



**REPUBLIC OF KENYA**

**IN THE HIGH COURT OF KENYA**

**AT MOMBASA**

**JUDICIAL REVIEW NO. 81 OF 2011**

**IN THE MATTER OF: AN APPLICATION FOR JUDICIAL REVIEW  
PROCEEDINGS IN THE NATURE OF CERTIORARI AND PROHIBITION.**

**AND**

**IN THE MATTER OF: PUBLIC HEALTH ACT CAP 242 AND THE FOOD, DRUGS AND  
CHEMICAL SUBSTANCES ACT CAP 254.**

**BETWEEN**

**MUNICIPAL COUNCIL OF MOMBASA .....1<sup>ST</sup> APPLICANT**

**TOWN CLERK, MUNICIPAL COUNCIL OF MOMBASA.....2<sup>ND</sup>  
APPLICANT**

**VERSUS**

**1. THE MINISTER OF PUBLIC HEALTH .....1<sup>ST</sup>  
RESPONDENT**

**2. THE MOMBASA DISTRICT HEALTH OFFICER .....2<sup>ND</sup>  
RESPONDENT**

**3. THE LIKONI DISTRICT HEALTH OFFICER.....3<sup>RD</sup>  
RESPONDENT**

**4. THE CHANGAMWE DISTRICT HEALTH OFFICER.....4<sup>TH</sup>  
RESPONDENT**

**5. THE KISAUNI DISTRICT HEALTH OFFICER .....5<sup>TH</sup>  
RESPONDENT**

**RULING**

**1.**By a Chamber Summons dated 29/7/2011 the Municipal Council of Mombasa and its town clerk sought leave of the court to apply for orders of certiorari and prohibition respectively to quash an order of the 1<sup>st</sup> Respondent authorizing the 2<sup>nd</sup> – 5<sup>th</sup> Respondents to execute and enforce the Food and Drugs and

Chemical Substance Act in place of the 1<sup>st</sup> Applicant within Mombasa Municipality and to prohibit the Respondents from acting on the said order. The court granted the leave sought and ordered that the grant of leave do operate as a stay of the said order.

**2.** Pursuant to leave granted, the Applicants filed their Notice of Motion dated

29/8/2011 in relation to the order issued by the 1<sup>st</sup> Respondent authorizing the 2<sup>nd</sup> to 5<sup>th</sup> Respondents to execute and enforce the Food, Drugs and Substances Act in place of the 1<sup>st</sup> Applicant within Mombasa Municipality. The motion was supported by the affidavit of Elipida Mwakamba, the Deputy Town Clerk of the 1<sup>st</sup> Applicant sworn on the 29<sup>th</sup> August, 2011. As discernible from the grounds of the Notice of Motion, the Applicants' case is that the 1<sup>st</sup> Respondent Minister for Public Health and Sanitation has without justification and notice to the 1<sup>st</sup> Applicant Municipal Council authorized the 2<sup>nd</sup> -5<sup>th</sup> Respondents who are the District Public Health Officers of the respective districts within the municipality of Mombasa to execute and enforce the Food, Drugs and Chemical Substance Act within the Municipality which jurisdiction they (the applicants) contend belongs to the 1<sup>st</sup> Applicant Municipal Council, thereby causing confusion in the enforcement of the Act and loss of the revenue the Municipal Council has hitherto been collecting from the enforcement of the Act.

**3.**In response to the Applicants' Notice of Motion dated 29/8/2011, the Respondents filed a counter-application seeking the setting aside of the order of the court made on 8/8/2011 that the grant of leave do operate as a stay of the impugned order of the 1<sup>st</sup> Respondent. The Respondent's Notice of Motion dated 11/10/2011 was supported by the affidavit of John Kirema Ndungu who is the District Public Health Officer in charge of the Changamwe and Likoni Districts, with the authority of the 1<sup>st</sup> Respondent. From the grounds of the Motion, the Respondents are opposed to the Applicants' application of 29/8/11 and the attendant order of stay on the grounds principally that the Applicants were guilty of material non-disclosure, that the Respondents are carrying out their lawful duties of inspection of premises, and that the continued stay of the execution of the Respondents' duties would expose the public to risk of epidemics which is contrary to interests of justice and public interest.

**4.**The Applicants filed a replying affidavit to the Respondent's application of 11/10/11, which was sworn by Rose Nowa, a Deputy Town Clerk of the 1<sup>st</sup> Applicant Municipal Council. The parties also filed written submissions their respective applications were heard simultaneously on the 25/10/11 and ruling reserved for the 9/11/11.

**5.**For the Applicants, Mr. Geke advocate submitted that the 1<sup>st</sup> Applicant was a statutory body established under the Local Government Act Cap 265 and under section 112 thereof every Municipality had a public health officer who was in charge of all health matters in the Municipality. Citing section 32(1) of the Food, Drugs and Chemical Substances Act, counsel argued that it was the responsibility of the 1<sup>st</sup> Applicant to inspect premises within the Municipality. Counsel said that on matters of public health, it was the 1<sup>st</sup> Applicant's responsibility in its area of jurisdiction to maintain cleanliness and prevent nuisance by virtue of section 116 and 117 of the Public Health Act Cap 242, and that the Minister for Public Health could only intervene following a complaint under section 14 of the Act. Counsel argued that the 2<sup>nd</sup> – 5<sup>th</sup> Respondents had wrongfully started inspecting premises within the jurisdiction of the Municipal Council without notifying the 1<sup>st</sup> Applicant of any order by the Public Health Minister in accordance with section 14 of the Public Health Act. Counsel also complained that the Respondents were collecting fees and issuing receipts which is the responsibility of the 1<sup>st</sup> Applicant, thereby denying the council fees revenue which it uses for paying its workers. Counsel reiterated the arguments contained in the written submissions for the 1<sup>st</sup> and 2<sup>nd</sup> Applicants.

**6.**Mr. Kamau, State Counsel, for the Respondents opposed the Applicants' application at the outset on the ground that the impugned order of the 1<sup>st</sup> Respondent was not attached to the application and contended

that the Respondents were just carrying out their duties as mandated by Law. Counsel argued that the 2<sup>nd</sup> – 5<sup>th</sup> Respondents were Public Officers who were seconded to the 1<sup>st</sup> Applicant Municipal Council conducting only delegated duties from the 1<sup>st</sup> Respondent, and that there was no interference with each other's duties. Counsel relied on Gazette Notice No. 4578 of 2001 to demonstrate that the fees charged by the Respondents were for clearance to allow the licensees to operate businesses and were in accordance with a schedule under the said Gazette Notice, which had been operating for the past 10 years. Counsel argued that the Municipal Council was not prevented from levying rates for the business premises. Arguing the Respondents' application for vacating the stay, counsel referred to paragraph 11 of the supporting affidavit of John Kirema Ndungu to indicate that the 1<sup>st</sup> Applicant had failed to carry out her duties under the Public Health Act in ensuring public health and asserted that the order of stay had prevented the Ministry of Health from ensuring the cleanliness of the premises. Counsel contended that there was no conflict between the Respondents and the 1<sup>st</sup> Applicant; that the first Respondent had delegated the powers under the Public Health Act to the local authority which was now opposed to the enforcement of the public health duties by public health officers appointed by the 1<sup>st</sup> Respondent and therefore prayed for the lifting of the stay order.

7. In reply, Mr. Geke for the applicants submitted that the existence of the 1<sup>st</sup> Respondent's order could be assumed as the Respondents could not exercise the powers without an order. He contended further that there was no provision for delegation of public health duties to Municipalities as local authorities had their own medical officers and any seconded personnel worked for the 1<sup>st</sup> Applicant and received their salaries from the Municipal Council. He urged the court to disregard the newspaper reports on the failings of the 1<sup>st</sup> Applicant in ensuring cleanliness as expression of opinion only.

8. In response to the Applicant's reply to the Respondents' application for vacating the order of stay, Mr. Kamau State Counsel, pointed out that under section 14(3) of the Public Health Act, a person appointed to perform the duty of a defaulting Municipal Council does not have the power of levying rates which is vested in the Municipal Council, and maintained therefore that the 1<sup>st</sup> Applicant still had its power to levy rates on the premises notwithstanding the inspection by the public health officers.

9. On a balance of probabilities, I find the following facts have been established by the parties in their respective applications:-

- a) The Applicants have shown that the 2<sup>nd</sup> - 5<sup>th</sup> Respondents have inspected bars and restaurants for liquor inspection and conducted medical examinations since 21/2/2011 and charged, respectively Ksh.3000 and 300/- for the exercises. The Respondents purport to levy the fees in accordance with Gazette Notice No.4578 of 2001.
- b) The Municipal Council has been unable to effectively deliver public health services within the Municipality as evidenced by the several legal processes taken against it including CM Cr. Case No. 99 of 2010; CM Cr. Case No. 3509 of 2010 and CM. Cr. Case No. 3008 of 2011; and closure and rectification orders issued by the Public Health Officers relating to its several public markets and sewerage facility.
- c) In reaction to the failure by the 1<sup>st</sup> Applicant to give effective public health services, the central Government established its own health clinics at Likoni and Changamwe districts for purposes of control and prevention of epidemics.
- d) All medical and public health officers of the 1<sup>st</sup> Applicant Municipal Council are seconded to the Council by the central Government.
- e) Although the 2<sup>nd</sup> -5<sup>th</sup> Respondents are newly created, the District Public Health Officer has been conducting inspections pursuant to powers conferred under the Public Health Act Cap 242 and the Food, Drugs and Chemical Substances Act Cap 254 at least since 2007 in view of the Report on Maxmillan Health Services dated 27/9/07 annexed as Exhibit F to the affidavit of John Kirema Ndungu. Since the coming into force of the Alcoholic Drinks Control Act no. 4 of 2010, the clearance of bars for licensing

has been done under the District Public Health Officer as the district medical officer of health has the authority to clear bars for operation.

**10.** The issues that arise for determination are therefore:-

**(a)** Whether the 1<sup>st</sup> Respondent has made an order authorizing or directing the 2<sup>nd</sup>-5<sup>th</sup> Respondents to enforce the Food, Drugs and Chemical Substances Act within the Municipality of Mombasa within the jurisdiction of the 1<sup>st</sup> Applicant.

**(b)** Whether the 2<sup>nd</sup> – 5<sup>th</sup> Respondents have in purported compliance with the Minister’s order or otherwise taken steps to execute and enforce the Food Drugs and Chemical Substances Act and continue or intend to continue so to do; and

**(c)** Whether the discretionary remedies of certiorari and prohibition should issue against the Respondents as prayed by the Applicants.

**11.** The parties attempted to expand the scope of the dispute by relying on other statutory provisions outside what is pleaded in the Statement and the Notice of Motion. The Applicants sought to rely on the mandate of every local authority under sections 115 – 117 of the Public Health Act Cap 242 to take ‘all lawful, necessary and reasonably practicable measures for maintaining its district at all times in clean and sanitary conditions, and for preventing the outcome therein of, or for remedying or causing to be remedied, any nuisance or condition liable to be injurious or dangerous to health’. For their part, the Respondents brought to their aid the provisions of the new Alcoholic Drinks Control Act no. 4 of 2010 which apparently gives exclusive jurisdiction on the clearance for licensing of establishments for the manufacture, production or sale of alcoholic drinks to the district medical officer of health under section 9(3) of the Act.

However, the Applicants’ judicial review as set out in the Statement and the Notice of Motion is wholly based on the Food, Drugs and Chemical Substances Act whose administration and enforcement by the 2<sup>nd</sup> – 5<sup>th</sup> Respondents on the authority of the 1<sup>st</sup> Respondent, the Applicants have challenged as unjustified and ultra-vires. See “the nature of the relief sought” and “grounds upon which the reliefs are sought” in the Statement of 29/7/2011.

**12.** In terms of Order 53 rule 4 of the Civil Procedure Rules, the Applicants are bound by the averments in the grounds set out in the Statement in the absence of amendments with leave of the court under sub-rule (2) thereof. Accordingly, the Applicants case for certiorari and prohibition will fail or stand on the basis only of the grounds set out in the Statement and Notice of Motion of 29/7/11 and 29/8/11, respectively. The Respondents’ Notice of Motion dated 11/10/11 will be decided on the grounds set out therein in answer to the Applicants’ case contained in the Statement. See also section 9(1) (c) of the Law Reform Act Cap 26.

**13.** The Respondents’ objection that the Applicants have not attached to their application the order of the 1<sup>st</sup> Respondent which is sought to be quashed is not well founded. As is clear from section 9(2) of the Law Reform Act judicial review will issue for any illegal “acts or omissions” and it is conceivable that the 1<sup>st</sup> Respondent’s act may be manifested in a verbal order or instruction to the 2<sup>nd</sup> – 5<sup>th</sup> Respondents. In addition, as observed by **WADE & FORSYTH, ADMINISTRATIVE LAW 10<sup>TH</sup> ED. (2009)** at p.520, many cases of judicial review necessarily turn upon the legality of acts, as opposed to decisions. I therefore hold that the failure by the Applicants to attach the order of the 1<sup>st</sup> Respondent allegedly authorizing the 2<sup>nd</sup> -5<sup>th</sup> Respondent to enforce the Food, Drugs and Chemical Substances Act within the 1<sup>st</sup> Applicant’s area of jurisdiction is not fatal to the application.

**14.** There is evidence as I have found above that the 2<sup>nd</sup> – 5<sup>th</sup> respondents were at least as from the 21/2/2011 executing the Food Drugs and Chemical Substances Act by offering medical examination and certification and charging Ksh.300/- for the service. The Respondents were also shown to have been

inspecting premises for liquor licensing at least as from the 6/7/2011 as in Exhibit EM2 in the Affidavit supporting the application of 29/8/2011. The two actions of the 2<sup>nd</sup>-5<sup>th</sup> Respondents are respectively pursuant to the Food, Drugs and Chemical Substances Act, which is the subject of the judicial review application and the Alcoholic Drinks Control Act No. 4 of 2010. Accordingly, the 1<sup>st</sup> Respondent's "order" or instruction which is sought to be quashed by an order of certiorari herein must have been made or given before the 21/2/2011. By virtue of the Respondents' application for vacating the stay, the Respondents intended to continue with the provision of the public health services in the 1<sup>st</sup> Applicants' Municipality.

15. There may be an issue whether the Minister's order is "other proceedings" for purposes of Order 53 rule 2 of the Civil Procedure Rules and whether therefore the application for certiorari herein is time-barred having been brought outside the 6 months period prescribed there under. However, as the issue was not raised by the Respondents or submitted upon by the parties, I do not base my decision on it and I proceed to deal with the merits. See **AKO VS SPECIAL DC, KISUMU (1989) KLR 163.**

16. Section 32(1) of the Food Drugs and Chemical Substances Act Cap 254 Laws of Kenya vests in every Municipal Council the duty to exercise such powers it has to provide safeguards for the sale of food, drugs, cosmetics, devices and chemical substances in a pure and genuine condition. The specific enforcement of the Food Drugs and Chemical Substances Act ordinarily lies with an "authorized officer"- meaning a medical officer of health, a Public health officer or of suitably qualified person authorized in writing by a municipal council for purposes of the Act. See ss 2 and 30 of the Act.

17. The 1<sup>st</sup> Respondent as the minister responsible for public health matters has powers to intervene under section 32(2) of the Food Drugs and Chemical Substances Act:-

**"if the minister is of the opinion that a municipal council has failed to execute or enforce any of the provisions of this Act in relation to any article and that its failure affects the general interests of the consumer, the minister may by empower an officer to execute and enforce those provisions, or to procure the execution and enforcement thereof in relation to any article in the order".**

The Minister is not required to consult the Municipal Council or to be advised by the Central Board of Health as with section 14 of the Public Health Act before he forms an "opinion that a municipal council has failed to execute or enforce any of the provisions of the (Food Drugs and Chemical Substances) Act" to warrant his intervention. However, fair administrative procedure would require that the principle of *audi alterm partem* be applied before an adverse opinion such as a contemplated under section 32(2) of the Act is formed and acted upon.

18. Although there was evidence, as I have found above, that the 1<sup>st</sup> Applicant Municipal Council had failed in discharging its public health responsibilities as evidenced by the numerous legal processes taken against it by various enforcement agencies, the minister should not have formed the adverse opinion of its failure for purposes of section 32(2) of the Food Drugs and Chemical Substances Act without giving the Municipal Council opportunity of being heard and or rectifying the situation as required by the Act. Such an approach coincides with the procedure under section 14 of the Public Health Act which requires the Minister to conduct an inquiry that a municipal council has been guilty of default alleged in a complaint to the Board of Health and is satisfied of the alleged default to make an order directing the municipal council to perform its duty in relation to such a complaint within a specified time and only after default in performance of such duty is the minister entitled to appoint some other person to perform the duty, at the expense of the Council.

19. Accordingly, I find that the 1<sup>st</sup> Respondent Minister acted unlawfully in ordering or directing or instructing or authorizing or permitting the 2<sup>nd</sup> -5<sup>th</sup> respondents to execute and enforce the Food Drugs and Chemical Substances Act without consulting, notifying or giving the 1<sup>st</sup> Applicant Municipal Council an opportunity to be heard in defence of its alleged failure of duty and to correct the situation or perform the duty to comply with the relevant provisions of the law. The purported execution and enforcement of the Act by the 2<sup>nd</sup> -5<sup>th</sup> Respondents in reliance of the unlawful order of the 1<sup>st</sup> Respondent minister is

similarly unlawful.

**20.** This finding does not affect the parties' dealing in relation to the Public Health Act Cap 242 and the Alcoholic Drinks Control Act No. 4 of 2010, which issues were not properly before the court in view of the reliefs sought in the Statement and Notice of Motion and the grounds thereof. The parties are at liberty to proceed in the usual manner in that regard.

**21.** As to whether the discretionary orders of certiorari and prohibition should issue as prayed by the Applicants, I have considered the following matters as affecting the grant thereof:-

**(a).** The 1<sup>st</sup> Respondent Minister through his officers, agents and tools in the form of the Central Board of Health under section 3 of the Public Health Act, the Director of Medical Services and officers under him under section 9 of the Public Health Act and the Public Health (Standards) Board under section 27 of the Food Drugs and Chemical Substances Act, is in overall charge of the maintenance of public health and the prevention of adulteration of food, drugs and chemical substances, with a mandate to take over the performance of the duties under the two Acts within any district or municipal council where the relevant authority has defaulted in its duty.

**(b).** There was overwhelming evidence of failure by the 1<sup>st</sup> Applicant municipal council to discharge its public health duties within its area of jurisdiction prompting the 1<sup>st</sup> Respondent Minister to step in and establish district Health Centers for the provision of the public health services to the residents of the Municipal Council.

**(c).** As held in **EAST AFRICAN COMMUNITY –V- RAILWAY AFRICAN UNION (K) & OTHERS (NO. 2) (1974) E.A. 425** judicial review orders will not be granted where it has not been shown to be necessary. Considering that the 2<sup>nd</sup>-5<sup>th</sup> Respondents are professional health officers on deployment in the same manner as their colleagues in the 1<sup>st</sup> Applicant Municipal Council and considering that it has been shown by evidence that the 1<sup>st</sup> Applicant Municipal Council has faced challenges in the execution and enforcement of the two Acts – Public Health Act and Food Drugs and Chemical Substances Act, it cannot be successfully demonstrated that an order to stop the Respondents from taking steps to complement the services of the failing 1<sup>st</sup> Applicant Municipal Council is necessary; and

**(d)** Disputes between the agencies of the government in execution of various duties under statutes for the benefit of the public should be resolved inter-departmentally in circumstances of mutual respect and cooperation.

**22.** This court has been guided by the paramount consideration that the public health and the food, drugs and chemical substances safety for the inhabitants of the Municipal Council of Mombasa be properly safeguarded. The relative capacity of the Municipal Council as against the central Government and the need for complementarity and cooperation as well as the harmonious relations between governments departments have also been taken into account. The result is that the orders of certiorari and prohibition sought by the Applicants are declined. In the circumstances, the stay granted upon leave is discharged. Each party will bear its own costs. The Jurisdictional warfare between the Council and the central Government must cease.

**Dated and delivered this 9<sup>th</sup> day of November 2011**

**EDWARD M. MURIITHI**  
**JUDGE**

**In the presence of**

.....for the applicants

..... **for the respondents**

.....**court clerk.**