REPUBLIC OF KENYA
IN THE HIGH COURT OF KENYA
AT NAIROBI (NAIROBI LAW COURTS)
Misc Crim Appli 245 of 2006

(From original conviction and sentence in Criminal Case No. 716 'A' of 2004

of the First Magistrate's Court at City Hall – L. Mutende, PM)

THE PAPER HOUSE OF KENYA LTD ……..……. APPELLANT

VERSUS

REPUBLIC …….……. RESPONDENT

JUDGMENT

The Paper House of Kenya Limited, hereinafter referred to as "***The Appellant***" was charged with the offence of failing to comply with a Notice contrary to Section 115 as read with Section 118 and 119 and punishable under Section 120 and 121 of the Public Health Act. The particulars of the offence were that on 1st July, 2004 the Appellant being the owner or occupant of Plot No. 209.8821, off Lunga Lunga Road situated in Nairobi Area, upon where a nuisance exists defined under Section 118 (1) 2 and (5) and having been served with a Notice dated 8th June, 2004 under Section 119 of the Public Health Act, and having been given a Notice of 21 days failed to abate a nuisance, the said nuisance being:-

1. Plaster/smoothen all the walls.
2. Paint all the dirty wall surfaces both internally and externally.
3. Resurface the entire floor to a smooth finish.
4. Recorrect the dampness on the walls.
5. Provide a changing room with lockers for workers.
6. Provide enough ventilation in the dark room.
7. Provide metal grill covers to all open drains.
8. Repair cracks on the walls.
9. Unblock the blocked toilet in the gents.
10. Repair the broken down cisterns in the toilets.
11. Provide 5ft tiles on the bathroom walls and provide doors for privacy.

12. Provide valid inspected fire extinguishers in the premises.

13. Provide valid medical certificates for kitchen workers.

The Appellant was duly tried and convicted of the offence. Upon conviction it was sentenced to a fine of Kshs.886,500/= in default one year imprisonment. The Appellant was aggrieved by the conviction and sentence and hence lodged the instant Appeal through Messrs Muciimi Mbaka & Co. Advocates. In its petition of Appeal, the Appellant faults the Learned trial Magistrate's conviction and sentence on the following grounds:-

1. **THAT** the Learned Magistrate erred in law and fact in failing to find that a re-inspection of the premises did not take place and therefore the charge was misplaced.

2. **THAT** the Learned Magistrate erred in law and fact in finding that any nuisance existed in the premises.

3. **THAT** the Learned Magistrate erred in law in convicting the Appellant and sentencing it to a fine of Kshs.865,500 or one year imprisonment in default thereof.

4. **THAT** the Learned Magistrate misdirected herself in law and in fact in assessing the fine before receiving the report of the Public Health Officer concerned.

5. **THAT** the Learned Magistrate erred in law and in fact in convicting the Appellant for failure to comply with a Notice, which Notice had not been properly served on the Appellant.

6. **THAT** the Learned Magistrate erred in law on finding that the Appellant was liable for the removal of nuisance of a structural character from the premises.

7. **THAT** the Learned Magistrate erred in law in convicting the Appellant on charges that were not set out in the charge sheet.

8. **THAT** the Learned trial Magistrate erred in law in shifting the burden of proof to the Appellant.

9. **THAT** on the whole the decision of the Learned Magistrate is unfair and unjust in the circumstances and against the weight of evidence adduced.

The brief facts of the Prosecution case were that on 8th June, 2004, a Public Health Officer – Tessie Wamatuba (PW1) whilst on routine inspection went to plot number 209/8821. She carried out sanitary inspection and noted some defects and conditions in the premises that were of a nuisance in nature. She notified the Appellant and required of it to abate the nuisance within 21 days. The Appellant failed to comply with the Notice and accordingly it was charged with the offence.

Put on its defence, the Appellant claimed that after it was notified to abate the nuisance, it did so but the Public Health Officer failed to re-inspect the premises as required. According to the Appellant therefore, it complied with the Notice and should not have been charged with the offence.

In support of the Appeal, Mr. Mbaka, Learned Counsel submitted that the conduct of the Appellant was of a person who was law abiding and keen to comply with the Notice. Counsel submitted that the record showed that the Notice was served on the Appellant on 8th June, 2004. However the date of the alleged re-inspection is indicted as 1st June 2004, It was the Appellant's contention therefore that there could not have been a re-inspection in the circumstances. Counsel further lamented that the Court had found that the nuisance had remained unabated for a period of 591 days. However the Learned Magistrate failed to make a specific finding as to the date when the nuisance was abated. Counsel also submitted that after the sentence was imposed, the trial Magistrate called for a compliance report. According to Counsel the calling for compliance report by the magistrate after imposing the fine was un-procedural. The correct procedure should have been for the Court to call for the compliance report first

before imposing the sentence. It was Counsel's further submissions that after the Court imposed the sentence, it became *functus officio* and should not have gone ahead thereafter to give the Appellant a cash bail of Kshs.2000 as it waited for compliance report. Counsel further submitted that some of nuisances were of a structural kind which could only be dealt with by the owner of the building and not the Appellant who was a mere tenant. Counsel pointed out that the Public Health Act is very clear that any defects in a premises that are structural in nature is the responsibility of the owner to correct and not the tenant or occupier. Counsel also submitted that there were 2 notices issued being Notice numbers 25816 and 25817. Notice number 25817 required certain things to be done relating to the kitchen. They did not form part of the particulars of the charge sheet yet the Court went ahead to convict the Appellant on the same. Finally, Counsel submitted that Section 121 of the Public Health Act requires the Court to consider whether the accused person acted with due diligence in abating the nuisance. The Appellant herein acted with due diligence, counsel submitted. This should have been considered as a mitigating factor. As for sentence, Counsel submitted that the default sentence was illegal. That the default sentence ought to have been 6 months and not 1 year.

The Appeal was opposed. Mrs. Gakobo, Learned State Counsel submitted that the evidence on record shows that there was nuisance that required to be abated by the Appellant. The Appellant was duly notified but failed to comply and abate the same. The conviction and sentence cannot therefore be faulted. On re-inspection, Counsel submitted that the Notice on record showed that a re-inspection was conducted on 1st July, 2004. It is on that basis that the Court held that there must have been an error on the Notice when it indicted that the re-inspection was conducted on 1st June, 2004. As regards the fine, Counsel submitted that the Court had clearly indicated that the nuisance had remained unabated for a period of 591 days. The Act provides that in imposing the fine, the Court takes into account the date of service of Notice until the date the nuisance is abated. It was Counsel's submission therefore that the Court did not arrive at the erroneous calculation. The Court visited the premises and found the nuisance unabated. The period of 591 days included the period that the Court visited the premises Counsel further submitted. On the issue that the Court should not have sentenced the Appellant before receiving compliance report, Counsel submitted that the Court had an obligation to satisfy itself even after sentence that the nuisance had been abated. The Court was therefore not *functus officio* after sentence. On nuisances that were structural in nature, Counsel submitted that the Magistrate had indicated in the Judgment that there was no way that the Appellant would have abated the nuisances that were structural in nature unless there was some sort of agreement with the owner of the premises. Even if the nuisances that were structural in nature were to be ignored, there were still other nuisances that remained unabated by the Appellant, Counsel maintained. On due diligence, it was Counsel's submission that the Court visited the premises on 30th August, 2005 and found that nuisances still existed on the premises. This was a year after the Notice had been served. It cannot therefore be said the Appellant acted with due diligence.

I must at this juncture remind myself of the functions and duties of a first Appellate Court in respect to the need for a thorough and exhaustive re-examination of the evidence before arriving at my own decision. I also note that I must give allowance to the fact that I did not observe the witnesses when they testified. In other words it is my duty to reconsider, evaluate and draw my own conclusions in deciding whether the Judgment of the trial Court should be upheld or upset as stated in the case of ***OKENO VS RPEUBLIC (1972(EA 32.***

On the evidence on record there is no doubt at all that the Appellant was served with Notice to abate nuisance by one T. Wamatuba. However did the Appellant fully comply with the Notice? It does appear from the evidence that as at the time the charges were preferred, the Appellant had not fully complied with the Notice and abated the nuisance. The Appellant claims that PW1 did not re-inspect the premises. If she had done so she would have established that conditions 1, 2, 3, 4, 5, 6, and 7 in the Notice had been met within 21 days. To buttress this argument the Appellant referred to the fact that the notice to abate the nuisance was dated 8th June, 2004 and yet the purported notice of re-inspection was dated 1st June, 2004. According to the Appellant therefore there could have been no re-inspection 7 days before the issuance of the notice to abate the nuisance. I have carefully perused the said Notice and have come to the same conclusion as the trial Magistrate that the date of re-inspection indicated thereon was clearly an oversight or inadvertent error. I do not think that PW1 stood to gain anything by mis-presenting the

truth. Further I do not think that the Appellant stood to gain anything by falsely accusing the Appellant. If indeed, PW1 had re-inspected the premises and found all the conditions set out in the notice to abate the nuisance had been met, what would have been the complainant's motive to press charges against the Appellant nonetheless? I can think of no rational explanation or reason at all. In any event it is on record that when the Court visited the *locus in quo* sometimes on 30th August, 2005, it still found that some aspects of Notice to abate the nuisance had not been fully complied with. In the premises, I have no hesitation whatsoever in coming to the conclusion that the Appellant's premises were re-inspected by PW1 and found wanting. PW1 in her testimony on the issue stated that she inadvertently indicated the date of the re-inspection to be 1st June, 2004 instead of 1st July, 2004. This explanation is rational, reasonable and plausible.

The Appellant in one of the grounds of Appeal seems to suggest that no nuisance existed in the premises and that therefore the Learned Magistrate erred in holding that there existed nuisance in the premises. The evidence of PW1 leaves no doubt at all that there existed nuisance on the premises of the Appellant which required to be abated. The nuisances were enumerated in the Notice which as issued and served on the Appellant. The said Notice was tendered in evidence as an exhibit. Indeed even in its defence, the Appellant conceded to the existence of the nuisance and which it had endeavored to abate before the charges were laid against it. In my Judgment the Appellant's assertion that there was no nuisance on the premises is clearly without merit.

Upon conviction, the Appellant was sentenced to a fine of Kshs.886,500/= or in default to serve one year imprisonment. The Appellant complains that in imposing the sentence, the trial Court did not make a finding as to when the nuisance was abated. Such finding would have assisted in computing the fine payable. I do not think that this complaint has any merit. The trial Court stated:-

"….***The nuisance herein remained unabated for a period of 591 days….***"

To my mind this was a definite finding. In arriving at the figure of 591 days, the trial Magistrate must have had in mind when the nuisance was abated. She did not pluck the number from the air. The Court in my view did not arrive at an erroneous calculation therefor.

After the sentence was imposed the trial Court thereafter called for a compliance report which was subsequently availed. Ordinarily the compliance report ought to have preceded the sentence. However I do not see any prejudice that was occasioned to the Appellant.

The Appellant has also pointed out that having passed the sentence, the Court became *functus officio* and should therefore not have released the Appellant on cash bail of Kshs.2,000/= as it waited for compliance report. I note from the proceedings that the Appellant who was represented by Counsel never objected to the Court dealing with the matter any further having passed the sentence.

The Court had an obligation in my view to satisfy itself even after sentencing, that the nuisance had been abated. Finally I do not think the Appellant was in any way prejudiced by the subsequent proceedings.

From the evidence, and charge sheet there were nuisances that were structural. Learned Magistrate appreciated this fact when in her Judgment she stated that smoothening the entire floor, provision of changing room and providing metal grill to cover the drains, repairing cracks in the wall and tiles went to the structure of the premises and which ought to have been dealt with by the owner. The Public Health Act is very clear that anything that is structural in nature is the responsibility of the owner to address. However I note from the proceedings that part of the structural defects alluded to above were addressed by the Appellant. It is not clear the basis upon which the Appellant took up that responsibility. The rhetorical question by he Learned Magistrate is pertinent. She stated:-

"……***These were structural repairs undertaken by the accused, the question would be why they undertook to do so, could it depend on the kind of agreement they entered into if any….***"

Even if the nuisances that were structural in nature were to be ignored, there were still other nuisances that remained unabated. Such nuisances included painting of the walls, re-correction of the dampness on the walls,, provision of enough ventilation in the dark room, unblocking of the toilets, repair of broken cisterns in the toilets, provision of valid inspected fire extinguishers and provision of valid medical certificates for the kitchen medical workers. Indeed upto the time the Court visited the site on 30th August, 2005 there was still signs of leakage, the dampness on the walls had not been corrected, the darkroom was not well ventilated and even the workers at the premises had not obtained medical certificates. So that whichever way one looks at the issue there was still nuisances that ought to have been abated by the Appellant but were not. Even if one excuses the structural defects the Appellant could still have been found guilty on the other nuisances which were not structural in mature and which were its responsibility to abate. This is not a case where the nuisances were severable!

In ground 5 of the Petition of Appeal, the Appellant laments that it was convicted for failure to comply with a Notice, which notice had not been properly served on the Appellant. Having gone through the proceedings, it is quite clear to me that this ground lacks merit. The Appellant was duly served with the Notice on 8th June, 2004. Mr. Nganda an employee of the Appellant received the Notice on its behalf and signed for it. The said Nganda testified in Court as defence witness number 1 and admitted to having received the Notice from PW1. The Appellant during the trial did raise the issue as to whether PW1 was the proper person to issue notices. According to the Appellant Public Health Act gives those powers to **MOH** and not Public Health officer. In addressing the issue the Learned Magistrate delivered herself thus and correctly so in my view:-

"…….***..PW1 a Public Health Officer derives her powers from Section 163 (1) of the Public Health Act. When she served the Notice Exh. 1. It was clearly indicated she did it on behalf of the medical officer of Health. That could not be questioned. She was hence exercising her powers lawfully….***"

I entirely agree with reasoning and conclusion reached by the Learned Magistrate as aforesaid. On the sentence, the Appellant claims that the same was illegal in so far as the Learned Magistrate did not indicate in her Judgment the period that the fine imposed covered. Further the Appellant claims that the Learned Magistrate did not revert to Section 121 of the Public Health Act before imposing the sentence and finally that default sentence was illegal as well. The Learned Magistrate clearly stated that the nuisance had remained unabated for a period of 591 days. Therefore the Magistrate did indicate the period for which the fine covered. Section 121 of the Act requires the Court to consider whether the accused person acted with due diligence in abating the nuisance. According to the Appellant, it acted with due diligence once it was served with the Notice. However and as correctly submitted by the Learned State Counsel, the notice was though served on 8th June, 2004, one year down the line when the Court visited the premises it noted that some nuisance still remained unabated. It cannot therefore be said in the circumstances of the case that the Appellant acted with due diligence. The default sentence cannot by any stretch of imagination be said to be illegal. Counsel stated that the default sentence ought to have been 6 months. He cited no authority for this proposition. I have not come across one either. Section 28 of the Penal Code provides for default sentence. It provides for instance, that where the amount of fine exceeds Kshs.50,000/- the default sentence should be 12 months. The Appellant's case falls within this category. Accordingly, the Learned Magistrate did not err in imposing the default sentence of one year.

In concluding this Judgment and in summary I would say that on the evidence availed by the Prosecution, a nuisance did exist on the Appellant's premises. That the Appellant was duly called upon to abate the same but was unable to do so fully.

I have said enough, I think to show that, the Appellant's Appeal must fail. Accordingly I dismiss the Appeal and uphold both the conviction and sentence imposed.

Dated at Nairobi this 6th day of November, 2006.

……..

MAKHANDIA

JUDGE

Judgment, read, signed and delivered in the presence of:-

Appellant

Mr. Muciimi Mbaka for the Appellant

Court clerk – Eric

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MAKHANDIA

JUDGE