



REPUBLIC OF KENYA
IN THE HIGH COURT OF KENYA
AT NAIROBI (NAIROBI LAW COURTS)
Misc Appli 191 of 2006

AQUARIUS LIMITED & 9 OTHERS.....
.....PLAINTIFF

Versus

THE CHIEF MAGISTRATE'S COURT NAIROBI AND 2
OTHERS.....DEFENDANT

JUDGMENT

Before me is the Notice of Motion dated 18th April 2006, filed by Aquarius Ltd. and 9 others against the Chief Magistrate's Court Nairobi and two others seeking the following orders;

1. An order of certiorari to remove to the High Court and quash the decision of the 1st respondent made through the Senior Resident Magistrate Mrs. Fridah Nyakundi (hereinafter referred to as the magistrate) in Nairobi Chief Magistrate's Court Misc Criminal Case No. 12 (A) of 2005 to take fresh evidence in the matter after the court had become functus officio and was without jurisdiction to review and/or vary its order to deliver a ruling.
2. An order of certiorari to remove to the High Court and quash the decision of the learned Magistrate to Summon the City Engineer to carry out an investigation on the suit premises and to prepare a report on its current status and produce the same in court after both the prosecution and defence had closed its cases and a date for the delivery of the court's ruling pronounced.
3. An order of prohibition barring or prohibiting the learned magistrate from reviewing and/or verifying its order to deliver a ruling based on the material and evidence before the court.
4. An order of prohibition barring or prohibiting the learned magistrate from summoning the city engineer from carrying out an inspection on the suit premises given the established conspiratorial relationships between the landlord and/or agents of the suit premises and the City inspectorate Department already condemned by two separate judges of the superior court in respect of the same parties and the same subject matter.

The grounds upon which the application is brought are inter alia;

- (8) That the learned magistrate has gone beyond her judicial mandate of being an impartial arbiter and entered into the arena of investigations.
- (9) The learned magistrate as an impartial arbiter should not be seen to be aiding one of the parties in the case or to be working towards a particular outcome in the case and thus denying one of the parties a fair hearing.
- (12) The learned magistrate having made an order that a ruling will be given, the parties and those interested in the proceedings had legitimate expectations that a ruling will be given on the basis of the material or evidence before the learned magistrate.
- (14) In any event the learned magistrate acted in excess of her authority and without jurisdiction as the court is functus officio and therefore has no authority or jurisdiction to review or vary its order.
- (15) The orders of the magistrate were capricious, arbitrary, irrational and unreasonable.
- (16) Further the conduct of the learned magistrate is an abuse of the process of the court and prejudicial to the rights of the applicants as tenants in the suit premises, the subject matter of the Criminal Proceeding.
- (17)
- (18) The learned magistrate ought to, yet failed to have had due regard for the separate rulings of the High Court given in Milimani HCC 203/02 and the order of Revision in the High Court Criminal Revision Case No 71 of 2003 between the same parties herein and on the same subject matter and both of which held that there is a conspiracy between the landlord/or agents of the suit premises and the City Council.

The application was also supported by a verifying affidavit sworn by Diamond Jaffer Ali Mapara the chairperson and main shareholder of Aquarius Ltd. the 1st applicant on behalf of the 1st applicant and other applicants. It is made up of 27 paragraphs. The applicants are all tenants of Metro Plaza Ltd. situate on Muindi Mbingu street. The application was opposed.

At the hearing of the motion there was no appearance for the Attorney General, for the 1st respondent. Though the Attorney General had not filed any papers in reply to the application, they filed skeleton arguments dated 22nd May 2006. The 2nd respondent was represented by Langi Advocate who relied on their submissions dated 17th May 2006 and grounds of opposition dated 18th May 2006.

The 3rd respondent was represented by Makori Advocate who did not make any submissions but the court notes that 3rd respondent had filed grounds of opposition on 18th May 2006.

At the hearing of the motion Mr. Orenge indicated to the court that he only wished to urge prayers 1 and 2 of the Notice of Motion seeking orders of certiorari to quash the Resident Magistrate's decision in Criminal Case No.12 A/05 and the order summoning the City Engineer to carry out an inspection and give a report. In effect counsel abandoned prayers 3 and 4 seeking orders of prohibition.

Briefly the facts that give rise to this case are as follows: The 2nd respondent is the owner of the suit premises LR 209/1853, 1854, and 2379 Nairobi area, where the applicants are tenants.

The 2nd respondent was charged with offences under the Public Health Act in Criminal Case No. 12 (A) of 2005. There had been other cases in which the 2nd respondent was charged, Criminal Cases No. 843/02 and 1324/02 where the applicant pleaded guilty to the charges and an order of demolition of the suit premises was made by the court. Though affected by the order, the applicants had not been joined to

the previous proceedings in the Lower court and they filed HCC 203/02 seeking to stop the demolition and the court stayed the demolition order.

The applicants sought a Revision Order in HCCR Revision 71/03 and the High Court quashed the demolition order. In Criminal Case No. 12(A) of 2005 the tenants applied to be joined to the proceedings and were allowed. The hearing of the case and submissions were concluded on 21st February 2006 and the Magistrate reserved her ruling for 7th March 2006 but it was not ready then. On 10th March 2006 when the ruling was to be read, the magistrate invoked Section 150 of the Criminal Procedure Code and directed the City Engineer to carry out investigations on the structure of the premises and prepare a report on its current status and produce the same in court on 15th March 2006 with a view to the court visiting the site one last time. The applicants contend that once a date had been given for judgment the court became functus officio and the magistrate had no authority to review its order; that the conduct of the magistrate was capricious, arbitrary, irrational and unreasonable and resulted in grave prejudice and irreparable loss and damage to the applicants and hence their entitlement to the orders sought.

Mr. Orenge submitted that the calling of additional evidence under Section 150 Criminal Procedure Code can only be done in exceptional circumstances but not used to fill in the gaps of any one party's evidence and that such evidence cannot be allowed if that evidence was available before closure of the prosecution case or if the prosecution ought to have known that, that evidence should be given. He said that such power to call witnesses by the judge or court has to be done with caution. Counsel relied on **ARCHBOLD – pleading; evidence and practice in Criminal Cases 1993 of para 4-346-4-356**. Counsel alleges that the magistrate was unfair in calling the witness and relied on the case of **VINCENT KIBIEGO SAINA V THE AG, HCC 1088/1999** where Justice Kuloba considered the issue of fairness in the conduct of criminal cases and observed that fairness has to be exercised right from the time the report is made to police, to the conduct of investigations and the hearing before the court.

Mr. Langi in opposing the application urged that the 1st respondent had jurisdiction to call or summon witnesses at any stage of the trial which she did and that the orders sought are overtaken by events because when the order to call the witness was made, the applicants did not object, they fully participated in the site visit and cross examined the witness who had been called. A judgment has been written. Counsel's view is that the applicants do not come to court in good faith as there is evidence on record and a judgment. In any event, one Daniel Rono the manager of the 2nd respondent, swore an affidavit that the premises have since been demolished, and if orders are given, they will be granted in vain.

The source of the dispute before the court is the 1st respondent's invocation of Section 150 of the Criminal Procedure Code, to call the City Engineer to evaluate the structure of the premises after she had reserved the matter for judgment.

Section 150 Criminal Procedure Code provides as follows;

“A court may, at any stage of a trial or other proceedings under this code, summon or call any person as a witness, or examine any person in attendance though not summoned as a witness, or recall and re-examine a person already examined and the court shall summon and examine or recall and examine any such person if the evidence appears to it essential to the just decision of the case.

Provided that the prosecution or the advocate for the prosecution or the defendant or his advocate shall have the right to cross examine any such person and the court shall adjourn the case for such time (if any) as it thinks necessary to enable the cross examination to be adequately preferred if, in its opinion, either party may be prejudiced by the calling of that person as a witness.”

Under the above quoted section, there is no doubt that the court has discretion to call or recall a witness if the evidence will assist the court in reaching a fair decision in the matter and secondly the evidence so adduced should not be prejudicial to either of the parties. In **Halsbury's Laws of England 4th Ed – Vol 11(2) at para 1011-1013**, also relied upon by counsel, the court can call evidence after close of defence case only in very exceptional circumstances in favour of the defence. In regard to evidence for the

prosecution's case, after closure of the defence, one can call such evidence only in rebuttal of a case raised by the defence evidence for the first time. Secondly such evidence must not be prejudicial to the other party. The said power to call witnesses by that court is exercised sparingly and with a lot of care. **Archbold on Pleading Evidence and Practice and Practice in Criminal Cases 1993** basically sets out the same principles as above.

In the case before the Lower Court, the Magistrate reserved the judgment for 10th March 2006, but come that that date, the magistrate ordered that the City Engineer do prepare a report to be produced in court on 15th March 2006 with a view to the court visiting the site. Under Section 150 Criminal Procedure Code the court can call or recall a witness even after close of the defence case under the circumstances considered above. However, the court having heard submissions of counsel and the matter reserved for judgment, I do agree that the court was functus officio. The court could not reopen the case. However the court went ahead and did re-open the case which in my view was, done in error with the magistrate believing she had jurisdiction under Section 150 Criminal Procedure Code. Acting on that mistake the magistrate made the order to call the city engineer.

Though the applicants were represented by Senior counsel they did not object to the calling of the witness. The applicant had an opportunity to challenge the magistrate's order once it was made. The counsel sat back and went along with the court to take the evidence of City Engineer and cross examine him till the court wrote a judgment after considering all evidence on record.

The reason that the court gave for calling the City Engineer is that it wanted to get evidence touching on the structure of the premises as to its status as at that time, the last evidence regarding the structure having been given by the tenants a year earlier. The court's order does indicate that the plaintiffs had failed to call any evidence regarding the structure and the court found it necessary to call the witness for the fair determination of the case. It is apparent that the evidence of the Engineer would be for purposes of buttressing or clarifying the prosecution's case. I do hold that it was evidence that the plaintiffs were aware of and for some reason had left it out and even though the defendants were allowed to cross examine the witness, that evidence would have been prejudicial to the defence. Besides, the witness called was an expert witness and belonged to the Nairobi City Council a party to the suit. May be the court should have preferred the parties to agree on a neutral engineer to examine the structure and give his report. Bringing in the Nairobi City Council engineer's evidence at that stage was likely to prejudice the defence. The court would hold that it was unreasonable and unfair for the court to call the said witness. However the court finds no evidence of malice or caprice as alleged. The magistrate may have made a genuine error.

From the record of the proceedings, the applicants never objected to the calling of the City Engineer. They fully participated in the proceedings before the magistrate, visited the scene and cross examined the witness (engineer) on his evidence. They never objected to the production of the evidence nor did they raise the issue of the court being functus officio. In fact there is a time the matter was adjourned after which the hearing of the said witness continued. The question this court poses is whether having subjected themselves to the proceedings in the lower court and after which the court gave a judgment on merit based on all evidence on record, the ex parte applicants can turn round and say that proceedings in calling of City Engineer was irregular and improper. The applicants acquiesced to the irregular summoning of the witness by the lower court and in my considered view they are estopped from seeking the quashing of the order of the court of 10th March 2006 and the subsequent proceedings because there is a judgment that followed. The judgment has been made on the merit after consideration of all the evidence adduced before the court. Judicial Review remedy goes to review the process not the merit of the decision.

Although the lower court may be said to have made an error, acted unfairly and acted unreasonably in recalling the engineer's evidence yet Judicial Review is a discretionary remedy and the court may refuse to grant such orders even where it is deserved. Halburys Laws of England 4th Edition Vol. II page 805 para.1508 was quoted by **J. Bosire in HC Misc. 805 OF 1990 Republic V. The Commissioner for Cooperatives Development & Kariobangi Housing and Settlement Co-operative Society Ltd ex parte David Mwangi & 13 Others:**

“Certiorari is a discretionary remedy which a court may refuse to grant even when the requisite grounds for grant exist. The court has to weigh one thing against another to see whether or not the remedy is the most efficacious in the circumstances obtaining. The discretion of the court being a judicial one must be exercised on the basis of evidence and legal principles”

The applicants having continued with irregular proceedings cannot turn round at this late hour in the day and seek their quashing and the most efficacious remedy for them in the circumstances was an appeal. This court will therefore decline to grant the orders of certiorari as prayed in the Notice of Motion of 15th April 2006. Counsel abandoned the prayers for prohibition and the orders can be made thereon.

The application is accordingly dismissed with each party bearing its own costs.

Dated and delivered at Nairobi this 11th day of August, 2006.

R.P.V. WENDO

JUDGE

Delivered in the presence of Ms. Aulo for Applicant

Mr. Ikoi for 1st Respondent

Mr. Langi for 2nd Respondent

R. V. P. WENDOH

JUDGE