



**REPUBLIC OF KENYA**

**IN THE HIGH COURT OF KENYA**

**AT NAIROBI (NAIROBI LAW COURTS)**

**Misc Civil Appli 1091 of 2007**

**IN THE MATTER OF AN APPLICATION BY INDO COMPANY LTD, JOYLAND  
CO. LTD, WATAALAMU CO. LTD, SALUTE HOLDINGS LTD, AND AUDIO CORNER LTD.**

**AND**

**IN THE MATTER OF THE SENIOR RESIDENT MAGISTRATE'S COURT AT CITY**

**HALL, CR. CASE NO. 619A OF 2007**

- 1. INDO COMPANY LTD**
  - 2. JOYLAND CO. LTD**
  - 3. WATAALAMU CO. LTD**
  - 4. SALUTE HOLDINGS LTD**
  - 5. AUDIO CORNER LTD .....**
- APPLICANTS**

**VERSUS**

**THE SENIOR RESIDENT MAGISTRATE**

**CITY COURT (L NYAMBURA) ..... RESPONDENTS**

**JUDGEMENT**

The application dated 15.10.2007 has been brought by the Republic on behalf of five tenants of a building called **Thathiini** building in the City of Nairobi.

The application seeks the following orders:

- (a) An order of certiorari to remove into this Honourable court and to quash the proceedings, judgment and also the closing order of the Senior Resident Magistrate made on 21.9.2007 in City court Criminal Case No.619A of 2007.
- (b) An order of prohibition directed at the landlord of **Thathiini** Building **Mr Joseph Muchoki**

**Mugo** not to give effect to the said closing order and also not to interfere in any manner with the applicants' quiet possession and enjoyment of their respective business premises except in accordance with the provisions of the Landlord and Tenants (Shops, Hotels and Catering Establishment) Act Chapter 301 of Laws of Kenya.

Following a subsequent application for amendment the order of prohibition was deleted from the Statement and the application.

The applicants have relied on grounds (i) to (vi) which grounds include inter alia lack of jurisdiction by the learned magistrate.

The application is opposed on the following principal grounds;

- (i) The learned magistrate had jurisdiction to give the closing order under the Public Health Act.
- (ii) The rules of natural justice were followed before the closing order was made. This was by way of summoning the tenants.
- (iii) That Judicial review is concerned with the decision making process and not with the merit of the decision in the criminal case instituted against the Landlord.

Parties have filed written submissions and lists of authorities and have also being given the opportunity to highlight their written submissions and authorities all of which I have taken into account in preparing this judgment.

The critical question in my view is that of jurisdiction or lack of it. Did the learned Magistrate have jurisdiction to grant the closing order?

It is common ground that the tenants/applicants enjoyed controlled tenancies pursuant to the Landlord and Tenant (Shops, Hotels and Catering Establishment) Act Cap 301 of Laws of Kenya in respect of LR 209/2523 Luthuli Avenue otherwise known as Thathini building.

It is also not disputed that on 29<sup>th</sup> and 30<sup>th</sup> June 2007 the tenants were served with witness summons in Criminal case 619A of 2007 requiring each of them to appear before the City Magistrate Court on 4<sup>th</sup> July 2007 at 8.00 a.m. and that the tenants appeared before the City Court through their advocate and that the court wanted to hear their views concerning the charge against the landlord. The advocate maintained that the so called charging and prosecution of the landlord was a conspiracy to assist the landlord circumvent, the controlled tenancy requirements, so as to have the tenants vacate the premises.

The advocate submitted that the learned magistrate did not have jurisdiction to make the closing order because inter-alia the Landlord and Tenant Act superseded the Public Health Act under which the closing order was intended to be made and that the alleged nuisance and the nature of the premises were such that this did not attract closing orders under the provisions of Public Health Act. And that the court's attention was also drawn to the judgment of the court in the case of **Republic v Kisanga & 8 others 1990 KLR 110**. All in all I find the following points critical to this court's intervention in judicial review.

### **Nature of the Premises**

It is not in dispute that the premises in question or building was at the material time being used as trade premises. However it is crystal clear to the court that the power for the lower court to grant a closing order only relates to dwellings.

Section 2 of the Public Health Act Cap 242 defines "dwelling" as any house, room, shed, hut, cave, tent, vehicle, vessel or boat or any other structure or portion whereof is used by any human being for sleeping or in which any human being dwells.

Trade or Business premises are therefore outside the purview of a closing order and are regulated by other laws.

### **Alleged Nuisance**

Since the alleged nuisance arose from want or defect the nuisance notices should have been served on the owner only, as the author of the nuisance.

The nuisance proved to exist must;

- (i) Render a dwelling unit unfit in the judgment of the court for human habitation. The nuisance must be injurious to health.
- (ii) Closing order prevails until the dwelling is in the judgment of the court fit for the purpose
- (iii) Although the landlord did plead to the charge as framed there was not in the judgment of the court a specific finding that the premises were a dwelling unit and that they were unfit for human habitation.
- (iv) The landlord's plea of guilty could not be used to affect the position of the tenants who are protected.

Section 7(1) (a) of the Landlord and Tenant Act Cap 301 of Laws of Kenya provides:

**“where under the tenancy under which the tenant holds for the time being, the tenant has any obligations in respect of the repair and maintenance of the premises comprised in such tenancy, the tenancy ought to be terminated in view of the state of repair of the premises, being a state resulting from the tenants failure to comply with the said obligations”.**

The landlord is authorized or empowered by the subsection to serve a notice of termination based on the above ground on the tenants.

Similarly ground 7 (f) of termination provide for a termination notice to be served where the landlord as is evident (as per the exhibits in this matter by the landlord) intends to demolish or reconstruct the premises comprised in the tenancy and he could not reasonably do so without obtaining possession.

I have no doubt that in the circumstances as outlined above the City court had no jurisdiction to grant a closing order in respect of premises regulated under the Landlord and Tenant Act Cap 301 of Laws of Kenya. Although the important case of *Republic vs Kisanga & 8 others* was brought to the High Court as a criminal revision Case No.27 of 1989, I entertain no doubts whatsoever that the facts as outlined in this current matter are substantially similar to the facts in the *Kisanga* case. In the *Kisanga* case the City court was being used as a sanctuary by the Landlord with a view to circumventing the protective provisions of the Landlord and Tenant Act, which only permit the termination of protected tenancy as per the provisions of the Act. The prevailing situation at the *Kisanga* time, was an instigation by the Landlords for them to be charged with nuisance offence under the Public Health Act to which they would either plead guilty or offer little resistance. This invariably resulted in the premises being condemned on “health” grounds and the tenants evicted in order for the conspiring landlords to abate the nuisance.

It is significant to the court that the advocate for the tenants in this case did draw the lower court's attention to the *KISANGA* judgment. It is clear to the court that although the High court had in very clear terms set out the applicable law as regards nuisance and the issue of the lower court's jurisdiction the court went on to ignore it or failed to direct its mind to its implications and its binding effect, inspite of the High Court clear findings on very critical matters on the lower court's jurisdiction to grant closing orders and proceeded to grant a closing order.

Section 4 of the Landlord and Tenant Act provides that notwithstanding the provisions of any other written law or anything contained in the terms and conditions of a controlled tenancy, no such tenancy

shall terminate or be terminated and no term or condition in or right or service enjoyed by a tenant of any such tenancy shall be altered than in accordance with the provisions of Cap 301.

The Landlord and Tenant Act by virtue of this provision supersedes the Public Health Act. In addition it is also a later Act.

From the above it is clear to the court that there is an error of law which clearly invites the court's jurisdiction in judicial review. I find and hold that the lower court;

- (a) Had no statutory jurisdiction to grant a closing order in respect of trade premises as opposed to dwellings.
- (b) Was guilty of procedural misconduct in issuing summons on the tenants contrary to the specific provision of the Public Health Act. In particular it failed to make specific findings concerning the fitness of the premises and also to find that the nuisance was injurious to health as defined in the **KISANGA** case.
- (c) Had in the circumstances failed to direct its mind properly on the relevant law including the case law as set out in the **KISANGA** case.
- (d) Failed in its duty to act fairly in exercise of its statutory power, in not giving the tenants sufficient notice to comply.

I therefore find that the lower court had no jurisdiction, was guilty of procedural impropriety under the Public Health Act acted in error of law by failing to direct itself properly concerning the applicable and finally failed in its statutory duty to act fairly.

For the avoidance of doubt I endorse fully the findings in the **KISANGA** case and further find and hold that the closing order is a nullity having been made without jurisdiction. I further find and hold that failure by the lower court to comply with the express procedural requirements contained in the two Acts namely the Public Health Act and the Landlord and Tenant Acts or any subsidiary legislation thereof and failure to address the substantive law on the subject as set out in the Kisanga case constituted serious procedural improprieties under the Act and the court is entitled to intervene on these grounds as well.

In the result the closing order is a nullity for lack of jurisdiction by the lower court. Once a nullity always a nullity.

Nullities, which are decisions deemed not to have been made for lack of jurisdiction are outside the certiorari time limit requirements.

The closing order is accordingly removed into the court and forthwith quashed by an order of certiorari as prayed in prayer (a) of the application. Costs to the applicants.

Dated at Nairobi this 7<sup>th</sup> day of November, 2008.

**J. G. NYAMU**

**JUDGE**