REPUBLIC OF KENYA
IN THE HIGH COURT OF KENYA AT KISII

Misc Civ Appli 226 of 2004

IN THE MATTER OF: AN APPLICATION BY WILSON JACK MAGETO, MOGUMO TEA COMPANY LIMITED, JOSEPH MENGE OTUNDO, DINESH SHAH, MAURINE OKONGO, DORCAS GESICHE, HANIFA VISRAM, DR. SAIDA, GUSII GLASS MART RENOVATORS, MR. BABU, HAZIZ BHANJI and CHARLES MORAGWA FOR JUDICIAL REVIEW

IN THE NATURE OF CERTIORARI AND PROHIBITION

AND

IN THE MATTER OF: PUBLIC HEALTH ACT, CHAPTER 242, LAWS OF KENYA

AND

IN THE MATTER OF: LANDLORD AND TENANT, (SHOPS, HOTELS AND CATERING ESTABLISHMENTS ACT)

AND

IN THE MATTER OF: CLOSURE OF PREMISES ON LR NO. KISII TOWN/BLOCK III/128

BETWEEN

REPUBLIC …….....…… APPLICANT

VERSUS

DISTRICT PUBLIC HEALTH OFFICER, KISII …….. 1ST RESPONDENT

RISPER KERUBO ONSARE ……..……. 2ND RESPONDENT

AND

WILSON JACK MAGETO

MOGUMO TEA COMPANY LIMITED

JOSEPH MENGE OTUNDO

DINESH SHAH

MAURINE OKONGO

DORCAS GESICHE

HANIFA VISRAM

DR. SAID

GUSII GLASS MART RENOVATORS

MR. BABU

HAZIZ BHANJI

CHARLES MORAGWA ……..... EX-PARTE APPLICANTS

RULING:

By a motion filed on 13th January 2005 the Ten Ex parte applicants seeks for the following orders:

1. Hon. Court be pleased to issue an order of Judicial Review in the nature of certiorari to remove unto this court and quash the decision of the District Public Health Officer Central Kisii District vide letter reference No.2258/2003/2 dated 6th December 2004 directing the closure of the premises situate on LR NO. KISII TOWN BLOCK III/128 thereby terminating the controlled tenancies of the Ex-parte Applicants therein without complying with the provisions of S.4 of the Landlord and Tenant (Shops, Hotels and Catering establishments) Act.

2. The Hon. Court do issue order of prohibition, prohibiting the respondents from closing premises situate on L.R NO. KISII TOWN/BLOCK III/128 and/or in any manner whatsoever and/or however terminating the controlled tenancies of Ex-parte applicants, without complying with the Law.

3. Hon. Court be at liberty to issue such further and/or orders as the court may deem expedient.

4. Costs of application be borne by the Respondent.

The application is supported by a supporting affidavit sworn by one JOSEPH MENGE OTUNDO who is the 3rd Ex-parte applicant on behalf of all the other applicants. The 1st Respondent is the District Public Health Officer Kisii and the 2nd Respondent one RISPER KERUBO ONSARE.

Risper Kerubo Onsare (the 2nd Respondent) is the owner of premises situated on LR NO. KISII TOWN/BLOCK III/128. All the ten exparte applicants are her tenants on that premises. In October 2003 the first respondent caused the 2nd respondent to be charged before Chief Magistrate's court Kisii in Kisii CMCCR No.2258 of 2003 complaining of various nuisance in the said building. The 2nd respondent pleaded guilty to all the four charges. She was ordered to carry out renovations in the building. She did not do so and on 3rd November 2003 the court ordered the premises closed. It seems thereafter no action was taken until 6th December 2004 when the District Public Health Officer Kisii wrote to the 2nd Respondent ordering her to close down the premise within 21 days.

On 14th December 2004 the 2nd Respondent through her lawyer wrote to all the tenants giving them one month to move out of the premises. Those notices are what prompted the present application.

Mr. Ogutu for the ex parte applicants submitted that the letter of 6th December 2004 issued by one Thomas Nyangau on behalf of District Public Health Officer was issued without authority or jurisdiction.

S.120 of Public Health Act only mandates the Medical Officer of Health to issue such notices and not the District Public Health Officer. Thus the notice by the 1st Respondent was not by Medical Officer of Health. He submitted that the 1st Respondent colluded with the 2nd Respondent in issuing the notice. Also the 1st Respondent had no powers to implement any court order issued under s.1210 of the Act. He acted ultra vires. The other issue was that the ex parte applicants were controlled tenants in the premises. Their relationship with the 2nd Respondent is governed by the provisions of Cap 301 Laws of Kenya. That Act provides the manner in which a controlled tenancy can be terminated. It was submitted that the 2nd Respondent is colluding with 1st Respondent to defeat the controlled tenancies using provisions of the Public Health Act. Provisions of Cap 301 takes precedence over Cap 242 laws of Kenya, it was submitted.

Another issue raised was that the 2nd Respondent had continued receiving rent even after the closing order was made contrary to s.120 Cap 242. Applicants also raised the issue that the affidavit in reply by one Thomas Nyangau on behalf of the 1st Respondent was not dated and did not have an endorsement of the person who drew and filed it contrary to s. 34 & 35 of the Advocates Act. Another issue raised was that the 1st and 2nd Respondent kept the applicants in the dark about what was going on, yet they knew any decision will affect their rights as tenants to the premises. They would be forced to close their business. They were not afforded a hearing which is contrary to the rules of natural justice.

Mr. Kemo for the 1st Respondent stated that it is not only the Medical Officer of Health who is empowered to take actions. He referred court to s.9 of Cap 242 which gives the Administrative structures of the office of director of medical services. The section provides that other officers can be appointed to enforce the provisions of the Act. The District Public Health Officer is a department in the office of the District Medical Officer of Health. It has officers who enforce the Act. The District Public Health Officer therefore did not abuse his office when he issued the Notice of 6th December 2004. The Notice was issued to the 2nd Respondent as the owner of the premises and the author of the nuisance which posed a health hazard. It was not an attempt to terminate controlled tenancy. Further 1st Respondent was only implementing court order made on 3/11/03. That order still stands.

Mr. Momanyi for the 2nd Respondent fist took issue with the heading of the application and submitted that it was wrong for 2nd Respondent to be named as a Respondent. An individual should not be made a respondent for he/she has not made any decision which ought to be quashed. She should have been named as an interested party. Further it was submitted that there was no order from the Public Health Officer. What there is the letter dated 6th December 2004 reminding her of the court's order made on 3rd November 2003 ordering the premises to be closed. 2nd respondent had been charged in court and ordered to do renovations. When she failed to do so the court ordered the premises closed. The applicants refused to allow her do the renovations. On receiving the letter dated 6th December 2004 the 2nd applicant gave notices to the applicants. She also gave them copies of the court's order. The court order still stands. Applicants cannot stop implementation of the court order. The order had been in force for over one year. The lower court is not enjoined as a party so that its orders can be quashed. The letter to 2nd respondent was only a reminder of the court's order. Further it is stated that there was no authority from the other applicants to the 3rd to swear the supporting affidavit. Also the original ex parte applicants motion was not served and new grounds were introduced.

Mr. Momanyi also submitted that there is no termination of tenancy intended. What there is the issue of renovation of the premises. The notice from second respondent is not to terminate or evict the applicants. Provisions of Cap 301 Laws of Kenya are therefore irrelevant. 1st respondent also stated that her accepting of the rent was on "without prejudice basis." The building had not been condemned for destruction.

As stated the applicants prayers are for certiorari to quash the order of the 1st respondent dated 6th December 2004 and prohibition to prohibit the two respondents from closing the premises in dispute or terminating the controlled tenancy. In the case of Kenya National Examination council –vs- Republic C.A Civil appeal No.266 of 1996 the Court of Appeal took time and clearly explained the orders of CERTIORARI PRHIBITION and MANDAMUS and in what circumstances they can be issued. The applicants' quarrel is with the order issued on 6th December 2004 and the authority of the person issuing

it. Respondents' position was that there was no order issued on 6th December but only a letter to remind the 2nd respondent about the court's order. 1st respondent was only implementing court's order made on 3rd November 2003. There is no dispute that the court on 3/11/03 did issue an order to close the premises. There was no evidence that the said order was rescinded or set aside. It still stands. However the letter of 6th December 2004 is quite telling. The writer starts by telling the 2nd respondent:

> **" Under the powers conferred on me under s.120 of the Public Health Act Cap 242 Laws of Kenya and the court order issued on 3/11/03 and which you are aware of you are now ordered to ensure that ……"**

The writer clearly states he is using powers donated to him by s.120 Cap. 242, to order the respondent close the premises. He of course informs her of the court order but it is clear that first and foremost he was ordering her to close the premises by the powers conferred to him by the Act in addition to the court's order. This is a decision he took and that is what the applicants are attacking. He did not say that he was specifically implementing the court's order of 3rd November 2003. One notes that he issued the said order one year and one month after the court had made the order to close down the premises. For one year he did not act on the court's order. He only refers to that order in the Notice he issued on 6th December 2004. It is clear from the wording that he had made a decision under the provisions of s.120 Cap 242. That Notice was not just a mere letter to remind the 1st respondent of the court's order but a communication of a decision made. The applicants were therefore in order to seek relief of certiorari.

Having found that the 1st respondent made a decision the other issue is the powers and authority of the 1st respondent to make such decision.

I concur with counsel for the applicants that s.120 and indeed the whole of Cap 242 does not mandate the District Public Health Officer to make such a decision. S.119 and 120 of Cap 242 talks of the Medical Officer of Health. Section 2 of the Act clearly defines a Medical Officer of Health to mean:

> (a) the Director of Medical Services; and
>
> (b) in relationship 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 the area.

Section 9 of the Act talks of appointment and duties of officers in relation to the Act. It states in sub(1)

> **There shall from time to time be appointed director of Medical services, a Deputy Director of Medical services, Ass. Directors of Medical services, Medical officers of health, Ass. Medical officers of health, Medical officers, Pathologists, Health inspectors, Port health officers and such other officers as may be deemed necessary.**

There is no mention of Public Health Officers though it is common knowledge that there are such officers in the field. I believe they must be the "such other officers as may be deemed necessary" as stated in that section. 1st respondent however did not show such appointment was made in his respect. In any case s. 199 and 120 Cap 242 are very clear as to the officer who has mandate to take actions. It is the Medical Officer of Health. Indeed there are many officers under him and I believe the Public Health Officer is one of them. However if such an officer has to take action it would be on behalf of the Medical Officer of Health and this must be clearly shown. In the Notice of 6th December 2004 the writer is one Thomas Nyangau for the District Public Health Officer and not for Medical Officer of Health. Clearly he had no powers or authority to issue the order.

Even if the said officer had powers to issue the order s.120 Cap 242 does not confer any powers on him to order for closure of a premises as he stated in his Notice. Sub section one of that section only empowers him to cause a complaint to be made before a magistrate. After that it is only the court can order the closure of the premises. True in 2003 he had caused a complaint to be made before the court but as I said

earlier his Notice was clearly not referring to that. He clearly states that he is acting under the powers conferred unto him by s.120 Cap 242. There are no powers conferred to him under that section to order closure of a premise. He was not even implementing the court's order of 3/11/03 as there are no provisions under that section for him to implement a courts order. If the courts order were disobeyed he should have brought that fact to the attention of the court for necessary action. The court would know how to deal with a person not complying with its orders. On that score the application will succeed. There was the issue that the order was made contrary to the rules of natural justice. The 1st respondent knew that there were tenants who were occupying the premises. It is obvious they were the people who were more affected by the order of closure than the 1st respondent. They had to close their business. They stated that they were not at all aware of the dealings between the two respondents until they received the notices dated 14th December 2004 from the 2nd respondent. 2nd respondent admitted that he sent the courts order to them together with those notices. There was no evidence that they were aware that the premises were due for closure for any nuisance.

The 2nd respondent did not exhibit any letter to them informing them of any order to close the premises. In short they were being asked to close their business before they were heard. This amounted to depriving them their right and as was held in the case of DAVID OLOO ONYANGO –VS- A.G. civil Appeal No.152 of 1986 (C.A) that is a violation of the rules of natural justice. They were the occupiers of the premises and they were entitled to notice as much as the 1st respondent. They have stated that they have been in occupation of the premises some from 1972. Infact they could have been said to be the authors of any nuisance in the building and as such the notice to remove the same should have been directed to them. The 2nd respondent had nothing to lose as she continued receiving rent from the applicants. As it were they were condemned unheard. They were not even informed of the criminal case against the 1st respondent and the subsequent order. No wonder then they feel that there is a collusion between the two respondent to have them vacate the premises. This feeling is more fired by the fact that at one time the 1st respondent had tried to terminate their tenancies but failed to do so after an order of the Business Premises Tribunal. To close the buildings means their moving out. There was no guarantee that they will be allowed back after renovations and even if so after how long. Natural justice demands that they should have been given a hearing before an action affecting their livelihood was made. This is therefore a proper case for the remedy of certiorari. Mr. Momanyi raised the issue that the heading of the application was not proper. The application properly shows that the state is the applicant and not the respondent. However the joinder of the 2nd respondent as a respondent and not an interested party was not proper. The orders of certiorari and prohibition can only be issued against a public body or tribunal. The first respondent is such a person and was therefore properly cited. The 2nd respondent however is not. An order of certiorari cannot issue against her as she cannot make any decision which would need to be quashed. Equally an order of prohibition cannot issue against her for prohibition is issued against a public body or tribunal which intends to make a decision which is contrary to rules of natural justice.

Prohibition cannot be issued against an individual as the law provides for other remedies. If the 2nd respondent intends to evict and terminate controlled tenancies as the applicants fears there are ways for them to go to court of tribunal and stop her. They cannot come to court against her for judicial review. As submitted by Mr. Momanyi she should have been cited as an interested party and not the 2nd respondent even if the applicants felt that she was colluding with the 1st respondent.

The misjoinder alone however does not make the application defective as far as it relates to the 1st respondent. Court has stated that 1st respondent has trampled on the rights of the applicants without following the rules of natural justice. The 2nd respondent did not make any decision to be complained of in this application. I therefore dismiss the application as far as the 2nd respondent is concerned with costs to her.

I however allow the application in respect of the first respondent and quash the order issued by him on 6th December 2004. He is further prohibited from closing premises on L.R. NO. KISII MUNICIPALITY BLOCK III/128 on the strength of the order issued on 6th December 2004 without affording the applicants a hearing. The 1st respondent will pay the costs of this application.

Dated 19th May 2005.

KABURU **BAUNI**
JUDGE.

Cc Mobisa

Mr. Gichaba for 2nd respondent

N/a for 1st respondent

Mr. Ogutu for the applicants