



REPUBLIC OF KENYA

IN THE HIGH COURT AT MOMBASA

Misc Appli 839 of 2005

**IN THE MATTER OF: THE PUBLIC HEALTH ACT CAP 242 LAWS
OF KENYA**

IN THE MATTER OF: AN APPLICATION BY:

K.J. SHAH & CO. LTD.....1ST APPLICANT

AND

IN THE MATTER OF: SURIYAKANT RADIA.....2ND APPLICANT

MANGLA RADIA3RD APPLICANT

PRAKASH RADIA00.....4TH APPLICANT

(ALL TRADING AS RADIA FURNISHERS)

AND

IN THE MATTER OF: DISTRICT MAGISTRATE II

MS.C.N. KERAGE1ST RESPONDENT

AND

IN THE MATTER OF:

MUNICIPAL COUNCIL OF MOMBASA2ND RESPONDENT

R U L I N G

The 1st interested party herein, Mohamed Abdulrahman Kassim, pleaded guilty to a charge preferred against him pursuant to sections 115 and 120 of the Public Health Act (Cap 242 Laws of Kenya). He was then sentenced to pay a fine of Kshs.3,000/- or in default to serve 30 days in prison. The conviction and sentence were made by B. Mararo, the learned District Magistrate vide Mombasa

R.M. Cr. Case No. 1310 of 2005. On the 7th day of October 2005 Mrs. C.N. Kerage, learned District Magistrate, issued an order requiring applicants herein namely, K.J. Shah & Co. Ltd and Suriyakant

Radia, Prakash Radia, Mangla Radia all trading as Radia Furnishers to vacate the business premises standing on Mombasa/Block XXXVII/9/M.I. Nehru Road to enable the 1st interested party comply with the court orders issued by Mr. B. Mararo, learned District Magistrate.

The applicants herein being tenants to the 1st interested party in Plot No. Mombasa/Block XXXVII/9 M.I. Nehru Road felt aggrieved and preferred to file a judicial review application by the motion dated 27/10/05. In that Motion, they sought for two main orders namely:

- (i) *An order of certiorari to have the aforesaid order requiring them to vacate quashed.*
- (ii) *An order of prohibition to prohibit the Municipal Council of Mombasa, the 2nd Interested party herein from executing the aforesaid order.*

The motion is supported by the affidavit of Suriyakant Radia

and a further affidavit of Abdulhalim Ahmed Salyani. When served, the interested parties each filed a replying affidavit to oppose the motion.

When the motion came up for interpartes hearing, a preliminary issue arose as to whether or not the applicants should be allowed to amend the Notice of Motion pursuant to the provisions of Section 3A of the Civil Procedure Act. It is the submission of Mr. Hamza, learned advocate for the applicants that this court should exercise its inherent power under section 3A of the Civil Procedure Act by allowing the motion to be amended so that the Republic is indicated to be the

applicant as opposed to the applicants herein. Mr. Mwakisha, learned advocate for the 1st interested party objected to the application for amendment saying that the provisions of section 3A do not apply to Judicial Review proceedings. The learned Advocate instead urged this court to strike out the entire motion for being fatally defective. Mr. Kibara, learned advocate for the 2nd interested party adopted the arguments of Mr. Mwakisha.

I have considered the arguments of learned advocates appearing for the competing parties herein. I have also perused the material placed before me. It is not denied that the Notice of Motion is filed in the names of the applicants herein namely: K.J. Shah and Co. Ltd., Suriyakant Radia, Mangla Radia, Prakash Radia all trading as Radia Furnishers. The law regarding to that issue was settled by the East African Court of Appeal in the case of **Mohamed Ahmed =vs= R [1957] E.A. 523** in which the East African Court of Appeal expressed itself as follows:

“As prerogative orders are issued in the name of the crown this appeal was wrongly instituted in that it joined the crown as the respondent.”

The same position was also restated by the same court in the case of **Farmers Bus Service and others =vs= The Transport Licensing Appeal Tribunal [1959] E.A. 779** in which it held *[that prerogative orders are issued in the name of the crown and applications for such orders must be correctly instituted]*. Our court of Appeal further adopted the above position in the case of **Municipal Council of Kisumu =vs= Madowo [1986 – 1989] E.A. 373 (C.A.K.)** as follows:

Prerogative orders are issued in the name of the Republic and applications for such orders must be correctly instituted.

In the end, the sum total is that an application in the nature of certiorari, prohibition and mandamus must be brought in the name of the Republic. This fact is recognized by the applicants herein and that is why Mr. Hamza has from the onset sought to have the amendment done on the motion before the matter was argued. The fact is that such a defect renders the entire proceedings fatally defective unless an amendment is allowed. This court has been beseeched to allow an application for amendment under Section 3A of the Civil Procedure Act. I have also been urged not to do so because the provisions of

Order LIII and the Law Reform Act do not permit the application of the provisions of the Civil Procedure Act and the rules therein. I have anxiously considered these arguments and I am convinced that the provision for amendments are provided for under order LIII hence there is no room for this court to import and apply the provisions of Section 3A of the Civil Procedure Act. I am in agreement with my learned brother Justice Ringera (as he then was) when the learned judge expressed himself in the case of **Jotham Mulati Welamondi =vs= Chairman E.C.K. Bungoma H.C. Misc. App. No. 81 of 2001** as follows:

“It follows therefore that it is incompetent to invoke the provisions of sections 3A and order I rule 8 of the Civil Procedure rules.”

I have purposely avoided to deal with the merits of the matter because I am convinced that the motion is not competently framed as required by law hence the same is available for striking out. In the end I dismiss the application for amendment and proceed to strike out the entire motion for being incompetent with costs to the 1st and 2nd interested parties.

Dated and delivered this 31st day of July 2007.

J.K. SERGON

J U D G E

In open court in the presence of Mr. Hamza for the applicants and Mr. Kibara h/b Mr. Mwakisha for 1st Interested party and Mr. Kibara for the 2nd Interested Party.