



REPUBLIC OF KENYA
IN THE HIGH COURT OF KENYA
AT NAIROBI (NAIROBI LAW COURTS)
Misc Crim Appli 626 of 2007

TITUS MAINA..... 1ST APPLICANT

ALEX MWANGI..... 2ND APPLICANT

JOHN OWIGO OYANGO.....3RD APPLICANT

-VERSUS-

REPUBLIC.....RESPONDENT

RULING ON REVISION

The applicants moved the Court by Notice of Motion dated 6th September, 2007 and brought under ss.362 and 364 of the Criminal Procedure Code (Cap.75, Laws of Kenya).

The applicants' prayers were, firstly, that the Court do call for, and examine the trial record for Principal Magistrate's Court Case No. M.2314(A) of 2006 – for the purpose of satisfying itself as to the correctness, legality or propriety of the order made on 8th August, 2007. The applicants prayed that, pending the hearing and determination of this application, the said trial Court order be stayed. They prayed that, this Court do reverse and/or alter the order made by the learned Senior Resident Magistrate on 8th August, 2007.

In support of the application, the applicants attached an affidavit which, however, is not in good form; it is a *joint affidavit* by the three applicants as deponents.

The detailed requirements of the law relating to affidavits are found in Order XVII of the Civil Procedure Code, but bear content no less applicable to affidavits made before a *criminal Court*. The Civil Procedure Code, on affidavits, has the following requirements.

O. XVIII, r.3(1) "Affidavits shall be confined to such facts as the deponent is able of his own knowledge to prove...."

r.5 "Every affidavit shall be drawn in the first person....."

The personal knowledge thus required can only be sincere, *individual* knowledge, as the basis of the facts deponed and, not knowledge emanating on the basis of general repute which can be testified to by a group; and the rule that affidavits are to speak in the *first person*, can only mean *first person singular*. It is improper, therefore, to swear an affidavit as a group, as the applicants have done in the instant application.

Given the common purpose in respect of which the applicants have moved the Court, however, I will apply the Court's discretion to admit the said affidavit, which is dated 6th September, 2007.

The grounds in support of the application are, firstly, that the Subordinate Court had acted in excess of jurisdiction when it made the orders of 8th August, 2007 – as the said Court had become *functus officio* after it passed sentence on 16th August, 2006; secondly, that the landlord/agent had been called upon to plead to charges that do not disclose any offence under the law; thirdly, that the landlord/agent had pleaded not guilty on 2nd August, 2006, but the learned Magistrate acted in excess of jurisdiction when she entered a plea of guilty following the prosecutor's narration of facts, in contravention of the provisions of the Criminal Procedure Code (Cap.75); fourthly, that the proceedings subsequent to 16th August, 2006 are irregular and illegal, and the orders arising therefrom contravene express provisions of s.120 of the Public Health Act (Cap.242) and so, are improper and oppressive; fifthly, that the proceedings before the learned Magistrate are, in the circumstances, void in law; sixthly, that the applicants stand to suffer irreparable loss and damage if this application is not heard and determined.

On or about 10th August, 2007 the applicants were served with an order dated 8th August, 2007 which required them to vacate plot No. 209/4844/1 Nairobi. The applicants *later* found out that the orders emanated from proceedings under the Public Health Act (Cap.242), against the owner/agent for Plot No. 209/4844/1 – and the owner/agent was not a party to the said proceedings.

The applicants are advised by their advocates, whom they believe to be truthful, that the said orders of 8th August, 2007 are irregular and defective in law and could have been made in bad faith, for the purpose of disposing of the 37 families occupying the subject premises.

The deponents aver that the landlord/agent had pleaded not guilty one year earlier, on 2nd August, 2006, to the charge of causing suffering and nuisance, contrary to s.115 of the Public Health Act. On that occasion, the City of Nairobi Medical Officer of Health had not given any evidence of the existence of the nuisance, but the prosecutor had simply narrated facts, and the Court had accepted the same. Contrary to the requirements of s.19 of the Public Health Act, the said Medical Officer of Health had not served statutory notice upon the 37 families living on the subject premises. The tenants were not accorded an opportunity to execute any such works as may have been required of them, on the subject premises. It was deponed that the affected 37 families, including the applicants, had lived on the premises since childhood, and so it was only fair that the claim made by the Medical Officer of Health should have been considered *inter partes*.

Learned counsel **Mr. Kariuki**, for the applicants, submitted that the subordinate Court's orders of 8th August, 2007 had been founded on a faulty conviction of the landlord/agent a year earlier; and yet it is precisely the said conviction that was now being used as a foundation, to evict the occupants of the subject premises, in *ex parte* proceedings.

Counsel submitted that the same Court which had passed judgement on 16th August, 2006 and was now *functus officio*, was making new orders as a continuation of the proceedings in that one-year-old decision. He cited a persuasive authority, **Maina v. Republic** [1989] KLR 506, for the proposition that a Magistrate's Court becomes *functus officio*, once it disposes of a case by verdict of not guilty, or by passing sentence, or by making some order finally disposing of the case. Counsel urged that since the Magistrate's Court had passed judgement on 16th August, 2006, in 2007 a fresh complaint ought to have been made, and heard *inter partes*.

Counsel submitted that the eviction, by the learned Magistrate's orders of 2007, of the 37 resident families, ought to have been done only after natural justice had been availed to the said families. He urged the Court to consider the legality of the proceedings leading to the said Court orders of 2007.

In his response, learned State Counsel **Mr. Makura** agreed that the proceedings which led to the Magistrate's orders of 16th August, 2006 were irregular; even though the landlord/agent had pleaded not guilty and this was on record, the prosecutor merely read out his statement, and then a conviction and sentence was recorded. This, learned counsel urged, was unprocedural; and in any case, since the faulty process had culminated in sentence, it was not open to a Court now *functus officio*, to reopen the matter in 2007 and make still further orders; so, the latest orders too, were irregular.

Mr. Makura urged that a further complaint ought to have been made, to lead to the August, 2007 orders by the Court. He urged that this Court could, in the circumstances, proceed under ss.362 and 364 of the Criminal Procedure Code (Cap.75), and exercise appropriate revision powers.

Mr. Makura conceded that the orders complained about had been in breach of principles of natural justice – because, after only two tenants were heard, the learned Magistrate made far-reaching orders, affecting 37 families; he urged that the said order could not stand, as against the said 37 families.

After considering the application, the depositions and the submissions of counsel on both sides, on 13th September, 2007, I delivered extempore orders, which I will affirm in the present considered ruling on revision. I stated, on that occasion, as follows:

“Upon reading the applicants’ Notice of Motion of 6th September, 2007, perusing the affidavit of the same date, and hearing the submissions of counsel on both sides, I have reached the decision that the application must be allowed, and the reasons are to be stated in a detailed ruling to be delivered....

“I will order now as follows:

The Order made by the Hon. Senior Resident Magistrate Ms. Nyambura on 8th August, 2007 is vacated and shall have no effect.”

I am in agreement with the submissions of counsel. The sentence meted out against the landlord/agent in 2006 was not founded upon right procedure. So, that sentence was null. Null as it was, that earlier sentence rendered the Magistrate's Court *functus officio*. So, in 2007 it was no longer possible to found new orders upon the decision of 2006. And consequently, the orders of 2007 too, were null.

Besides, the circumstances clearly dictated that, in 2007, the Medical Officer of Health should have moved the Court afresh, and due service would be made upon the interested parties, in preparation for an *inter partes* hearing.

I therefore affirm this Court's orders, as rendered on 13th September, 2007.

Orders accordingly.

DATED and DELIVERED at Nairobi this 24th day of October, 2007.

J.B. OJWANG

JUDGE

Coram: Ojwang, J

Court Clerk: Tabitha Wanjiku

For the Applicant: Mr. Kariuki

For the Respondent: Mr. Makura