



**REPUBLIC OF KENYA**  
**IN THE HIGH COURT OF KENYA**  
**AT ELDORET**  
**MISCELLANEOUS CIVIL APPLICATION 77 OF 2005**  
**IN THE MATTER OF APPLICATION FOR ORDERS OF JUDICIAL REVIEW**

**AND**

**IN THE MATTER OF AN APPLICATION UNDER ORDER LIII OF THE CIVIL PROCEDURE  
RULES AND SECTIONS 8 AND 9 AND THE LAW REFORM**

**AND**

**THE MATTER OF THE NOTICE ISSUED BY THE MUNICIPAL COUNCIL OF ELDORET ON  
8<sup>TH</sup> APRIL 2005 UNDER SECTION 115 -117 OF THE PUBLIC HEALTH ACT AND SECTION 165  
(2) B (II) OF THE LOCAL GOVERNMENT ACT**

**AND**

**IN THE MATTER OF CRIMINAL CASE NO. 2655 IN THE CHIEF MAGISTRATE'S COURT AT  
ELDORET.**

**REPUBLIC:.....APPLICANT**

**VERSUS**

**MUNICIPAL COUNCIL ELDORET:.....RESPONDENT**

**PETER GICHARU NGINGE**

**T/A GITURO S.N. QUARRY 2000:.....EXPARTE**

**NATIONAL ENVIRONMENTAL MANAGEMENT AUTHORITY (NEMA):.....INTERESTED PARTY**

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**JUDGEMENT**

This is an application for judicial review orders made under the provisions of Order 53, Rules 1,2,and 3 of the Civil Procedure Rules after leave was duly obtained.

The Applicant instituted these proceedings against the Municipal Council of Eldoret seeking the following orders:-

- a) An order of certiorari to remove into this Honourable court and quash the decision of the Chief Public Health Officer, the Municipal Council of Eldoret made on 18<sup>th</sup> April, 2005.
- b) An order of certiorari to remove into this Honourable Court and quash the purported decision of Municipal Council of Eldoret, canceling ;the Ex parte Applicant's single Business permit as flows from the Criminal charges against the Exparte Applicant in Criminal case No. 2655 of 2005.
- c) An Order prohibiting the Respondent from closing down and/or otherwise interfering with the Exparte Applicant's business premises and/or quarrying business on Eldoret Municipal Block 16 (Kamukunji) 108 limited only to crushing and not blasting or rocks pending completion of investigations by the commissioner of mines and Geology, Ministry of Environment and Natural Resources.
- d) An Order of mandamus directing the Respondent to immediately observe the order issued by the Chief Magistrate's court in Eldoret Chief Magistrate's court Appeal case No. 1 of 2004 on 24<sup>th</sup> November,2004.
- e) Costs of this application to abide the outcome of the main motion.

Before the hearing of the application this court, upon consultations with both counsel for the parties and in exercise of its powers under order 53, Rule 3 (4) enjoined the National Environmental management Authority (NEMA) as an interested party. The said Authority hereinafter referred to as NEMA had made a stop order under section 108(4) of the Environmental Management and coordination Act, (EMCA), 1999.

At the hearing the Applicant abandoned prayers (b) and (d) on the ground that the Criminal case had been concluded and the applicant discharged. What remained to be considered and determined by this court were prayers (a) and (c).

The grounds set out in the statutory statement were two – fold:-

- i. The decision of the Respondent was arrived at in flagrant abuse of the rules of natural justice.
- ii. The decision of the Respondent was reached in utter disregard of an existing court order.

It is my view that upon the Applicant abandoning prayers (b) and (d), then ground (ii) also went out with them. The only ground to support prayers (a) and (c) is that contained in ground (i), that the decision of the Respondent was arrived at in flagrant abuse of the rules of natural justice.

NEMA in opposition to the application had filed a Notice of Preliminary Objections setting out the following grounds:-

- a) That the suit herein is Res judicata as the orders sought are the same as those sought in an earlier application being HC.CC.NO.Misc. Application Number 3 of 2004.
- b) That the entire application as instituted is a gross and blatant abuse of the process of court, bad in law and irredeemably defective and the same ought to be dismissed entirely with costs.
- c) That the court had no jurisdiction to entertain this matter at this stage.
- d) That the orders sought herein do not lie against NEMA.
- e) That there is material non-disclosure.

At the hearing, counsel for NEMA proposed to argue the foregoing grounds as a response to the Application. After hearing the entire matter, I do find that one of the issues raised ought to have been argued as a Preliminary matter. NEMA through its counsel Mr. Kituku submitted that these proceedings are in effect defective since in the application for leave to institute the judicial review proceedings the Applicant had named the Republic as the initial applicant yet that application ought to have been in the applicant's name in the first instance. He argued that this defect was incurable.

This point of law is an important one but it was not presented as a preliminary point of law. In fact, it was not expressly set in the Notice of Preliminary objections which were later converted into Grounds of opposition and neither the Applicant nor the court could have known that it was one of the grounds.

It is the view of the court that Notices of Preliminary objections must set out the exact points of law being taken up with details or clarity so that the other party and the court know and understand the issues of law from the outset. In this way the court will determine and give directions if one or more of the points of law are truly of a preliminary nature and which must be heard before delving into the merits of the application or case.

It is improper to let the court hear the application or case substantially or in its entirety before popping up an issue of law which ought to have been raised at the outset.

In the present situation I find that the issue strictly is not a jurisdictional issue and the defect is curable. Had the Applicant made an application to amend, this court would have had the jurisdiction and discretion to consider it and grant the leave to amend – see – *FARMERS BUS SERVICE & OTHERS –VS- THE TRANSPORT LICENSING APPEAL TRIBUNAL (1959) E.A. 779 (COURT OF APPEAL)* in the present case, the NEMA which was joined as an interested party by this court has ambushed the Applicant with the aforesaid point of law which was not even taken up by the Principal Respondent.

In the interest of substantial justice and fairness and exercising this court's inherent jurisdiction and discretion, I do hereby order that the title in the Chamber Summons dated 27<sup>th</sup> April, 2005 be deemed to have been amended by deleting the Applicant as the Republic and substituting it with the name of Peter Gicharu Ngige T/A S.N. Gituro Quarry 2000 as the Applicant.

The decision being challenged here was given by the Chief Public Health Officer, Municipal Council of Eldoret on the 18<sup>th</sup> April, 2005. It is pertinent to set out the contents of the entire letter which I hereby do for the facts to come out clearly:-

“Managing Director,

S.N. Gituro Quarry, (2000),

P.O.BOX 524,

**ELDORET.**

**ATT: MR. PETER NGIGE**

**NOTICE TO STOP QUARRYING PURSUANT TO SECTIONS 115 -117 OF PUBLIC HEALTH ACT CAP 242 AND 165 (2) (B) (II) OF THE LOCAL GOVERNMENT ACT CAP 265 LAWS OF KENYA**

Supplement to earlier communication(s), the above refers.

Your continued excavating, blasting and crushing of stones/rocks have greatly become dangerous to life/injurious to health of your neighbours.

The effect of the blast you did on 19<sup>th</sup> March, 2005 on Kamukunji Estate as captured by both the electronic media on 20<sup>th</sup> march 2005 and print on 21<sup>st</sup> March, 2005 and persistent complaints from the effected public cannot be downplayed any longer.

The danger to life and injury to health has been lent credence by your own acceptance in your letter to the Commissioner of Mines and Geology of 29/3/2005. As much as you are willing to repair the damage caused on the buildings and household, it will be difficult to restore human life and health in the even it noted.(sic)

In view of the above you are strongly advised to ***immediately stop quarrying activities*** until all the conditions that are likely to endanger life and/or injure health are eliminated – further take notice that failing to comply with the requirements of the notice the council may take legal action against you.

Please be advised accordingly.

Yours faithfully,

W.K. CHESANG

CHIEF PUBLIC HEALTH OFFICER

**FOR: TOWN CLERK**

C.C

District Commissioner,

Uasin Gishu district,

P.O.BOX 2962,

**ELDORET.**

Upon receiving the aforesaid letter whose contents are self explanatory, the Applicant did not respond or write back to the Chief Public Health Officer. He instead on 26<sup>th</sup> April, 2005 filed the application for leave to institute judicial proceedings. This was exactly 7 days after receiving the notice.

What do sections 115 – 117 of the Public Health Act cap 242 and section 165 (2) (b) (ii) of the Local Government Act, cap 265 Laws of Kenya stipulate?

Section 115-117 of the Public Health Act set out laws relating to Public nuisance and, maintenance of cleanliness and present nuisances and also to prevent and remedy danger to health from unsuitable dwellings. They read as follows:

Section 115, Public Health Act

***“ 115 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 be injurious or dangerous to health.”***

Section 116.

***“116. It shall be the duty of every local authority to take all lawful, necessary and reasonably practicable measures for maintaining its district at all times in clean and sanitary condition, and for preventing the occurrence therein of, or for remedying or causing to be remedied, any nuisance or condition liable to be injurious or dangerous to health, and to take proceedings at law against any person causing or responsible for the continuation of any such nuisance or condition.”***

Section 117.

***“117. 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 remedial 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 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.”***

And section 165 (2) (B) (II) of the Local Government Act provides that:-

***“ (2) A local authority may cancel any licence granted by it on any such grounds as it may, by by-laws, specify aid in addition, on any of the following grounds whether specified in such by – law or not:-***

**a) .....**

**b) Additionally,, with respect to any licence specified in sub-section 1(b) –**

**i. ....**

**ii. That the continuation of such licence in force would be calculated to cause nuisance or annoyance to persons residing in the neighborhood .....**

From a careful reading of the foregoing provisions, it is my view that the Chief Public Health Officer had

the power to issue and serve the Notice complained of on the Applicant. Section 118 of the Act defines the situations that amount to nuisances. The questions that this court has to pose and ask itself are:-

- 1) What was the meaning and effect of the decision and/or Notice dated 18<sup>th</sup> April, 2005?
- 2) Did the said decision amount to an order closing down or interfering with the Applicant's business premises and/or quarrying business?
- 3) Was he entitled to be given an opportunity to be heard before the said decision was made and notice given?
- 4) Was it arrived at in flagrant abuse of the rules of natural justice such that the rights of the Applicant were violated?

Having identified the issues and questions to be considered and determined, I am of the view that in this application, it is not for the court to decide whether the alleged actions/omissions of the Applicant were in breach of the provisions of the Public Health Act or the Local Government Act. It is also not for the court to investigate and/or determine whether the Applicant was only carrying out crushing of rocks and not the blasting thereof. These are matters which are within the purview and mandate of the statutory or public body, the Municipal Council of Eldoret acting through the Public Health Officers or department. It is not for the court at this stage to consider and determine whether any nuisances exist on the suit premises. The duty of this court in this judicial review application is to inquire into and find out whether there was due process before the Chief Public Health Officer made his decision.

I have carefully perused the relevant provisions of the statute referred to and under which the notice was given. After setting out the nuisances alleged by his the Chief Public Health Officer concluded:-

“ .....

***In view of the above you are hereby strongly advised to immediately stop quarrying activities until all conditions that are likely to endanger life and/or injure health are eliminated – further take notice the failing to comply with these requirements of the notice the council may take legal action against you.***”

Once such a notice is given, it is my view, the Applicant was under an obligation to state and explain his position and then declare whether he was going to comply with the notice or not. The Respondent gave him notice that if he failed to comply with the requirements of the notice it ***“may take legal action against him.”***

Instead of responding, he rushed to this court within 7 days thereby denying the Council the opportunity to discharge its duties under section 120 of the Public Health Act which provides for the procedure if the owner fails to comply with the notice.

Subsection (1) and (2) provides that:-

***(1) “120 (1) if the person on whom a notice to remove a nuisance has been served as aforesaid fails to comply with any of the requirements thereof within the time specified, the medical officer of health shall cause a complaint relating to such a nuisance to be made before a magistrate, and such magistrate shall therefore upon issue summons requiring the person on whom the notice was served to appear before his court.***

***(2) If the court is satisfied that the alleged nuisance exists, the court shall make an order on the author thereof, or the occupier or owner of the dwelling or premises as the case may be, requiring him to comply with all or any of the requirements of the notice or otherwise to remove the nuisance within time specified in the order and to do any works necessary for that purpose.....”***

The said provisions demonstrate that the Notice served on him is strictly not an order for the Applicant to

close his business. It was a demand and notice that he had to ensure that all conditions that are likely to endanger life and/or injure the health of the members of the public in the neighborhood are removed or eliminated. It is clear from the notice and other correspondence that there had been previous correspondences between the court and the Applicant on the subject matter. In any case, if he required further particulars of the required conditions or time within which to comply he should have responded in writing before rushing to court.

I do hold that the Applicant jumped the gun and did not respond as required. The Public Health Officer certainly did not have the power and he did not order the closure of his business as claimed. It is only the magistrate's court under the aforesaid provisions which has the jurisdiction under the said statutes to determine whether indeed there exist the nuisances if there was a dispute and then make appropriate orders including imposition of fines and orders for the removal or stoppage of any nuisances found to exist.

In conclusion, I do hereby answer the 4 questions as follows:-

- 1) The Notice was given under the provisions of section 120 of the Public Health Act under powers donated to the medial officer under sections 115 – 117 of the Act.
- 2) It was not an order strictly to close down the Applicants business premises or activities. It was a decision and notice for him to remove or stop alleged public nuisances. The Respondent had the jurisdiction mandate and duty to issue the said notice.
- 3) It is my view that the Notice itself was an opportunity for the Applicant to be heard. He was required to respond and declared whether he intended to comply or not. If he asked for time etc. and removed the alleged nuisance, if any, then that would be the end of the matter. If he did not agree with the allegations and intended not to comply, then the Respondent was required in law to file its complaint with the Magistrate for the court's determination. Such jurisdiction is given to the magistrate's court. This court as a judicial review court under Order 53 of the Civil Procedure Rules has no jurisdiction to hear the questions on the merit/demerits in respect of the alleged nuisances under the Public Health Act.
- 4) In conclusion, the respondent did not arrive at its decision in flagrant abuse of the rules of natural procedure. By instituting these proceedings the Applicant pre-empted and interfered with the statutory procedures and process to investigate the allegations which had been triggered by the notice.

Finally the court is of the view that though the orders sought are directed to the Respondent local authority, NEMA still has sufficient interest and role to play ultimately and in any event. The duties and role of NEMA are set out in the Environmental Management and coordination Act (EMCA) 1999. The allegations made against the Applicant are not simple nuisances' i.e. domestic nuisance, in-habitable premises, etc. The alleged nuisances relate to wide environmental questions affecting a large crowd of the public in the area and the environment generally. The role of NEMA therefore appears to be necessary in this case to compliment the work of the Chief Public Health Officer. There are high chances that an Environmental Impact Assessment may be necessary and hence the need for NEMA to continue being involved in this matter including risk assessment, audit and monitoring.

This court is quite aware of its special jurisdiction and functions in judicial review proceedings and the limited issues of due process in this case. However, I also cannot ignore the duties and role of the High Court under the Environmental management and coordination Act, (EMCA) hence the obiter dicta recommendations to NEMA.

The upshot of the foregoing is that I do hereby dismiss the application. Each party do bear his/its costs in this application being a matter of public interest and considering that the Applicant stopped the alleged activities pending the outcome of this application.

Dated and Delivered at Eldoret on this 19th day of March, 2008

***M.K. IBRAHIM***

***JUDGE.***