REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA

AT NAIROBI
MISC APPLICATION NO. 1261 OF 2005

BARCLAYS BANK OF KENYA……………………………….……..PLAINTIFF

Versus

CITY COUNCIL OF NAIROBI……………………………………DEFENDANT

JUDGMENT

Before me is the Notice of Motion dated 13th September 2005 seeking orders of Judicial Review. The applicant was granted leave to file this application on 24th August 2005. Filed along with the Chamber Summons for leave was the required notice to the Registrar served on 23rd August 2005, a statutory statement and a verifying affidavit sworn by David Otieno, the property Services Manager of the applicant. The application was expressed to have been brought pursuant to Order 53 R 3(1) Civil Procedure Rules and all other enabling provisions of law.

The orders sought are as follows:

(a) An order of certiorari moving this court for purposes of quashing the charge sheet and all proceedings relating to Criminal Case No. M1509(A)/05 **REPUBLIC V MANAGER BARCLAYS BANK (K) Ltd MARKET BRANCH**

(b) An order of prohibition issued to the respondent or any of its employees or agents from commencing any further criminal or other proceedings against the applicant or any of its employees in relation to the painting or repairing of the building known as Barclays Bank (K) Ltd Market Branch.

(c) An order of mandamus compelling the respondent within 21 days of the Order to issue a refund to Mr. David Otieno on behalf of the applicant the sum of Kshs.90,000/= being the cash bail paid to the City Court by the applicant in Criminal Case No. **M1509(A)/05 REPUBLIC V MANAGER, BARCLAYS BANK (K) LTD, MARKET BRANCH**

The application was opposed and Lucy Kamau, a public Health Officer working in the office of the medical officer of the respondent filed a replying affidavit.

Briefly, the background of the facts giving rise to this case are that on 19th January 2005, Lucy Kamau in company of Grace Waweru and Catherine Kimani from the respondent council visited the applicants' premises, Barclays Bank, Market Branch, and issued the applicant with a notice dated 20th January 2005 requiring the applicant to repair its premises both internally and externally within 21 days of the day of the notice (DO 2). Upon receipt of the notice, the applicants on 21st January 2005, wrote to the respondent indicating that they had recently renovated and painted the building in 2004 and requested for

a joint inspection of the premises with the respondent so that the respondent could pin point the areas that needed painting but the respondent did not respond. On 27th July 2005 the applicant was served with a charge sheet and Summons requiring the manager of the applicant to appear in court to answer charges of failing to repaint a building. The charge sheet was annexed (DO 4). Upon the applicants manager appearing in court, he denied the charge and was released on cash bail of kshs.90,000/= (DO 5).

The applicants were surprised by the notice dated 20th January 2005 because they had repainted the building in 2004. A copy of instructions to the contractors and a final account of the quantity surveyor confirming completion of work were annexed (DO 1).

It is the applicants contention that in failing to respond to the applicants letter of 21st January 2005, the respondents were in breach of rules of natural justice: that in charging the applicants manager, the respondent acted capriciously; that the nuisance allegedly committed by the applicant is not dangerous or injurious to life or health and does not therefore fall under provisions of Section 118 of the Public Health Act.

The applicant also alleges that the respondent is acting in excess of its jurisdiction and lastly that the City Council of Nairobi has no jurisdiction to prosecute any offence.

The respondent did admit having visited the applicants premises on 19th January 2005, found the premises in a bad state of repair in that it was very dirty and needed painting. The officers issued a 21 day notice. On 21st January 2005, the applicants wrote to them and that the respondent responded by sending their representatives one Wamae and Grace Waweru and a representative of the applicant inspected the premises and agreed that they should be repainted.

The deponent went back to the premises on 2nd February 2005 but the premises were not painted and Grace Waweru recorded a statement to that effect (LK 1) and the respondent decided to charge the applicant. It is denied that the premises were recently painted. The respondent urged that the charges against the applicant were properly preferred.

I have now considered the skeleton submissions by applicants counsel, submissions made in court and authorities cited. The issues that arise are as follows:

1) Whether the provisions of law under which the applicant was charged disclose any offence;

2) Whether the respondent denied the applicants their right to be heard and therefore breached rules of natural justice

3) Whether the respondent acted maliciously and capriciously in taking too long to charge the applicants.

4) Did Lucy Kamau have capacity to serve notice on the applicants?

5) Can the court grant the orders sought?

The charge which the applicant faced states as follows:

“Failing to comply with a notice contrary to Section 115 as read with Section 118 and 119 and punishable under Sections 120 and 121 of the Public Health Act Cap 242 (LOK) and as contained in the statute law (Miscellaneous Amendments) Act No. 2 of 2002”

The particulars of the charge are that the applicant failed to repaint the premises operating as a bank both internally and externally. Section 115 which prohibits nuisances provides as follows

“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 incharge any nuisance or other condition liable to be injurious or dangerous to health."

Section 118 of the same Act sets out what constitutes a nuisance.

Section 118 1 (l) and (s) under which the applicant is charged provide as follows:

(1) Any public or other building which is so situated, constructed, used or kept as to be unsafe, or injurious or dangerous to health

(2) Any act, omission or thing which is, or may be, dangerous to life or injurious to health.

For the above offences to be proved, the following ingredients must exist, the premises have to be unsafe; dangerous to health; dangerous to life or injurious to health. The offence the applicant committed is failing to repaint the premises. Failing to repaint premises cannot be unsafe, injurious to health or to life or injurious to health. The charge as framed does not disclose any offence. If there is an offence as failing to redecorate, may be that would have been the correct charge to prefer against the applicant. Besides there is not a shred of evidence contained in Lucy Kamau's affidavit showing the nature of the nuisance or what injury or danger it posed to the public. The specific areas that needed repainting were not pointed out. I therefore hold that the charge which the applicant faced was fatally defective and the charge does not disclose any offence known under Section 115 and 118 of the Public Health Act.

The 21 day notice requiring the applicants to repaint the premises is dated 19th January 2005, issued by Grace Waweru, Lucy Kimani and Catherine Kimani. Lucy Kamau claims to be a Public Health Officer working in the office of the Medical Officer of the respondent. It is Mr. Gichuhi's submission that only a medical officer has the capacity and authority to issue notices of nuisances and file complaints with the magistrate.

This authority is conferred to the medical officer by Section 119 of the Public Health Act. Under that 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 to that nuisance to be made before a magistrate. S. 167 then goes on to provide that a health authority may specifically authorize any of its officers in writing to prosecute any offence. The notice to the applicant was issued by Lucy Kamau and 2 others.

Though Lucy Kamau depones that she was authorized by the medical officer, no authority in writing has been shown to the court. The deponent did not even show on the notice that they acted on behalf of the medical officer. The respondent has failed to demonstrate that the officer who started these proceedings was an authorized officer as per the law and I do hold that the officer acted utra vires her powers.

It is common ground that the applicant did write to the respondent on 21st January 2005 seeking to be shown the specific areas that needed repainting since they had just repainted the building in 2004.

The respondent does admit having received the applicants letter of 21st January 2005. Lucy Kamau depones that some of the respondent's officers went to the Bank and in company of the applicant's officer and it was decided the whole premises had to be painted. None of the officers who allegedly went to the applicants premises swore any affidavit to that effect.

Lucy Kamau depones to the premises having been visited for an inspection and names the people who went to inspect. She was not one of them. Her deposition is total hearsay. The one who allegedly went and purported to write a statement to that, did not swear any affidavit and in the report she does not state when they visited the applicant's premises following the request of 21st January 2005 or who they were with. There is no written report about the visit. There is totally no evidence of the respondents officers having gone to inspect the applicants premises as requested. When the respondent preferred charges against the applicants, the applicants had not been given a chance to explain their side of the events or

story. Mr. Gichuhi submits that they were condemned unheard.

Mr. Gichuhi, counsel for the applicants cited several authorities in support of his submission that the applicants were condemned unheard even after requesting to be heard.

1. In the case of REPUBLIC V KIGARA 1998 KLR 819 in which the court heard evidence of a Public Health Officer and a Landlord of some premises and found them to be unfit for human habitation. The tenants affected challenged that decision as they had not been given a chance to be heard. The court held that the fact that there was no express provision in the Public Health Act empowering the court to hear the tenants, did not mean that the court was divested of or denied jurisdiction to hear them on rules of natural justice and that rules of natural justice are inherent in all proceedings be they judicial or administrative unless there is an express provision barring the hearing of any interested party.

2. In the case of ONYANGO V ATTORNEY GENERAL (1987) KLR 711, the Commissioner of Prisons purported to deprive the appellant of his right of remission. He challenged that decision and the court held that the commissioner could not be seen to have acted fairly without giving an inmate an opportunity to be heard before imposing a loss of liberty sanction and that the principle of natural justice applied where ordinary people would reasonably expect decision makers to act fairly. Other cases cited were

3. PUBLIC PROCUREMENT COMPLAINTS REVIEW AND APPEALS BOARD V PHILIP MEDICAL SYSTEM NETHERLAND 122/02.

4. NYONGESA V EGERTON UNIVERSITY 1990 KLR 693.

The sum of these decisions is that the right to be heard is a cardinal principle of natural justice. In the instant case the applicants contention is that they had just repainted the premises in 2004 and were surprised at the notice given in January 2005 and therefore requested for audience.

The respondents did not give them that opportunity but instead kept quiet for a while then preferred charges. I hold that the respondents were in breach of that cardinal rule of natural justice that one should not be condemned unheard and this matter would squarely fall under the purview of Judicial Review.

When the respondent failed to respond to the applicants request for a joint inspection of the premises on 21st January 2005, the notice of 21 days issued to applicants on 20th January 2005 then lapsed. The respondent's officer then visited the applicants premises on 2nd March 2005 and confirmed that the notice to repaint had not been complied with. The respondent did not take any steps towards filing a complaint against the applicants till 27th July 2005, about 4 months later. It is the applicants submission that the delay to charge the applicant is malicious in that it is meant to harass the applicant because the applicant will be called upon to pay over Kshs.200,000/= if found guilty when they could have paid less had they been charged soon after the notice period lapsed.

S. 121 of the Public Health Act provides for payment of Kshs.1,500/= for every day during which the default continues. It means that the applicant would be condemned to pay 1,500/= to date from the date the notice lapsed sometime in early February 2005. No reason has been given as to why the delay from February when the notice lapsed to July when the complaint was filed. I am persuaded to believe that the delay in charging the application is malicious and capricious and meant to get as much money as possible from the applicant in the form of fine in the event of a conviction. I hold that the said decision can be subject to Judicial Review.

Can the orders prayed for be granted by this court?

The applicant has ably demonstrated that the offence with which the applicant was charged is non existent and the charge is therefore incompetent and fatally defective; the Respondent denied the applicants their right to be heard, thus breaching rules of natural justice; the charge was preferred by an unauthorized officer who acted in excess of her powers and the Respondent acted maliciously by delaying in charging

the applicants. The charge sheet and proceedings in case No. 1509(A)/05 are amenable to being quashed and I hereby order them quashed by order of certiorari. I wish to note here that since proceedings of the court are sought to be quashed the court should have been joined as a respondent to these proceedings.

The 2nd prayer is for an order of prohibition seeking to prohibit the respondent and their agents from commencing further criminal or other proceedings against the applicant in relation to the painting or repairing of the building known as Barclays Bank K Ltd Market Branch. I find that this prayer is too general. The applicant could only seek this prayer as it relates to the notice of 21st January 2005. Otherwise the respondent has the right to charge the applicant if the premises is found to be wanting in repairs. As to painting, if there is a proper section under which one can be charged for failing to paint, and if the applicant has failed to do so, this court cannot prohibit the respondent from exercising its rights.

That order cannot issue.

The applicant also seeks an order of mandamus compelling the City Court to refund a sum of Kshs.90,000/= being cash bail paid in the said case by the official of the applicant.

As clearly indicated on the receipt issued to the applicant, the Cash Bail was paid to the magistrate’s court by the respondent. The magistrates court is not a party to this case. No order can be directed against that court. In any event such an order would be made in vain because once the charge sheet and proceedings are quashed, the cash bail should be automatically released to the applicant.

An order of mandamus cannot issue.

Each party bears its own costs.

Dated and delivered this 17th day of March 2005.

R.P.V. WENDO

JUDGE

Read in the presence of

Mr. Gichuhi for applicant

Mr. Mburu for respondent

Court Clerk: Ojijo