



**REPUBLIC OF KENYA**

**HIGH COURT OF KENYA AT NAIROBI (MILIMANI LAW COURTS)**

**MISC CIVIL APPLI 531 OF 2006**

**JUBILEE INSURANCE CO. OF KENYA LTD.....APPLICANT**

**Versus**

**CITY COUNCIL OF NAIROBI.....RESPONDENT**

**JUDGMENT**

Jubilee Insurance Company of Kenya Ltd. filed the Notice of Motion dated 29<sup>th</sup> June 2006 seeking the following Judicial Review orders against the City Council of Nairobi:-

- 1) an order of certiorari to remove into this Honourable court for purposes of the same being quashed, the notices served upon the Applicant dated 15<sup>th</sup> June 2006 and 30<sup>th</sup> August 2006 by the Respondent;
- 2) That an order of prohibition to prohibit the Respondent or any of its employees or officers or agents from commencing any Criminal or other proceedings against the Applicant or any of its employees in relation to repainting or scrubbing the internal and external walls of the building known as Jubilee Insurance House erected on LR 209/3526 Wabera Street Nairobi.
- 3) The applicant also prays for costs of the Motion.

The Motion is premised on a Verifying Affidavit sworn by Margaret Muhuni on 19<sup>th</sup> September 2006 and a Statement of the same date. The Applicant also filed skeleton arguments on 4<sup>th</sup> October 2007 Ms Gathara appeared for the Applicant.

The Application was opposed though no reply or arguments were filed. Mr. Kenyatta appeared on behalf of the Respondent. The grounds upon which the Notice of Motion is premised are inter alia;

- (a) That there no provision under Public Health Act or Nairobi City Council By laws providing for repainting or scrubbing of external walls of buildings;
- (b) The notices served by the Respondent were issued by an unauthorized person.

Margaret Muhuni, the Company Secretary of the Applicant deponed that on 15<sup>th</sup> June 2006 the Respondent wrote to the property manager of the Applicant requesting the Applicant to urgently scrub and paint the external walls of the Applicant's building known as Jubilee Insurance House. On 16<sup>th</sup> June 2006, the Applicant replied to the letter indicating that the manager had recommended painting, granito

tile cladding or Alucoband cladding and was going to await the decision before proceeding. A reply was made by an undated letter received on 22<sup>nd</sup> June 2006 (UNI) asking that Applicant to commence the work immediately. Another notice was served on the Applicants property manager on 30<sup>th</sup> August 2006 requiring compliance within 7 days in default they would be liable to prosecution under the Public Health Act and Nairobi City Council By laws (MM2). It is the Applicants contention that they have hired the services of Metro Cleaners & Renovators who have been doing the cleaning satisfactorily.

Ms. Gathara submitted that there is no provision under the Public Health Act or the Nairobi City Council By laws for repainting of buildings and the Respondent is acting in excess of its jurisdiction if it seeks to enforce the notices issued as it has been doing.

It was also submitted that there was no reply to the Affidavit of Margaret that the building is clean Metro Cleaners & Renovators have been doing the cleaning.

It is also the case of the Applicant that the notice issued to Applicant is issued by a person who is not authorized as per provisions of S.119 of the Public Health Act, which provides that the notice be issued by the Medical Officer of Health. Applicants relied on the case of **BARCLAYS BANK LTD V CITY COUNCIL OF NAIROBI 1261/05** in which facts were similar and the court held it to be amenable to Judicial Review.

Mr. Kenyatta in opposing the Application urged that Section 2 of the Public Health Act defines a Medical Officer to include a Medical Officer and a Public Health Officer who is duly authorized, and that the one who issued the notice, Onyango Outho was an authorized officer. He contrasted this case with the **BARCLAYS BANK CASE** where the one who issued the notice was authorized.

Mr. Kenyatta submitted that the Local Government Act 265, Section 162 (a) Cap 265 gives the Respondent the mandate to ensure that cleanliness and sanitary standards are maintained within its district. That S.131 of Local Government Act and 116 of Public Health Act empower Respondent to remedy any nuisance which is defined under S.118 of Public Health Act and that though painting is not specifically mentioned, it should be included otherwise it would defeat the intention of the Act to keep the city clean and that the court should give it a purposeful interpretation. That the Applicants having declined to repaint, the Respondent then followed due process in issuance of the notice. The Respondent relied on the following cases;

1. **REP V LAND REGISTRAR KAJIADO MISC 118/04**
2. **HARRISON MAINA KARIUKI V AG MISC 922/05**

where the court held that certiorari lies to quash a decision made in excess of authority. Counsel urged that prohibition cannot issue as the decision has already been made.

For ease of reference, I think it necessary to set out the two impugned letters. The 1<sup>st</sup> letter dated 15<sup>th</sup> June 2006 reads:-

**“The Manager**

**Jubilee House**

**Plot No. 209/3526**

**Wabera Street**

**RE: SCRUBBING AND PAINTING OF YOUR PREMISES**

**We appreciate the efforts you made sometime back to repair the canopy of your premises. However, the external walls above the canopy are an eyesore. They are dirty and present a bad**

picture for a building situated in such an area within the city.

We are appealing to you to urgently scrub and paint the external walls of the building to be at par with the other buildings in the immediate neighbourhood.

In case of any enquiries please do not hesitate to contact the undersigned on Tel: 073390040.

Signed

R.K. Muene

For Medical Officer Health

The second letter of 30<sup>th</sup> August 2006 reads:-

30/8/06

“Dear sir/Madam,

#### **SANITATION OF BUSINESS PREMISES**

Your attention is drawn to the following condition which amongst others, must either be provided or observed or maintained in your business premises in the interest of public health. Any contravention of these conditions will render you or your employees or both, liable to prosecution under the Public Health Act and the relevant Nairobi City Council By laws.

- (1) Repaint/clean up/scrub the dirty external wall of the entire building.
- (2) Repair the defective water closet on the 6<sup>th</sup> floor
- (3) Repair the dirty internal wall of the 7<sup>th</sup> floor
- (4) Maintain general cleanliness at all the time.

Onyango Outho

Public Health Officer

0722-298116

Signed

For Medical Officer of Health

Received by

Signed

Company Secretary

Property Manager

## **Jubilee House Nairobi”**

It was also written on the notice **“To comply within 7 (seven) days”**

Though the Respondents did not file any reply or skeleton arguments, the above quoted notice must have been issued pursuant to Sections 115 & 116 of the Public Health Act Cap 242 which mandates the city of Nairobi or any other Local Authority to ensure the district is kept clean at all times.

Section 115 of Cap 242 prohibits the causing of nuisances

The impugned notice must have been preferred under S.115 which 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 conditions liable to be injurious or dangerous to health”**

The Section stipulates;

**“ S. 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 prevention of 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 conditions of any such nuisance or condition.”**

S. 118 specifically defines what amounts to a nuisance and lists the various kinds of nuisances from S.118 – I have picked out;

**“S. 118 (1) The following shall be deemed to be a nuisance liable to be dealt with in the manner provided in this part;**

**(b) Any dwelling or premises or part thereof which is or**

**are of such construction or in such a state or situated**

**or so dirty or so verminous as to be, in the opinion of**

**the Medical Officer of Health, injurious or dangerous**

**to Health, or which is or are liable to favour the**

**spread of any infectious disease**

**(l) any public or other building which is so situated**

**constructed, used or kept as to be unsafe or**

**injurious or dangerous to health;**

**(s) any act or omission or thing which is or may be**

**dangerous to life or injurious to health.”**

What stands out from the above provisions is that for an act to amount to a nuisance, the premises must be unsafe, dangerous to health, dangerous to life or injuries to health or which is hostile to favour the spread of infectious disease or it harbours vermins.

The question is whether the Respondent's complaint against the Applicant falls under that description of a nuisance. In the first letter of 15<sup>th</sup> June 2006 issued to the Applicant, the Respondent complained that the external walls above the canopy are an eyesore meaning they were unsightly or unpleasant to the eye or not beautiful. There has been no complaint that the said walls were unsafe, injurious or dangerous to the public, or harboured any vermins that were likely to cause disease. Mr. Kenyatta urged that court should consider what the intention of the statute was in interpreting the said section. Mr. Kenyatta relied on **HWR WADE on Administrative Law page Chapter 8** where the writer says that, **"a statutory power will be construed as impliedly authorizing everything which can fairly be regarded as incidental or consequential to the power itself; and the doctrine is not applied narrowly."** The Respondent wants the court to give that provision a purposeful interpretation. Even if the court were to do so, it is apparent from Section 115, 116 and 118 of Public Health Act that the acts complained of must be unsafe, injurious or dangerous to health, it has not been shown how failure to paint is injurious or dangerous to health. There is no evidence that the building is verminous, and likely to cause disease, unsafe and hence dangerous to the public. To hold that failure to paint a building is dangerous or injurious to life would be stretching the meaning of the word nuisance out of proportion.

After issuance of the notice of 30<sup>th</sup> August 2006, the Applicants by their letter of 6<sup>th</sup> September 2006, invited the Respondents to do a joint inspection of the premises because the Applicants were alleging they have maintained cleanliness and they have engaged a company which is charged with cleanliness. The said invitation was not honoured by the Respondent. Margaret Muhuni, the Applicants Company Secretary specifically deponed to the fact that they have engaged Metro Cleaners and Renovators to carry out cleaning duties. These facts have not been controverted by way of any Affidavit and so they stand uncontroverted. The question is, what would be difficult in having a joint inspection of the premises and the Respondent pointing out the specific areas that amounted to a nuisance in the Medical Officers view?

The 2<sup>nd</sup> complaint by the Applicant is the notice of 30<sup>th</sup> August 2006 that that is impugned was not issued by an authorized officer, Onyango Outhe a Public Health Officer signed for the Medical Officer of Health. S. 119 of the Public Health Act confers authority on the Medical Officer to issue notices and file complaints relating to parties committing nuisances to remove the nuisances. Under the said Section, once the Medical Officer is satisfied that a nuisance exists, he shall serve notice on the author of the nuisance and if the nuisance is not removed in the specified time, the Medical Officer shall cause a complaint relating thereto to be made before a magistrate. It's the Respondents contention that Section 2 of the Public Health Act defines who a Medical Officer is. It states; **"Medical Officer of Health means**

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- (a) the Director of medical Services and;**
  - (b) in relation to the area of any municipality, the duly appointed medical officer of health of the Municipality including a Public Officer seconded by the Government to hold such office; and**
  - (c) in relation to any other area a medical officer of health appointed by the Minister for that area"**

Under S.2 (b) medical officer includes an appointed Medical Officer of Health and a Public Health Officer duly authorized. **BLACKS LAW DICTIONARY** defines 'Officer' as **"a person who holds office of trust authority or command. In public affairs, the term refers especially to a person holding public office under a national State, or Local Government, and authorized by the Government to exercise some specific functions."**

There is no doubt that Onyango Outhe is a Public Health Officer who can exercise such authority as above. However S. 2(b) specifically requires that the said medical officer be appointed. It is not enough for him to just sign on behalf of the Medical Officer of Health. There has to be evidence of appointment. And that is the reason why under S. 167 of the Public Health Act, it is provided that a health authority may specifically authorize any of its officers in writing, to prosecute any offence. The said Onyango Outhe threatened the Applicants with prosecution. However, there is no written authority shown to court allowing Onyango Outhe to carry out these duties. I believe this section was inserted for good reason, so

that unauthorized officers do not take it upon themselves to issue such notices and purport to prosecute without authority. It is true that in the **Barclays Bank case**, the author of the notice did not indicate whether she had authority or not. In the instant case, though it is indicated that the Public Health Officer issued the notice on behalf of the Medical Officer, yet the court needed to be shown the written authority issued under S. 167 of the Public Health Act. I find that the Respondent has not demonstrated that Onyango Outho was authorized to issue the notice or to prosecute and the notice is made without citing Section and hence made ultra vires. The same amounts to the letter written on 15<sup>th</sup> June 2006.

Can the orders lie?

Certiorari lies to quash the decision of a public body/officer if it is made in excess of or without jurisdiction or where there has been breach of rules of natural justice. In this case, the notices issued to the Applicant do not constitute a nuisance within the meaning of S.115, 116 and 118 of the Public Health Act and the notices are therefore made in excess or without jurisdiction and are ultra vires the powers of the Respondent. I have also found that the Officer who issued the notice was unauthorized under S.167 of the Public Health Act and therefore acted outside his powers and that decision is an illegality. For the above reasons the impugned decisions fall under the purview of Judicial Review and an order of certiorari hereby issues to quash the decision dated 15<sup>th</sup> June 2006 and 30<sup>th</sup> August 2006.

Can prohibition issue? Prohibition is an order issued by the High Court to stop a decision that is yet to be made. It is however powerless to stop a decision that is already made. (See **KENYA NATIONAL EXAMINATION COUNCIL V REP CA 266/96**). By the letter of 30<sup>th</sup> August 2006 the Applicants, were threatened with being prosecuted. That decision to prosecute has not yet been made otherwise charges to that effect could have been shown to court.

That decision is yet to be made and prohibition can therefore issue to bar the Respondent from prosecuting the Applicant based on the notices of 15<sup>th</sup> June 2007 and 30<sup>th</sup> August 2006.

As I observed in the **Barclays Bank case (supra)**, failure to paint a building can only be said to be an eyesore, unpleasant to the eye or unsightly and it can only be made an offence if the Public Health Act is amended to include failure to decorate/paint premises as an offence. Presently there is no such offence in the statute as failing to paint.

In sum, the court grants the orders as prayed in the Notice of Motion dated 29<sup>th</sup> September 2006 and costs to the Applicants.

**Dated and delivered this 6th day of December 2007.**

**R.P.V. WENDOH**

**JUDGE**

Read in the presence of:

Ms Gathara for Applicant

Mr. Kenyatta for the Respondent