101 of 2011*** pursuant to leave granted on 29<sup>th</sup> November 2011, the Notice of Motion dated 1<sup>st</sup> December 2011 seeking;
  1. *That this Honourable Court be pleased to issue an order of certiorari to remove and bring to the High Court for the purpose of quashing the 1<sup>st</sup> respondent's notices dated 21st November 2011 addressed to the interested parties herein requiring them to vacate immediately their premises on LR. No. Kiambu/Kikuyu Trading Centre/Parcel No. 64.*
  2. *That this Honourable Court be pleased to issue an order of certiorari to remove and bring to the High Court for the purpose of quashing the 2<sup>nd</sup> Respondent's summonses dated 24th November, 2011 addressed to the interested parties herein requiring them attend court on 30th November, 2011 to answer a complaint preferred against them by the 1st Respondent in Resident Magistrate' Court at Kikuyu Criminal Case No. 854 of 2011, 869 of 2011, 860 of 2011, 858 of 2011, 856 of*

- 2011, 870 of 2011, 863 of 2011, 862 of 2011, 868 of 2011 and 872 of 2011.
3. That this Honourable Court be pleased to issue an order of certiorari to remove and bring to the High Court for the purpose of quashing the 3rd Respondent's demand / order requiring the applicant to “demolish immediately the Canopy Extending to the Road Next to Jivanjee Garden being a part of the building known as Kiambu/Kikuyu Trading Centre/Parcel No. 64.
  4. That this Honourable Court be pleased to issue an order of prohibition to prohibit the 3rd respondent from acting on the said demand/ order requiring the applicant to demolish the said Canopy Extending to the Road next to Jivanjee Garden, a part of the applicant's building on LR. No. Kiambu/Kikuyu Trading Centre/Parcel No. 64.
  5. That this Honourable Court be pleased to issue an order of prohibition to prohibit the 3rd respondent from demolishing the said Canopy Extending to the Road next to Jivanjee Garden, a part of the applicant's building on LR. No. Kiambu/Kikuyu Trading Centre/Parcel No 64.
  6. That this Honourable Court be pleased to issue an order of prohibition to prohibit the 2nd respondent from hearing Resident Magistrate's Court at Kikuyu Criminal Case No. No. 854 of 2011, 869 of 2011, 860 of 2011, 858 of 2011, 856 of 2011, 870 of 2011, 863 of 2011, 862 of 2011, 868 of 2011 and 872 of 2011 instituted against the interested parties herein.
  7. That the costs of this application be provided for.
5. As the matter was pending hearing and determination, the 2<sup>nd</sup> respondent issued summons for some of the tenants who were not interested parties to appear in court for failing to comply with the notices. As a result **Misc. 109 of 2011** was filed. Pursuant to leave granted on 5<sup>th</sup> December 2011, the applicant filed the Notice of Motion dated 6<sup>th</sup> December 2011 in which it seeks;
1. That Honourable Court be pleased to issue an order of certiorari to remove and bring to the High Court for the purpose of quashing the 2nd respondent's summonses addressed to the interested parties herein requiring them attend court to answer complaints preferred against them by the 1st Respondent in Kikuyu Resident Magistrate' Court in the following cases; No. 853 of 2011, 862 of 2011, 867 of 2011, 868 of 2011, 870 of 2011, 871 of 2011, 8884 of 2011 and 885 of 2011.
  2. That this Honourable Court be pleased to issue an order of prohibition to prohibit the 2nd respondent from hearing Resident Magistrate's Court at Kikuyu Criminal cases referred to in prayer No. 1 above.
  3. That the costs of this application be provided for.
6. On 15<sup>th</sup> December 2011, the court ordered that the matters be heard together as they arose from the same set of facts. They also raise the same issues of law.
7. A replying affidavit was sworn on 8<sup>th</sup> February 2012 by Leonard Waiyaki, a Public Prosecutor and District Public Health Officer Kikuyu District. He depones that an inspection of the property was carried out which revealed the dilapidated nature of the property. This state of affairs caused him to issue the tenants with notices to vacate the premises on 21<sup>st</sup> November 2011. On 24<sup>th</sup> November summons requiring all the occupants to attend court were sought from the Kikuyu Magistrate's court issued and served. Thereafter the persons who were summoned and charged under **section 11** of the **Public Health Act (Chapter 242 of the Laws of Kenya)** (“the Act”).
8. The applicant's case is that the 1<sup>st</sup> respondent usurped the powers of the magistrate under **section 120** of the **Act** when he purported to issue an order for the interested parties to vacate the premises as only the Magistrate could do so after hearing the prosecutor, owner of the building and tenants consequently all the notices are null and void. Dr Kuria S.C., counsel for the applicants, submitted that the Court in these circumstances should issue an order of certiorari and prohibition according to the well laid principles in **Kenya National Examination Council v Republic ex-parte Geoffrey Gathenji Njoroge and Others CA Civil Appeal No. 266 of 1996 [2011]eKLR**. He also referred to the case of **Public v Kigera [1986] KLR E & L 131**, **G G Githui v Public Health Officer Nyeri HC Cr. App. No. 141 of 1996 [2005]eKLR** and **R v District Public Health Officer Kisii HC Misc. Appl. No. 226 of 2004 [2005]eKLR** which support the applicants' argument that the Public Health Officer had no power to take steps to evict the tenants.

9. The respondents' case is that the Public Health Officer is empowered by **section 117** and **163(1)** of the **Act** to enter in to any premises to inspect or perform any work or do anything which it is required or authorised to do by the **Act**. **Section 117**, the **Act** provides, *"It shall be the duty of every health authority to take all lawful, necessary and reasonably practicable measures for preventing or causing to be prevented or remedied all conditions liable to be injurious or dangerous to health arising from the erection or occupation of unhealthy dwellings or premises, or the erection of dwellings or premises on unhealthy sites or on sites of insufficient extent, or from overcrowding, or from the construction, condition or manner of use of any factory or trade premises, and to take proceedings against any person causing or responsible for the continuance of any such condition ."*
10. The 1<sup>st</sup> respondents argues that the Public Health Officer is empowered to take all reasonable steps to ensure that the provisions of the Act are complied with hence the action of the 1<sup>st</sup> respondent were within the law.
11. In **Republic v Kenya Revenue Authority ex parte Yaya Towers Limited Nairobi HC Misc. App. 374 of 2006 [2008] eKLR** it was held that 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 (see also **Republic v Judicial Service Commission ex-parte Pareno Nairobi HC Misc. 1025 of 2003 [2004]eKLR**). The court is therefore not concerned with whether the building is fit or unfit for human habitation. It is concerned with the process of enforcing the provisions of the **Act** that is whether the officer had the power to act as he did and whether he afforded the applicants and interested parties, who are tenants, due process.
12. The Notice that is impugned in view cannot stand scrutiny, first it is a general notice referring to *"building code provisions of the Public Health Act Cap 424 and regulations."* A proper notice should point specifically to the law which is invoked. I have scoured the **Act** and have found no such provisions that require persons to vacate a building for such general and inchoate violation that do not have foundation in law. The Notice also contravenes the law as the Public Health Officer has no authority to order tenants to vacate premises immediately.
13. **Section 117** of the **Act** called in aid by the 1<sup>st</sup> respondent does not assist the 1<sup>st</sup> respondent as it only permits the authority to take *"lawful measures"* and *"to take proceedings against any person causing or responsible for the continuance of any condition"*. Requiring the tenants to immediately vacate the premises contravenes the statute in this respect.
14. Under **section 118(i)** of the **Act**, a nuisance includes, *"any public or other building which is so suited, constructed, used or kept as to be unsafe, injurious or dangerous to health"*. The condition of the building, described by the 1<sup>st</sup> respondent, as being unsafe for human habitation falls within the definition of a nuisance. The procedure for removing or abating a nuisance is set out clearly in **sections 119** and **120** of the **Act**.
15. **Section 119** of the **Act** provides as follows;

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

*Provided that—*

- i. where the nuisance arises from any want or defect of a structural character, or where the dwelling or premises are unoccupied, the notice shall be served on the owner;*
- ii. where the author of the nuisance cannot be found and it is clear that the nuisance does not arise*

or continue by the act or default or sufferance of the occupier or owner of the dwelling or premises, the medical officer of health shall remove the same and may do what is necessary to prevent the recurrence thereof. [Emphasis Mine]

16. The provisions are clear that the notice required to be served under **Section 119** to the author of the nuisance is one that requires the person to remove the nuisance within a time specified in the notice, to execute such work or to do such things as the officer deems desirable specifying any work to be executed to prevent recurrence of the nuisance. The notice which was issued on 21<sup>st</sup> November 2011, apart from the deficiencies I outlined, does not comply with the provisions of **section 119** of the Act.
17. In this case, I have found the notices wanting. These notices gave rise to the criminal proceedings. The applicant and tenant were not given an opportunity to abate the nuisance, if any. The Public Health Officer had no power to order eviction. I therefore find and hold that this is a proper case for the grant of relief as the Notice issued to the applicants tenant is *ultra vires* the Act and consequently the proceedings founded on it are built on quick sand and must be quashed.
18. As regards the notice issued under the *Physical Planning Act*, the Town Clerk did not contest these proceedings. In the absence of evidence to the contrary, I agree that a notice to demolish a canopy immediately is unreasonable within the meaning ascribed to the term in *Associated Provincial Pictures v Wednesbury Corporation* (1948) 1 KB, 223 where Lord Green MR stated that, *“Decisions of persons or bodies which perform public duties or functions will be liable to be quashed or otherwise dealt with by appropriate order in judicial review proceedings where the court concludes that the decision is such that no person or body properly directing itself on the relevant law and acting reasonably could have reached that decision.”*
19. In view of the finding I have made I quash the notices issued by the 1<sup>st</sup> and 3<sup>rd</sup> respondent and the proceedings arising there from. I therefore grant the following orders;
  1. **The 1<sup>st</sup> respondent's notices dated 21st November 2011 addressed to the interested parties herein requiring them to vacate immediately their premises on LR. No. Kiambu/Kikuyu Trading Centre/Parcel No. 64 are hereby quashed.**
  2. **The 2<sup>nd</sup> respondent's summonses dated 24th November, 2011 addressed to the interested parties herein requiring them attend court on 30th November, 2011 to answer a complaint preferred against them by the 1st Respondent in Resident Magistrate' Court at Kikuyu Criminal Case No. 854 of 2011, 869 of 2011, 860 of 2011, 858 of 2011, 856 of 2011, 870 of 2011, 863 of 2011, 862 of 2011, 868 of 2011 and 872 of 2011 are hereby quashed.**
  3. **The 3rd Respondent's demand/order requiring the applicant to demolish immediately the Canopy Extending to the Road Next to Jivanjee Garden being a part of the building known as Kiambu/Kikuyu Trading Centre/Parcel No. 64 is quashed.**
  4. **The 3rd respondent is prohibited from demolishing the said Canopy Extending to the Road next to Jivanjee Garden, a part of the applicant's building on LR. No. Kiambu/Kikuyu Trading Centre/Parcel No 64 based on the notice subject of these proceedings.**
  5. **The 2nd respondent is prohibited from hearing Resident Magistrate's Court at Kikuyu Criminal Case No. No. 854 of 2011, 869 of 2011, 860 of 2011, 858 of 2011, 856 of 2011, 870 of 2011, 863 of 2011, 862 of 2011, 868 of 2011 and 872 of 2011 instituted against the interested parties herein.**
  6. **The 2nd respondent's summonses addressed to the interested parties herein requiring them attend court to answer complaints preferred against them by the 1st Respondent in Kikuyu Resident Magistrate' Court in the following cases; No. 853 of 2011, 862 of 2011, 867 of 2011, 868 of 2011, 870 of 2011, 871 of 2011, 8884 of 2011 and 885 of 2011 are hereby quashed.**
  7. **The 2nd respondent is prohibited from hearing Resident Magistrate's Court at Kikuyu Criminal from hearing the following cases; No. 853 of 2011, 862 of 2011, 867 of 2011, 868 of 2011, 870 of 2011, 871 of 2011, 8884 of 2011 and 885 of 2011.**
  8. **There shall be no order as to costs.**

**DATED and DELIVERED at NAIROBI this 30<sup>th</sup> May 2014.**

**D.S. MAJANJA**

**JUDGE**

Dr Kuria S.C., instructed by Kamau Kuria and Kiraitu Advocates for the ex-parte applicants.

Ms Muchiri, Litigation Counsel, instructed by the State Law Office for the respondents.