



**REPUBLIC OF KENYA**

**IN THE HIGH COURT OF KENYA**

**AT NAIROBI (NAIROBI LAW COURTS)**

**Miscellaneous Civil Case 750 of 2008**

**REPUBLIC ..... APPLICANT**

**VERSUS**

**THE PERMANENT SECRETARY MINISTRY OF**

**PUBLIC HEALTH AND SANITATION..... 1<sup>ST</sup> RESPONDENT**

**CITY COUNCIL NAIROBI..... 2<sup>ND</sup> RESPONDENT**

**THE HON. ATTORNEY GENERAL..... 3<sup>RD</sup> RESPONDENT**

**EX PARTE AUTOSILO QUEESWAY LIMITED AND**

**RECENT MANAGEMENT LIMITED**

**J U D G M E N T**

Autosilo Queensway Ltd and Regent Management Ltd filed the Notice of Motion dated 9/12/08 seeking the following Judicial Review Orders against the Plaintiffs Ministry of Public Health and Sanitation, 1<sup>st</sup> Respondent, City Council of Nairobi, 2<sup>nd</sup> Respondent; and the Hon. the AG, 3<sup>rd</sup> Respondent;

1. an order of certiorari to remove into the High Court and quash the charge sheet and all proceedings relating to Criminal Case No. ***M269A/08 REP V LANDLORD TRANSNATIONAL PLAZA;***
2. an order of prohibition directed at the Respondents, their employees or agents from commencing any further criminal or other proceedings against the Applicants or any of the employees in relation to the painting or repairing of the building known as Transnational Plaza;
3. an order of mandamus directed to the Respondent to compel the Respondents within 21 days of the order to issue a refund to Mr. Wilberforce Ojiambo Oundo on behalf of the Applicants, the sum of Kshs.80,000/= being cash bail paid to the City Court by the Applicants in Criminal Case ***M269A/08 REP V LANDLORD TRANSNATIONAL PLAZA;***
4. costs of this application to be provided for.

The Notice of Motion is expressed to be brought under Order 53 rule 3(1) CPR & Ss 8 & 9 of Law Reform Act Cap 26 Laws of Kenya.

The Notice of Motion is predicated on grounds found in the statement of facts and the verifying affidavit of Wilberforce Ojiambo Oundo, a director of the 2<sup>nd</sup> Applicant, dated 27/11/08. The Applicants also filed arguments and lists of authorities on 26/2/09. The applicants were represented by Mr. Matheka whereas Mr. Waigi Kamau appeared for

the 1<sup>st</sup> & 3<sup>rd</sup> Respondents. The 2<sup>nd</sup> Respondent though served, did not appear. Mr. Waigi Kamau indicated to the court that save for costs, he did not oppose the application.

Briefly, the Applicants' case is that on 13/3/08, the Applicants received a 14 day's notice under the Public Health Act, from officers of the 2<sup>nd</sup> Respondent (W001). The notice required the Applicants to clean by painting the dirty internal and external surfaces of Transnational Plaza situated on LR No.209/5958. That on 10/1/08 the Applicants' advocates, Kipkenda, Lilan & Koech wrote to the 2<sup>nd</sup> Respondent indicating that the building had been cleaned by painting in 2006 – 2007 (Woo2). By the same letter, the Applicant invited the 2<sup>nd</sup> Respondent for a joint inspection of the said building to establish the areas that required painting. That though the said letter was hand delivered to the Respondent, it has not elicited any reply. Instead, on 8/8/08, the 2<sup>nd</sup> Respondent charged the Applicants with the offence of failing to comply with the notice contrary to S115 as read with Ss 118 and 119 and punishable by sections 120 and 121 of the Public Health Act Cap 292. The summons and charge sheet are exhibited as W003. On 25/8/08 the Applicant's caretaker Mr. Antony Kakumba appeared in the City Court where he denied the charge and was released on a cash bail of Kshs.80,000/= (W004). It is the Applicant's contention that on 3/10/06, the 1<sup>st</sup> Applicant awarded a contract to Crown Berger (K) Ltd, to supply paint to the said building (W005). On the same date, the 1<sup>st</sup> Applicant awarded Pilgrim Engineering Works the painting works (W006). On 30/5/06, the said house was handed over to the Applicant as per the handing over the notes (W007) after the painting works were complete. It is the Applicants contention that the charges preferred against the Applicants are in breach of rules of natural justice as they were condemned unheard. That the decision is also capricious and malicious. That if any nuisance was committed, it is not dangerous or injurious to life and does not fall within S118 of the Public Health Act.

Counsel submitted that due process was not followed and relied on the case of **REP V MUNICIPAL COUNCIL OF NAKURU ex parte SAMUEL KANGEA MISC. APP. 163/05**.

Counsel also relied on **R V BARCLAYS BANK LTD MISC 1261/05** a case whose facts are nearly similar to the present one and the court quashed the Respondents decision for having failed to hear the Applicants as the applicants alleged that repairs and painting had been carried out on the building.

Mr. Waigi Kamau submitted that no order of prohibition can issue as prayed because there may be need to comply with the Public Health Act in future and secondly, that all complaints are directed at the 2<sup>nd</sup> Respondents and so no orders can issue against the 1<sup>st</sup> and 3<sup>rd</sup> Respondents.

It is as a result of the notice dated 13/3/08, issued by the 2<sup>nd</sup> Respondent that the Applicants were charged with the offences in Criminal Case M 269 A/08 the subject of challenge in these proceedings. The notice issued by the 2<sup>nd</sup> Respondent reads:

***“Clean by painting the dirty internal and external surfaces of your entire premises.”***

The Applicants did not repaint or repair the said premises but instead asked for a joint inspection of the premises with the 2<sup>nd</sup> Respondent because according to them, they had carried out repairs and painting in the year 2006/07. The Applicants have filed documents as evidence of the fact that they had contracted various companies to carry out the repairs and painting works and exhibited as W005, 6 and 7 as evidence of the work that was done. This being a Judicial Review application, what is in issue is not the merits of decision of the 2<sup>nd</sup> Respondents to charge the Applicants but whether the decision to charge the Applicants was arrived at fairly. This is because Judicial Review is concerned not with the merits of the decision but it reviews the decision making process itself. The above facts have not been denied. The issues for determination are therefore, whether the Respondents were in breach of the rules of natural justice in failing to accord the Applicants a hearing by taking a joint inspection of the premises; whether the decision to charge the Applicants was made in contravention of Ss 118 and 119 of the Public Health Act; whether the decision was malicious and capricious and hence outside the Respondent's jurisdiction.

The impugned charge reads:

“ ---

***Failing to comply with a notice contrary to section 115 as read with S118 and 119 punishable under S120 and 121 of the Public Health Act Cap 292 Laws of Kenya and as amended in the Statute Law (Miscellaneous Amendment) Act (No. 2 of 2002) in respect of Public Health Act, Cap. 242 (Penalties).***

***Caretaker/landlord, on the 9<sup>th</sup> day of April 2008. Being the owner/ocupier of plot No. LR 209/5958, along City***

**Hall Way Road/Street, Situated in Nairobi area, upon where a nuisance exists defined under S.118(1) and (5) and having been served with a notice dated 13/3/08 under section 119 of the Public Health Act and having been given a notice of 14 days failed to abate the said nuisance within such period namely”**

**“Clean by painting that dirty internal and external wall surfaces of the premises”**

For the Applicants to be charged under the above provisions of law, they must have failed to abate a nuisance on their premises. S115 of the Public Health Act makes it an offence for the owner of a premises to commit a nuisance. That section reads as follows:

**“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 incharge, any nuisance or other conditions liable to be injurious or dangerous to health.”**

Section 118 then sets (lists) out what constitutes a nuisance. In this case the Applicants are alleged to have committed a nuisance under Ss118 (l) and (s).

In the **BARCLAYS BANK** case (supra) which arose out of nearly same facts, the court held that the charge sheet did not disclose any offence under S118 (l) and (s) of the Act. The section under which the Applicants were charged reads as follows:-

**“118\_ \_ \_ \_ \_**

**(L) any public or other building which is so situated, constructed used or kept as to be unsafe, or injurious or dangerous to health**

**(m)– (r)**

**(S) any act, nuisance or thing which is, or may be, dangerous to life, or injurious to health.”**

To found a charge, the 2<sup>nd</sup> Respondent should have established that the nuisance is unsafe or injurious or dangerous to health or the act or omission is dangerous to life or injurious to health. The notice issued to the Applicant states that they failed to clean by painting the dirty walls of the internal and external walls of the premises. The question is whether failure to paint is dangerous to life and injurious to health.

In my view there is no offence committed under those sections and it seems that the 2<sup>nd</sup> Respondent acted outside its mandate and that decision is subject to being quashed by an order of certiorari.

It is the Applicants’ contention that they were entitled to be heard. The right to be heard is a cardinal principle of rules of natural justice and in **RIDGE V BALDWIN (1964) AC 41**, the House of Lords held that breach of rules of natural justice renders a decision null and void. In **ONYANGO V AG 1987 KLR 711**, the court held that failure by the Commissioner of Prisons to give an inmate a hearing before imposing a loss of remission was a breach to rules of natural justice and therefore void.

In the Public Health Act, there is no provision for hearing of a party before charges are preferred. In the instant case, the Applicants requested to be heard before the charges could be preferred by inviting the Respondents to inspect the premises but that offer was declined. In **RIDGE – BALDWIN** (supra) the court observed that even where a case seems plain on the face of it, an inquiry can not be dispensed with. In **HYPOLITO CASSIANO DE SOUZA V CHAIRMAN AND MEMBERS OF THE TANGA TOWN COUNCIL 1961 EA 377** the court held that one of the requirements of a fair hearing was that even where there was no specific provision that one be accorded a hearing, the right to a hearing was implied. The court observed at page 387

**“2. If no procedure is laid down, there may be an obvious implication that some form of inquiry be made such as will enable the tribunal fairly to determine the question at issue.”**

The circumstances of the case were such that the 2<sup>nd</sup> Respondent was invited to a joint inspection of the premises because the Applicants were contending that they had actually painted the premises and there was no nuisance to be abated. The Respondent instead of visiting the premises and making its final decision on whether or not the Applicants should be charged, kept quiet and surprised the Applicants with the summons to appear before the court. In my view, the 2<sup>nd</sup> Respondent denied the Applicant a hearing and are in breach of rules of natural justice and their decision is therefore null and void. I will agree with the decision in the **OLOO** case and in **MIRUGI KARUIKI V AG CIVIL**

**APPEAL 70/1991** that there is a presumption in the interpretation of statutes that rules of natural justice will apply.

Can the orders sought issue? An order of certiorari lies to quash a decision made without or in excess of jurisdiction or where rules of natural justice have been flouted. In the instant case, the decision to charge the Applicant was made in excess or without jurisdiction and also breached Rules of natural justice by denying the Applicants a hearing. The charge sheet in Criminal Case 269A of 2008 must be brought up to be quashed and is hereby quashed by an order of certiorari.

In prayer 2, the Applicants seek an order of prohibition directed at the Respondents from commencing any further criminal or proceedings against the Applicants or any of its employees in relation to the painting or repairing of the building known as Transnational Plaza. An order of prohibition issues to stop any further proceedings or an action being taken in a certain matter in breach of statute of rules of natural justice. The prayer as framed can not issue because once the charge sheet is quashed, the Respondents can not proceed to effect the notice issued on 13/8/08 as it is spent. In any event, the 2<sup>nd</sup> Respondent can not be barred from charging the Applicants for future infractions of the Public Health Act. As prayed, that prayer can not issue. The order for prohibition can only be limited to stopping the proceedings that the Applicants face in Criminal Case 296A/08 but not any other as prayed. That order can not issue.

The 3<sup>rd</sup> prayer is that the Respondents be compelled to refund Mr. Wilberforce Ojiambo Oudo Kshs.80,000/- deposited with the court as cash bail in Criminal Case 296A of 2008. An order of mandamus lies to compel a public officer or public body to perform its statutory duty where it has neglected or refused to do so. There must have been a demand followed by a refusal or neglect. In this case, the court has just quashed the charge sheet in 296A/08. There has been no demand to refund the Kshs.80,000/= deposited as cash bail and an order of mandamus can not issue. The prayer is premature and can not issue.

In sum, I find that Applicants are entitled to prayer (1) of the notice of motion and the proceedings and charge sheet in Criminal Case 296A/08 are hereby quashed by an order of certiorari. The other prayers are refused. Costs of the Application to be borne by the 2<sup>nd</sup> Respondent since the 1<sup>st</sup> and 3<sup>rd</sup> Respondents were not part of the decision to charge the Applicants Costs to the Applicant.

Orders accordingly.

Dated and delivered at Nairobi this 25<sup>th</sup> day of September 2009.

**R.P.V. WENDOH**

**JUDGE**

Delivered in the presence of:-

Mr. Matheka for the Applicant

No appearance for the Respondents

Muturi - court clerk