



No. 348

REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA

AT KISII

MISC. CIVIL APP. NO. 136 OF 2009

**IN THE MATTER OF AN APPLICATION FOR JUDICIAL REVIEW IN THE NATURE OF
CERTIORARI**

AND

IN THE MATTER OF LAW REFORM ACT (CAP 26 LAWS OF KENYA)

AND

IN THE MATTER OF PUBLIC HEALTH OFFICER – KISII CENTRAL DISTRICT

AND

IN THE MATTER OF THE RESIDENT MAGISTRATE’S COURT AT KISII

AND

**IN THE MATTER OF LANDLORD AND TENANT (SHOP, HOTELS AND CATERING
ESTABLISHMENTS ACT – CHAPTER 301 LAWS OF KENYA)**

AND

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

BETWEEN

REPUBLIC.....A
APPLICANT

-VERSUS-

SENIOR RESIDENT MAGISTRATE KISII LAW
COURTSRESPONDENT

AND

JOSEPHINE MORAA
OMANWA.....INTERESTED PARTY

EX-PARTE APPLICANTS

JACKSON MASEGA
KEN SAGINI
MICHAEL OMBONGI
AUGUSTINE OMWENGA
SAMWEL B. MOSE

RULING

The applicants were tenants of one, **Nicholas Siro Angwenyi** in respect of the premises known as **Kisii Town/block/II/65**. By a letter dated 1st July, 2009 however, the said landlord informed the applicants that he had sold the premises to a third party, **Josephine Moraa Omanwa**, hereinafter **“the interested party”**. Consequent upon the foregoing and by a letter dated 27th August, 2009, the interested party demanded of the applicants to vacate and deliver up to her in vacant possession the premises. The applicants objected to the demand and lodged a complaint with the Business Premises Rent Tribunal. On 17th September, 2009 whilst the reference was pending in the Business Premises Rent Tribunal the interested party hipped construction material on the premises thereby restricting the movement of the applicants into and out of the same. The 2nd applicant was compelled to move to the Chief Magistrate’s court, Kisii and obtained an interim mandatory injunction. The interested party was unwilling to comply with the same and the 2nd applicant then commenced contempt proceedings against her. However, the interested party according to the applicants connived with the public health officer and had herself conveniently charged in the chief Magistrate’s court, Kisii under the **Public Health Act** on 28th September, 2009 where she pleaded guilty to the charge, was convicted and sentenced to a fine of kshs. 1,000/= in default 1 month imprisonment. In the meantime, the court ordered the closure of the premises on 10th October, 2009. Pursuant to the warrants issued in the above criminal case, the applicants were arrested at the instance of the interested party and given personal bonds. On 15th October, 2009 when the matter came up for hearing, counsel for the applicants raised a preliminary objection as to the jurisdiction of the subordinate court to entertain the case as they had already filed in this court judicial review proceedings to quash the order closing the premises. In view of the manner in which the respondent was

conducting the proceedings, the applicants demanded the disqualification of the learned magistrate. In a ruling delivered on 15th October, 2009, the magistrate duly disqualified himself from the case.

On 19th October, 2009, the premises were broken into and the applicants' properties worth millions of shillings thrown out, damaged and or stolen by the interested party with the assistance of well armed police officers from Kisii Police station. The applicants belately learnt that the interested party had infact filed an application under certificate of urgency in the Chief Magistrate's court, Kisii and obtained ex-parte orders authorizing the Public Health Officer, Municipal council of Kisii to break into the premises and allow the interested party to carry out renovations therein to abate the nuisance. In the main this is the order that the applicants are seeking for an order of certiorari to remove into this court and have quashed.

On 23rd November, 2009, the applicant duly obtained as required by the rules leave to commence such proceedings. The applicants were required to file the substantive motion within 21 days. On 8th December, 2009 the applicants duly filed the substantive notice of motion as directed and within time. In the said notice of motion the applicants' prayed thus:-

“...This honourable court be pleased to issue an order of certiorari to remove unto the high court and quash the proceedings and order of the senior resident magistrate at Kisii given on 19th day of October, 2009 directing and/or allowing the public health officer to the Kisii Municipal Council and/or agents to break into the premises situated on plot No. Kisii Municipality/Block II/165 and allow the interested party herein to carry out renovations and abate nuisance and further directing that the officer in charge of Kisii Police Station to provide security during breaking in...”

Upon being served with the substantive application, the interested party reacted by filing a replying affidavit in which she deponed that she purchased the premises from **Nicholas Siro Angwenyi** pursuant to a mortgage loan facility she procured from National Bank of Kenya. The premises were in a dilapidated state and had been condemned by the public health officer and were therefore in dire need for repairs and renovations. Indeed the premises had been condemned even before she assumed ownership. Upon assumption of ownership of the premises aforesaid she was immediately served with a notice by the public health office to eradicate a nuisance within the premises by undertaking certain major renovations. However she could not comply with the notice as the applicants were in occupation and such renovations could not be undertaken with them in occupation. Having failed to comply with the notice, she was charged in court under **Public Health Act** with failure to comply with the statutory notice and to abate existing nuisance contrary to sections 115, 120 (1) as read with section 121(1) of the **Public Health Act**. She was found guilty and fined Kshs. 1,000/= in default to serve one month imprisonment. She duly paid the fine. She denied that she was the one who ordered the premises closed nor did she collude or connive with the Public Health Officers in any way to have the premises condemned. By the time she took over the premises they had already been condemned as being unfit for habitation. The order for closure was made by the respondent and in accordance with the law and in the best interest of the applicants' safety and did not in any way infringe on their rights. The respondent in making the order was discharging his statutory mandate. The order made was not in excess of jurisdiction but within the powers donated by the **Public Health Act**. Following the order of closure, she had constructed a storey building which was nearing completion and the applicants are not in any way occupying any portion of the premises as such any orders made would be in vain. If the applicants are aggrieved in any way their remedy lies elsewhere as the decision sought to be quashed has been fully implemented. The quashing

order would thus be made in vaccum.

The respondent did not file any papers in response to the application.

When the application came up for interpartes hearing before me, parties agreed to urge the same by way of written submissions. Those submissions were subsequently filed and exchanged. I have carefully read and considered them.

The applicants are seeking a judicial review order of certiorari to quash the decision of the respondent, the senior resident magistrate's court, Kisii. That decision or order was made on 19th October, 2009. It was in terms that:

“a. The application be and is hereby certified urgent and heard ex-parte.

b. That the public health officer of Municipal council of Kisii and or his agents be and are hereby allowed to break into the premises on Kisii/Town/block III/165 and allow the applicant to carry out renovations therein to abate a nuisance.

c. That the officer commanding station (O.C.S) Kisii Police Station be and is hereby directed to provide security during the break in and abatement of the nuisance in the premises on Kisii Town/block III/165 ...”

From the onset it must be appreciated that this was an order of court. It was made on the application of counsel for the interested party. That application was made ex-parte by way of Notice of Motion. The learned magistrate must have been satisfied as to the legality and or competence of the application before he entertained and allowed it. A party who is aggrieved by a court order has several options in the form of remedies. He can appeal the decision, or seek a review or setting aside and or even stay execution of the decision. All these options were available to the applicants. But that is not to say that they were barred from challenging that decision by way of these proceedings. They were perfectly entitled to do so.

However under Order LIII rule 7(1) and now Order 53 rule 7(1) of the current **Civil Procedure Rules** which came into force on 10th September, 2010, it is therein specifically provided that:

“...In the case of an application for an order of certiorari to remove any proceedings for the purpose of their being quashed, the applicant shall not question the validity of any order, warrant, commitment, conviction, inquisition or record, unless before the hearing of the motion he has lodged a copy thereof verified by affidavit with the registrar, or accounts for his failure to do so to the satisfaction of the High Court...”

There is no evidence on record that the applicants complied with the above mandatory provision of law. That is enough reason for the application to fail.

However as a general proposition, certiorari will only issue from the high court to quash the determination of an inferior court or tribunal if such body has exceeded or acted without jurisdiction, has failed to act fairly or in accordance with rules of natural justice, or for an error of law on the face of the record or where the determination was procured by fraud, collusion or perjury. From the proceedings so far it is not evident that in making the order sought to be impugned, the learned magistrate acted without or exceeded his jurisdiction. The learned magistrate had been moved as appropriate by way of an ex-parte notice of motion. Whether or not such weighty application should have proceeded ex-parte was entirely within his discretion to determine. He may have thought that perhaps the law allowed it. Another judicial officer may have decided otherwise. The mere fact that he allowed the application to be heard ex-parte cannot be the basis to allege that he acted without or in excess of jurisdiction. It cannot also be the case of the applicants that he failed to act fairly or in accordance with rules of natural justice. Ofcourse if it were me, I would have desired the presence of the applicants. However, I cannot substitute my views for that of the trial court. The trial court must have thought and rightly so, in my view that since he had been moved ex-parte and considering the grounds in support of the application, the affidavit sworn in support thereof and the annexures thereto, this was a fit and proper application to be disposed off ex-parte. It is not uncommon for matters to be disposed off ex-parte. Indeed the law allows in certain circumstances. It is not in every case that parties must be heard.

Again I do not discern any error of law on the face of the record. Much as the applicants allege collusion between the interested party and the respondent, there is no scintilla of evidence to back up such serious allegation against a judicial officer. In any event had there been such collusion, I do not see how the respondent would have agreed to reclude himself from the proceedings on the application of the applicants.

Sections 120 and 121 of the **Public Act** empowers the respondent to make orders closing premises, prohibiting the use thereof and to make further orders in a bid to eradicate a nuisance and allowing the health authorities and any other persons to execute works therein. The applicants have not disputed the fact that the building had been condemned by health authorities previously as being unfit for human habitation. This was even before the interested party came in to the picture. How then can there be collusion between her, the public health authorities and the respondent. It would appear that the applicants were given a chance to show cause why a break-in order should not be made. They failed to attend court and show such cause. They cannot now be heard to complain.

It is also uncontested fact that the decision sought to be quashed has been already effected, implemented and or executed. Of what use to the applicants then will be the order of certiorari. The order will have been made in vain and or vacuum. Courts do not issue orders in vain. The premises have been demolished and a storey building put up thereon.

The upshot of the foregoing is that the application is unmerited. Accordingly it is dismissed with costs to the interested party.

Ruling dated, signed and delivered at Kisii this 31st day of January, 2011.

ASIKE-MAKHANDIA

JUDGE