



REPUBLIC OF KENYA
IN THE HIGH COURT OF KENYA
AT NAIROBI (NAIROBI LAW COURTS)
Misc Appli 111 of 2005

1. Land Environmental Law Division
2. Subject of main suit: - Judicial Review Public Health Act Cap 242 sections 115.
 - i) Exparte applicant, agent charged with offence under the Public Health Act cap 242
 - ii) Alleges he is not the person to be charged.
 - iii) Judicial Proceedings to quash orders or proceeding of the Senior Resident Magistrate's court certiorari and prohibition.
3. In reply by 1, 2 and 3 respondents
 - a) Application frivolous ,vexatious abuse of process of law
 - b) Applicant falls under section 115 of the Public Health Act Cap 242 Laws of Kenya.
4. Held: No proceeding have been contravened requiring the courts intervention by way of medical review
5. Case law
 - a) City Council of Nairobi vs. Barclays Bank of Kenya Ltd
Application 150/2006 (UR 85/2006)
6. Advocate

J.M. Gitau of Mwaniki Gitau & Co. Advocates for the plaintiff/applicant – present

L. N. Gakatho advocate for the 1st and 2nd Respondent – present

N. Wanjiku of Maina of Wanjiku Maina & Co. Advocates for the 3rd defendant - present

RAJIV GUJRALAPPLICANT

VERSUS

THE SENIOR RESIDENT MAGISTRATE’S COURT AT NAIROBI.....1ST RESPONDENT

THE ATTORNEY GENERAL.....2ND RESPONDENT

THE TOWN CLERK, NAIROBI CITY COUNCIL.....3RD RESPONDENT

RULING

I. BACKGROUND

1. Leave to commence Judicial Review proceeding was duly granted by the court (Ibrahim J 27.1.04) to apply for orders of prohibition and certiorari to move to the High Court for purpose of quashing the charges, proceedings, and ruling of 30th November, 2004 together with orders made on 10th December 2004 by the said court in the criminal court case No. M767(A) 2004 in the subordinate court at City hall Nairobi. The leave duly granted operated as a stay of case R V Rajiv Gujral (SRMM 767 A 2004)
2. Rajiv Gujral, the exparte applicant herein was originally charged before the subordinate courts at city hall under the Public Health Act Cap 242 for contravening Section 115 of the said act.
3. This section reads.

“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 to the injurious or dangerous to health” (as read with S118, 119, 120 and 121) .

S118 – What constitutes nuisance

S119 – Notice to remove nuisance.

S120 – Procedure if over facts to comply with notice.

S121 – Penalty respecting nuisance.

3. This concerned a building situated on plot No RR 209/2490/5 along Ngara road which was alleged to have contained section 118(b) being

“any public or other building which is so situated, constructed used or kept as to be unsafe or injurious or dangerous to health”

4. The exparte applicant is an estate agent. His task was to manage the premises in question situated on the said LR209/2490/5. This premises were said to be dilapidated. The exparte agent collected rent but never undertook any maintenance and or repairs. He notified the court that he is not the one who should be held liable for the poor conditions of the building but the rightful requested owner who was represented by Visram Sharma advocate.
5. In this matter the said exparte applicant when charged before court in his personal name for the offence of nuisance forwarded the papers to the owners advocate. He duly appeared to court once. There was a time no one appeared and he was held to be in contempt and fined.
6. Believing that the trial magistrate, the Attorney General and the City Hall were wrong to in fact charge him with the offence, he prayed the court stay the proceeding and quash the said orders of the

magistrate and the proceeding before court at City hall.

II. REPLY.

7. In reply, the 1st, 2nd and 3rd respondent through their counsel stated that the said charge was correct. The ex parte applicant fell under the category of offender under section 115. The case ought to be dismissed as being frivolous and an abuse of the court process.

III. OPINION.

8. Judicial Review is defined in Black's Law Dictionary as:-

8.1. "Courts power its review the action of other decrees or rules of Government especially the courts power to invalidate legislative and executive actions as being unconstitutional.

8.2. The constitutional doctrine providing for his power.

8.3. A courts' review of a lower courts' or an administrative body's factual or legal funding".

9. The High Court has Jurisdiction to entertain a judicial review application of a lower court. It has no jurisdiction to entertain a judicial review of its High Court from other cases.

10. The ex parte applicant has come before this court for judicial review. The matter was referred to the Land and Environmental Law Division on the grounds that the subject matter is land/premises.

11. The gist of the ex parte's complaint is that the Attorney General wrongfully charged him with a criminal offence under the Public Health Act Cap 242 when in fact he was not the proper accused to be charged. The proceedings he stated should therefore be terminated against him.

12. The respondents bought in a point whereby they stated that under the act it is immaterial whether ex parte applicant is the owner of the premises or not.

13. I termed to the definition of "owner" under the act and noted its definition as follows:-

"Owner" as regards immovable property, includes any person other than the Government, receiving the rent or profits of any lands or premises from any tenant or occupier thereof or who would receive such rent or profits if said land or premises were let whether on his own account or as agent for any person other than the Government, entitled thereto or interested therein, the term includes any lessee or licensee from the Government and any superintendent, overseer or manager of such lessee or licensee ready on the building."

14. The reasons given by the ex parte applicant is that he is not the owner of the suit premises to occasion him to be charged with the criminal offence of nuisance. The definition alone states that as an agent for any person- in his case the landlord of the premises, he is deemed to be qualified as the owner and therefore capable of being so charged. If that is the conclusion from the reading of the said definition then the ex parte applicant is to accordingly be charged.

15. The task of an estate agent is not only to collect rent but to ensure that the premises is well maintained. If he collects rent he has a duty to notify the landlord, his principal on the issue of maintenance. This of cause is part of evidence to be dealt with by the subordinate Court. A good defense may perhaps be available.

16. I am of the opinion that a judicial review is to invalidate powers of the legislature, the executive and or other bodies which are unconstitutional. In this case we are dealing with the powers of the subordinate court.

The High court is meant to deal with a factual or legal finding of the subordinate court. In this matter no decision on the main suit has been determined. The only orders made was in a ruling whereby the trial magistrate on 30th November 2004 held the exparte applicant in contempt of court for failing to attend court. The issue of ownership was the cause of non-attendance to court by the exparte applicant.

17. I find that no proceedings have been contravened requiring this courts intervention by way of judicial review. Due process should be followed. The application is hereby dismissed with the costs to the respondents.

18. That the accused exparte applicant be arranged before the court on 7th April 2008 at 9.00am for mention of his case No criminal case No. M 767A/2004 at City hall.

DATED THIS 13TH DAY OF MARCH 2008 AT NAIROBI

M. A. ANG'AWA

JUDGE

J.M. Gitau of Mwaniki Gitau & Co. Advocates for the plaintiff/applicant – present

L. N. Gakatho advocate for the 1st and 2nd Respondent – present

N. Wanjiku of Maina of Wanjiku Maina & Co. Advocates for the 3rd defendant - present