REPUBLIC OF KENYA
IN THE HIGH COURT OF KENYA
AT NAIROBI
MISC CRIMINAL APPLICATION NO 162 OF 2005

ATHENACIUS KILONZO……..APPLICANT

VERSUS

REPUBLIC……RESPONDENT

ORDER ON REVISION

This is an application which has been instituted by way of an Originating Summons under the provisions of Sections 362 and 364(1)(b) of the Criminal Procedure Code.

The applicant was asking for Revision of the record of the proceedings in Criminal Case No. 934 of 2004, before the City Magistrates' Court, Nairobi. In particular, the following two prayers are significant, as I will explain shortly:

> **"4. THAT the Ruling and/or Order of the magistrate at the city court Magistrate delivered on or about 8th march 2005 be altered to the effort effect that the city Council of Nairobi shall not demolish the structures on LR NO., 209/4399 of Kengeles, for as long as a valid licence is in place issued by the City Council of Nairobi.**
>
> **5. THAT this Honourable Court be pleased to order that pending the hearing and determination of this application, an interim order do issue restraining the respondent, the city Council of Nairobi, its officers, servants, workmen, employees and/or any other person acting or purporting to act for and on behalf of the city council of Nairobi, from pulling down, demolishing, removing or interfering in any manner whatsoever with the structures currently situate on L.R No. 209/4399 belonging to Kengeles."**

Before delving into the substance of the application, it is important to understand the background to it. First, the applicant, **ATHANACIUS KILONZO,** is a manager **of KENGELES HOLDINGS LIMITED**, who the licenceholders and occupants of the property in issue. On 20.12.04, the applicant was served with a Notice to Attend Court, to answer to 2 charges of encroachment onto Koinange street, and having a branded canvas without a licence, and also without paying the requisite fees. The said charges were said to have arisen following a violation of the City Council of Nairobi Planning Regulations and By-laws.

The record of the proceedings shows that the applicant first appeared before the court on 21.12.2004. On that occasion, his plea was differed to 10.1.2005, whilst he was granted a cash bail of Kshs 2,500/=.

On 10.1.05, the applicant's advocate submitted that the charge sheet was totally defective, for the reason that the applicant was just but a manager at Kengeles Holdings Limited, who were tenants at the premises in issue. At that point in time, it was the turn of the prosecution to seek an adjournment, as they needed to give consideration to the applicant's objections. The court granted the adjournment, and

allowed the prosecution some two days.

When the case resumed on 10.1.05, the prosecutor, Mr. Nyaga responded to the objection. He opposed the objection, on the grounds that the By-laws (in particular, By law No. 231(2) of the Local Government adopted By-Laws Building Order 1968) made it possible for the local authority to prefer charges against the occupier, as opposed to the owner of the premises, which are said to have breached the law.

In a well considered Ruling, the trial court held that the applicant herein was a principal officer of the occupier of the premises. The applicant was the manager of the establishment. In the circumstances, the trial court overruled the objection raised by the applicant, and directed him to enter a plea to the charges.

The applicant then entered a plea of "guilty". He was therefore convicted on his own plea of guilty, and then sentenced to a fine of Kshs 40,000/=, in default of which he was to be imprisoned for two months.

Following the conviction and sentencing of the applicant, the prosecutor made an application to the court. By his said application, the prosecutor sought authorization to demolish the structures which encroached upon the pavement.

That application was opposed by the applicant, because in his view, the City Council of Nairobi was obliged to give a Notice of 90 days, requiring the applicant to restore the premises to its original condition. The applicant pointed out to the court that it had obtained approval for the its plans for the encroachment, and also had been licenced to carry out the said encroachment. Indeed, the applicant had paid a sum of Kshs 114,000/= to the City Council of Nairobi for the licence. After giving due consideration to the application, the court observed that the applicant had provided proof that he had been licenced for the encroachment. The proof was in the form of a receipt issued by the City Council of Nairobi, for a sum of Kshs 114,000/=. The receipt was dated 17th February 2005, and was for a period expiring on 31.3.05. In the light of the said proof, the learned trial magistrate held as follows:

> ***"Its my considered opinion that the encroachment has been paid for, the same expires on 31.3.05. I shall therefore decline to grant the orders for demolition. However the Council shall be at liberty to demolish the same on the expiry of the licence."***

Following the issuance of that order, the applicant moved this court for an order of revision. It is his contention that the learned trial magistrate erred by holding that the Council could demolish the structures after the expiry of the licence. As far as the applicant is concerned, the most that the court could have done was to have said that the Council could remove the structures encroaching on the pavement if the applicant did not have a licence.

As it is , the Council apparently moved onto the premises, demolished the structures, and carted away some furniture, flower pots and vases. In the process of the demolition, some of the furniture and other items were damaged or destroyed altogether.

The question that arises now is whether or not the learned trial Magistrate's order ought to be revised. Mr. Wambugu, advocate for the Council, submitted that by virture of section 30(3) of the Physical Planning Act 1996, once an offence had been committed, anything in connection with any development in respect of which the offence is committed under that section, would be null and void, and such development shall be discontinued. In his considered opinion, as soon as the applicant pleaded guilty to the charge, the encroachment was to have been discontinued forthwith.

If that be correct, I must ask myself why it was necessary for prosecutor to ask the trial court for the consequential order, for the demolition of the structures. Clearly, if the position in law was so very obvious, the Council did not need to make any application to the court, because, by operation of the law, the applicant's development would have had to be discontinued forthwith, automatically.

Both parties to this application have also addressed this court on the issue of a licence which the

Council issued subsequent to the orders of the learned trial magistrate. Apparently, the applicant sought and obtained a further licence for the encroachment. But the Council rekons that the said licence is of a doubtful integrity. For that reason, the Council has revoked the said licence.

To my mind, if one contends that a licence purportedly issued by it is not valid, he would have no reason to revoke it, as the licence would not have been valid in the first instance. Therefore, if the Council was taking steps to revoke the current licence, it must be deemed to have acknowledged its validity. But that notwithstanding I find that the issues pertaining to the subsequent licence have no application to the issue of Revision. I say so because it would be improper for this court to say whether or not the orders made by the trial court ought to be revised on the basis of matters which occurred subsequent to the orders that I am being asked to revise. If I were to make my decision on the basis of facts which came into being after the trial court had dealt with the case, that would be improper.

Secondly, during the hearing of this application, the parties did let me know that there are some civil proceedings which are going on, parallel to this case. In the said civil case, the applicant has sought and obtained an interim injunction to restrain the Council from demolishing the structures in question. As far as I am concerned, the fact there are other proceedings going on parallel to this case is a perfect recipe for utmost confusion. I say so because it is conceivable that this court may well arrive at a decision that was at variance with the court which was handling the civil proceedings. Such variations would not necessarily be due to the two courts having a different understanding of the law. It may well be simply because the standard of proof applicable to civil cases was on a "balance of probability", whereas in criminal cases the prosecution was required to prove its case "beyond all reasonable doubt."

For that reason, I must emphasize the importance of parties making a choice as to which court they should be appearing before, if the issues before the two counts were so inter-linked that the decision in one matter would definitely have an impact on the other. When so saying, I am conscious of the fact that the existence of a criminal case is not a bar to civil proceedings, and vice versa. But nonetheless the courts must strive to avoid a scenario wherein its two arms may make inconsistent or contradictory orders, touching on the same subject matter. For that reason, it may be necessary for one set of proceedings to be stayed, so as to do away with the possibility of there being conflicting decisions.

Reverting now to the matter in issue, I must state whether or not the learned trial magistrate was wrong to have issued the order being challenged. In principle, having rejected the application for authority to demolish the offending structures, there was nothing wrong in the court stating that after the licence lapsed, the Council could, if it so wished, take steps to demolish the said structures. That order is not inconsistent with the decision by the learned trial Magistrate to dismiss the Council's request for permission for demolition.

Having said so, however, I find that there is a more fundamental problem. The said problem emanates from the express finding of fact that as at the time when the applicant was convicted, the Council had issued Kengeles Holdings limited with a licence for encroachment on the pavement. The trial court had the opportunity to see the original licence, in court. It is for that reason that the court declined the Council's request for demolition. That being the case, it would imply that the conviction of the applicant cannot stand.

He was charged with the following offences:

> ***"1. Unauthorized encroachment onto Koinange Street, entailing about (3 x 19) m², amounting to shs 684,000/= outdoor Licence fee.***
>
> ***2. Branded canvas without city Council Licence amounting to shs 19,200/= Advert Fees, contrary to the City Council of Nairobi Planning Regulations and By-laws."***

The trial court verified that the applicant was licenced. In my understanding, therefore, the applicant ought not to have been convicted for encroachment, whilst the Council had issued a licence for the encroachment, after receiving due payment for the same.

In the circumstances, although this court has not been asked to do so, I nonetheless hold that it is in the interest of justice to interfere with the verdict and the sentence. Accordingly, I do now quash the applicant's conviction and set aside the sentence. If he did pay the fine, it should be refunded to him.

But even as I arrive at the conclusion, I deem it necessary to emphasize that this decision is not in itself a reflection of the ability of the learned trial Magistrate. I say so, because at the time when the trial court convicted the applicant, the latter had pleaded guilty. Also, the court had not had the opportunity to peruse the licence.

Therefore, the court did not have any reason to doubt the efficacy of the applicant's plea. Thereafter, the applicant mitigated before he was sentenced. However, even at that stage, he did not tell the trial court about the licence. It was not until after the Council applied for permission to demolish the structures that the applicant told the learned trial Magistrate that the Council had licenced the structures encroaching onto the pavement.

At that point in time, the learned trial Magistrate could not re-visit his earlier orders. The only recourse available to the parties, at that stage was either to appeal or alternatively to seek revision.

The applicant sought revision, and having considered it I have decided to issue the following orders, in that regard;

1. The applicant's conviction is quashed and the sentence set aise.

2. If the applicant did pay the fines imposed by the learned trial Magistrate, the money should be paid back to him.

3. The learned trial magistrate was not wrong to have allowed the Council to demolish the structures, as and when the licence, which was then in force, lapsed.

4. The validity of the current licence was not in issue before the learned trial Magistrate, and therefore cannot form part of this decision.

5. This decision cannot alter the position in relation to the civil proceedings.

Those are the orders I make.

Dated at Nairobi this 9th day of May, 2005

FRED A. OCHIENG

JUDGE

Delivered in the presence of For the State

For the Applicant

Mr. Odero court clerk