



Republic v Senior Principal Magistrate’s Court, Eldoret; County Government of Uasin Gishu & 2 others (Interested Parties); Eldoret Market Traders Association (Exparte Applicant) (Judicial Review 6 of 2023) [2024] KEHC 3497 (KLR) (12 April 2024) (Ruling)

Neutral citation: [2024] KEHC 3497 (KLR)

**REPUBLIC OF KENYA
IN THE HIGH COURT AT ELDORET
JUDICIAL REVIEW 6 OF 2023**

JRA WANANDA, J

APRIL 12, 2024

**IN THE MATTER OF AN APPLICATION FOR JUDICIAL REVIEW ORDERS OF
CERTIORARI AND PROHIBITION AND IN THE
MATTER OF THE PUBLIC HEALTH ACT, CAP. 242**

BETWEEN

REPUBLIC APPLICANT

AND

**THE SENIOR PRINCIPAL MAGISTRATE’S COURT,
ELDORET RESPONDENT**

AND

**COUNTY GOVERNMENT OF UASIN GISHU INTERESTED PARTY
PUBLIC HEALTH OFFICER, UASIN GISHU COUNTY INTERESTED PARTY
CHIEF OFFICER, TRADE & INDUSTRIALIZATION, UASIN GISHU
COUNTY INTERESTED PARTY**

AND

ELDORET MARKET TRADERS ASSOCIATION EXPARTE APPLICANT

RULING

1. By the Notice of Motion dated 24/07/2023 filed through Messrs Mutai Oduor & Co. Advocates, the ex parte Applicant seeks the following orders:
 - i. Certiorari to bring forth to this Honourable Court, for the purposes of their being quashed:



- a. The statutory notice dated 4th November 2022 issued by the 2nd Interested Party purportedly under Section 118 of the [Public Health Act](#);
 - b. The complaint laid before together with any Summons issued by the Principal Magistrate, Eldoret in Criminal Case No. E1019 of 2022;
 - c. Proceedings had, and/or orders issued, and/or decision made, on 24th November 2022, and extended on 23rd December 2022 or at any time subsequent thereto, by the Senior Principal Magistrate, Eldoret, in Criminal Case No. E1019 of 2022 without notice or participation of the ex parte Applicant.
- ii. Prohibition to bar the Senior Principal Magistrate and/or any other subordinate Court from entertaining proceedings, or hearing, and/or issuing orders in Criminal Case No. E1019 of 2022 without notice and participation of the ex parte Applicant.
2. The Application is supported by the Affidavit sworn by one Peter Wainaina who described himself as the Organising Secretary of the ex parte Applicant. He deponed that he carries on the business of selling fruits, vegetables and other agricultural produce in Eldoret Champions Market and that he regularly pays for his licence, that members of the ex parte Applicant numbering over 600 also trade in similar business within the said Champions Market and Sixty Four Market both located within Eldoret Town, that the said members are regular traders within the meaning of the Uasin Gishu County Trade and Markets Act, 2022 who were allocated stalls and spaces within the said two Markets having complied with all the requirements, that on 18/11/2022, the 1st Interested Party announced abrupt closure of the two Markets, that the reasons given for the closure was an incident of insecurity that was precipitated by skirmishes between officers of the 1st Interested Party and a horde of handcart fruit vendors, and that following that closure, the 1st Interested Party declared an immediate relocation of all traders to Kimumu and Kahoya Markets on the outskirts of Eldoret Town.
 3. The deponent stated further that the members challenged the closure of the 2 markets and relocation of traders by filing Eldoret ELC Petition No. 006 of 2022 since it was clear to them that the 1st Interested Party had violated the law by abruptly, and without notice, closing the markets, that the 1st Interested Party served the ex parte Applicant's Advocates with a Replying Affidavit which contained statements that the deponent had never heard of, and documents that he had never seen before, that in particular, the deponent became aware, for the first time that certain criminal proceedings were undertaken in Eldoret Criminal Case No. E1019 of 2022 in which the 3rd Interested Party was arraigned before Court for failure to comply with a notice purporting to have been issued under Section 118 of the [Public Health Act](#), that he also learnt for the first time of the existence of an alleged statutory notice that was issued by the 2nd Interested Party against the 3rd Interested Party, that when the members reviewed the information, it became apparent that that the Interested Parties had hatched a clever plot to secure orders from Court that they would ordinarily not get, namely, orders of closure of a market in a criminal prosecution, that be that as it may, there is no justification as to why a matter that commenced and proceeded as a criminal matter against an individual morphed into a case where the Court issued orders that affected over 6000 traders who were not part of the proceedings, that besides, in a public health matter such as the impugned one, proceedings ordinarily ought to have been taken against the author of the nuisance, if any, and not an official of the County Government.

Interested Parties' Replying Affidavit

4. In opposing the Application, the Interested Parties relied on the Replying Affidavit filed on 27/11/2023 and sworn by one Abraham Mengich who described himself as the Director, Trade and



Industrialization within the 1st Interested Party. He deponed that he was issued with the statutory notice on 4/11/2022 by the health department on the grounds that there existed a nuisance at the Eldoret Champions Market and which notice required his department, within 14 days, to carry out renovation of the market, that his department was unable to comply within the time limits since the members of the ex parte Applicant organized violent demonstrations and did not allow the officers access therein, upon failure to comply, the public health officials registered a complaint with the Respondent (Magistrate's Court) and summons were issued against the deponent to appear in Court, that the deponent did take plea, pleaded guilty and explained to the Court that the ex parte Applicants had made it impossible to remove the nuisance from the market, that the market is undergoing reconstruction and renovation pursuant to the orders of the Magistrate's Court given on 24/11/2022 in Eldoret Criminal Case No. E1019 of 2022 and the works are yet to be completed, that such works will completely remove the nuisance and correct the defects in compliance with the order, that due to need for more time to rectify the nuisance, and that on 23/12/2022 and subsequently on several other occasions, the Court extended the orders for the market closure.

5. He deponed further that the said Court is empowered to penalize any accused person, including the Interested Parties where there is no compliance, that the statutory notice is proper and legal as the two departments are distinct from each other and the 2nd Interested Party is mandated to perform such role under the [Public Health Act](#), that the Judiciary is enjoined as a partner of promoting environmental governance, that the Application should be dismissed since the Interested Party is currently complying with the orders, that the order has already been partially implemented hence Court orders issued herein may be in vain, that the instant Application, if allowed, will set a bad precedent, this Court should not be seen to be ridiculing the Magistrate's Court which has the competent jurisdiction, and that there was no collusion amongst the interested parties as sensationally implied by the Applicant since each part was acting within its mandate

Hearing of the Application

6. It was agreed, and I directed, that the Application be canvassed by way of written Submissions. Pursuant thereto, the ex parte Applicant filed its Submissions on 12/02/2024 while the 1st, 2nd and 3rd Interested Parties had filed theirs earlier on 6/02/2024.

Ex Parte Applicant's Submissions

7. In lengthy Submissions, Counsel for the ex parte Applicant argued that the statutory notice dated 4/11/2022 was issued by the 2nd Interested Party against the 3rd Interested Party, that the notice was issued under the [Public Health Act](#) and the Food Drugs and Chemical Substances Act, that the notice relies on Section 118(1)(b), (j), (k) and (s) of the latter Act and in that context, it raises the issue of cleanliness of the Eldoret Wholesale Market, rats and vermin, overcrowding, and risk of contamination of foods, that the notice then requires the 3rd Interested Party to de-rat the entire market, remove the illegal temporary timber stalls within the market so as to reduce harbourage for rodents, remove the vendors using handcarts at the market entry, exit, pavements and paths for ease of manoeuvrability in and out of the market, replace missing downpipes at gutters so as to direct the rain-water into the storm drain, unblock all the drainage system and replace drain channel grills, replace the missing taps at all water points including the fruits and vegetables washing sinks and provide additional twenty water closets, 20 hand wash basins and 5 bathrooms.
8. Counsel submitted further that the notice was issued on 4/11/2022 and supposedly served on the 3rd Interested Party on the same day, that Section 118(1) of the [Public Health Act](#) gives examples of what may be deemed to constitute nuisance and Section 118(2) states that the author of a nuisance means



“the person by whose act, default or sufferance nuisance is caused, exists or is continued”, that Section 119 authorizes a Medical Officer to issue notice for removal of nuisance, that the Medical Officer must be satisfied that a nuisance exists but cannot be satisfied out of thin air, that the Officer is exercising a public duty which means that the duty must be exercised on the basis of facts and that satisfaction of the Medical Officer will arise after some investigation has been done and a Report prepared to that effect, that even if no such Report exists, there must be a basis, such as a complaint by members of the public which is documented, that the Officer cannot just act on whim, that the equivalent of this in criminal law is what is known as reasonable or probable cause, that a review of the Replying Affidavit sworn by the 3rd Interested Party does not show any proof that such a basis had been laid before the notice was issued, that the notice was not based on any factual reasons but was meant to lay a basis for closing down the markets.

9. It was Counsel’s further contention that that the notice did not comply with the [Public Health Act](#) under which it purports to have been issued, that under Section 119, the notice must first be issued against the author of the nuisance, that it can only be served upon the owner or occupier of premises if the author cannot be found, that the first port of call for purposes of the notice under Section 119 is the person directly causing the nuisance, in this case the members of the ex parte Applicant, they are the ones who trade in the market, they were the ones who originated, if at all, the nuisance, on the basis of which the notice was issued, that this is more profound in the context of the right to a fair hearing especially since the closure of the market was going to affect the livelihood of over 600 traders.
10. Counsel further averred that the complaint laid before the Principal Magistrate and the Summons deriving therefrom is not supported by law in that it is not contemplated under the [Public Health Act](#) under which it was purported to be made. He submitted that under Section 120 of the [Public Health Act](#), the order of events is that the Medical Officer must be satisfied that the person served with the notice has failed to comply, that this requires objective proof in the form of a Report or a document ascertaining failure to comply, that the Officer then files a complaint with the Magistrate’s Court, the Magistrate then issues Summons requiring the person to appear before Court, that if the person appears, the Court must satisfy itself that the alleged nuisance exists and only then can the Court order the author of the nuisance, or the owner or occupier of the subject premises to either comply with the notice or remove the nuisance within a specified time, that a fine may be imposed on the person if he complied with the notice within the required time and/or also impose costs.
11. According to Counsel, it can be seen that the Respondent Court and the Interested Party flouted the law with impunity, that what happened is clear from the proceedings of 24/11/2022, that it is not clear whether a complaint was laid before the Court to enable the Court assume jurisdiction, whether the Court issued Summons, whether the Court confirmed that the nuisance indeed existed, that there is no evidence of what was laid before the Court to justify the proceedings, that what the 3rd Interested Party has exhibited is a document that captures the proceedings of the Court of 24/11/2022, that it is not even shown that charges were read over to the 3rd Interested Party and that he pleaded to the same, that the Court simply proceeded to issue orders closing “Eldoret Market”.
12. It was also Counsel’s contention that nowhere does the Court have the power to order closure of the premises, that the only provision relating to closure is subsection (9) which provides that if a nuisance that is proven to exist is such as to render a dwelling unfit, in the judgment of the Court, for human habitation, the Court may issue a closing order prohibiting the use thereof as a dwelling until in its judgment the dwelling is fit for that purpose, that Section 2 of the [Public Health Act](#) defines a “dwelling” but does not define what to dwell means but that the Miriam-Webster dictionary defines “dwell” to mean to “live as a resident”, that as the Act refers to a place where someone sleeps in, to dwell must mean to reside in a house, that it cannot mean to live in a shop, stall or market where business is undertaken,



- that the members of the ex parte Applicant are traders, they do not dwell in the market and so their places of work are not dwellings within the meaning of the Act, that the implication therefore is that Section 120(9) can only be brought to bear with respect to dwelling houses, and not a market.
13. Counsel added that even if the Court has such power, then it can only be exercised procedurally as set out in the Act, that the proceedings must be declared a nullity, that whereas the orders were expressed to last for only 30 days, the 1st Interested Party shut down the market indefinitely and has in fact proceeded to demolish the stalls inside, that to date, the markets remain closed raising the issue whether indeed the stated nuisance was the reason for the proceedings before the lower Court. On the issue of procedure, Counsel cited the case of Peter K. Waweru v Republic [2006] eKLR where, he submitted, the Court held that where the proper procedure for invoking the jurisdiction of the Court in a nuisance case was not followed, any trial emanating therefrom was a nullity. He also cited the case of Republic v Hitan Majevdia, Nairobi City County Executive Committee Member ex parte Scion Healthcare Limited [2021] eKLR in which, he submitted, that the Court dealt with the issue of procedure under Section 119 and 120 of the *Public Health Act*.
 14. According to Counsel, the proceedings before the Magistrates Court was a clever ploy to secure orders for closure of the Market through the backdoor since the Interested Parties were aware that they had no legal way of doing so, that the proceedings were a sham, that the 2nd Interested Party, an official of a department of the 1st Interested Party purported to issue a statutory notice against the 3rd Interested Party, another official in a department of the self-same Uasin Gishu County, the 1st Interested Party, that this was a game of musical chairs, a charade meant to ensure that they had a Respondent against whom the order of closure of the market could be pegged, that they knew that the full rigour of the law would catch up with them if they were to involve the traders and so they looked for a convenient and “safe” accomplice, that the 3rd Interested Party deliberately “defaulted” so as to lay a purported basis for the subsequent complaint in the criminal case, that two departments of the same institution were prosecuting each other with the clear intention of laying a basis for inviting the Court to issue orders of closure of the markets, and that the Respondent Court and the Interested Parties abused Court proceedings to secure an outcome favourable to themselves. On abuse of the process, he cited the case of Ephraim Miano Thamaini v Nancy Wanjiru Wangai & 2 Others [2022] eKLR. He also cited the case of Republic v Chief Magistrate’s Court at Mombasa ex parte Ganijee & Another [2002] eKLR.
 15. Counsel further submitted the order of closure of the Market was made in criminal proceedings where the 3rd Interested Party was an accused and yet the order affects over 600 members of the ex parte Applicant who were not given notice or an opportunity to be heard, that the said members were licensed to carry on their trade within the markets, that it has not been shown that they were in violation of any law, they therefore had a legitimate expectation, indeed a right, that having complied with the laid down requirements, they would be free to conduct their trade without being molested by the 1st Interested Party, that at the very least, they had the legitimate expectation that in any proceedings where their business was likely to be adversely affected, they would be given an opportunity to make representations before orders are made. He cited the case of Michael Barasa Mangeni v Ministry of Health & Sanitation & Another [2020] eKLR, the case of Republic v Hitan Majevdia (supra) and also the case of Republic v Kabue Kigera [1986] eKLR.

Interested Parties Submissions

16. On his part, on the considerations to be taken by the Courts in Judicial Review, Counsel for the Interested Parties cited the case of Republic v Migori County Government & Another ex parte Nyangi John Juma [2018] eKLR and submitted that the decision of the 2nd Interested Party vide the Statutory Notice dated 4/12/2022 was not tainted by illegality, irrationality or procedural impropriety. He



submitted further that the 2nd Interested Party is mandated under the Public Health Act to maintain the standards of public health within Uasin Gishu County, that he is required under Section 123 thereof to enter and examine any premises, that he is further mandated upon such examination and inspection, to issue statutory notices to owners or dwellers of the premises that are found to be defective to either correct the defects or demolish altogether to avert public health crises, that Part XI of the Act provides for such procedures to be followed by the 2nd Interested Party, that Section 117 requires that the 2nd Interested Party as the health authority within the County do prevent or remedy danger to health from unsuitable dwellings, that Section 118 defines a nuisance, that the 2nd Interested Party, upon its assessment, decreed the trading area referred to as Markets as being a nuisance, that the 2nd Interested Party therefore issued the notice upon the 3rd Interested Party which is the owner or occupier of the markets to correct the defects listed in the notice, that the failure to comply with the notice led to the criminal proceedings and resulted in the accused being convicted on a plea of guilty, that the accused was allowed by the Court to comply with the notice and a date was given for confirmation of compliance.

17. On the question of illegality, Counsel submitted that the 2nd Interested Party had the mandate to issue the notice, that the decision issued pursuant to the notice is a legal one made by a Medical Officer who had the powers to do so, and that therefore the decision is not tainted with illegality and that the Applicant has not led any evidence to show the nature and/or particulars of illegalities committed by the 2nd and 3rd Interested Parties. On whether the decision made vide the notice is tainted with irrationality, Counsel submitted that the same was made pursuant to a Court Order, is based on the law, is reasonable and no evidence has been led to show that the decision is irrational. On whether the decision was tainted with procedural impropriety, Counsel submitted that the decision was made fairly and in adherence to the procedure laid down by the Act, that the decision was made in the best interests of the users of the markets in order to avert public health crises and that therefore the decision was a proper one in the eyes of the law.
18. On whether the decision of the Magistrates Court was tainted with illegality, irrationality and procedural impropriety, Counsel submitted that upon failure by the 3rd Interested Party to comply with the notice, Summons were issued upon him to appear in Court on 24/11/2022, that the 3rd Interested Party complied and appeared before the Court and pleaded guilty to the charges, that the Court upon listening to the reasons for failure to comply, issued directions to the 3rd Interested Party to comply, that the charges were read in the presence of the Office of the Directorate of Public Prosecution (ODPP), and that the Respondent is the Magistrate's Court with the jurisdiction to hear and determine criminal matters of this nature and it had the mandate and powers to issue any directions to meet the ends of justice, and that there was therefore no error of law committed. It was Counsel's further contention that there was no irrationality since the decision to direct a dweller of a given premises to remove a nuisance within a period of days cannot be said to be unreasonable.
19. Finally, Counsel submitted that the Court should not be invited to unjustifiably supervise criminal proceedings before the subordinate Court where the Applicants were not parties, and that the Court should not be used to further the Applicant's course of stopping the implementation of the Public Health Act to the detriment of the people of Uasin Gishu County and the users of the markets

Analysis & Determination

20. Upon considering the pleadings and the matters presented, I find the issues that arise for determination to be as follows:
 - i. Whether the decision to issue the statutory notice was tainted with illegality.



- ii. Whether the Magistrate’s Court proceedings leading to the decision to close the markets was irregularly conducted.
 - iii. If the notice and the Magistrate’s Court decision were tainted with illegalities as alleged, what remedy should this Court give?
21. I now proceed to answer the said questions.

i. Whether the decision to issue the statutory notice was tainted with illegality

22. Counsel for the ex parte Applicant has submitted that the statutory notice was issued under the provisions of Section 118 and 119 of the Public Health Act which sections require that the Medical Officer issuing it must be “satisfied” that a nuisance exists. Counsel observed that there is however no Investigations Report produced to reveal the basis under which such “satisfaction” was founded r even a complaint from members of the public. According to Counsel therefore, the notice was issued without any factual basis and was therefore null and void.
23. On this point, although it is true that no Report has been presented to this Court to support the basis upon which the notice was issued, my view is that the jurisdiction to question whether there was any such factual basis to support the notice would be the mandate of the trial Court. Further, since the 3rd Interested Party is said to have pleaded guilty, it means that the matter never proceeded to hearing or taking of evidence. In view thereof, there would be no basis for faulting the Respondent Court.
24. Counsel argued further that the notice was defective since Section 119 requires that the notice be issued “against the author of the nuisance” and that it can only be served upon the owner or occupier of the dwelling or premises if the author cannot be found. According to Counsel, the “author of the nuisance” were the members of the ex parte Applicant and it is them who therefore ought to have been served since it is them who trade in the market and it is them who would be most affected by any adverse action arising out of the notice.
25. On this point, I have looked at the notice and note that what was listed in the notice as being required to be addressed or rectified were to de-rat the market, remove illegal temporary timber stalls so as to reduce harbourage for rodents, remove the vendors using handcarts at the market entry, exit, pavements and paths for ease of manoeuvrability, replace missing downpipes at gutters so as to direct the rain-water into the storm drain, unblock drainage system, replace drain channel grills, replace missing taps at water points and provide additional water closets, hand wash basins and bathrooms.
26. From the foregoing, it is clear that the defects listed in the notice and required to be rectified were, by their nature, such that it is the owner of the premises who was meant to address them. It could not have been meant for the traders. To this extent, I am satisfied that the “author of the nuisance” in the context of this case was undeniably the County Government of Uasin Gishu and by extension, the Chief Officer, Trade and Industrialization, the 1st and the 3rd Interested Parties, respectively, as owners of the market. Service upon the 3rd Interested Party was therefore proper. This ground therefore fails.
27. Having said so however, it is my view that the ex parte Applicant ought to have also been served since as aforesaid, it is its members who stood to be most affected by any adverse orders that would have arisen in the event of non-compliance with the notice. This is also because the members of the ex parte Applicant were holders of existing and valid 3 years renewable trading licences and therefore had legitimate expectation that the licences would not be interfered with and would remain in place for the remainder of the term.



28. Further reason why the notice should have also been served upon the ex parte Applicant is because as argued by the ex parte Applicant, the 2nd Interested Party who issued the notice and the 3rd Interested party against whom the notice was issued are both entities or departments within the 1st Interested Party. Non-service upon the ex parte Applicant therefore lends credence to the ex parte Applicant's assertion that this was a conspiracy and a "game of musical chairs" hatched and executed by two siblings (2nd and 3rd Interested Parties) and cleverly calculated to achieve a pre-determined result against the ex parte Applicant. To lay to rest this justified suspicion, the 2nd Interested Party ought to have therefore also served the ex parte Applicant.
29. On whether this non-service of the notice upon the ex parte Applicant will eventually render the entire process fatally defective, I will revert hereinbelow.

ii. Whether the Magistrate's Court proceedings leading to the decision to close the market was conducted in an irregular manner

30. Counsel for the ex parte Applicant has submitted that from the proceedings of 24/11/2022 before the Magistrate's Court, it is not clear whether a complaint was laid before the Court to enable the Court assume jurisdiction, whether the Court even issued Summons, whether the Court conducted any inquiry over the issue of compliance with the notice or whether the Court even confirmed that the nuisance existed in the first place. Counsel submitted further that it is not even shown whether any charges were read out to the 3rd Interested Party and whether he pleaded to the same.
31. On their part however, the Interested Parties have submitted that Summons were issued against the 3rd Interested Party to appear in Court on 24/11/2022, that the 3rd Interested Party appeared before the Court and pleaded guilty to the charges, that upon listening to the parties, the Court gave the 3rd Interested Party time to comply. Counsel also submitted that the charges were read in the presence of the Office of the Directorate of Public Prosecution (ODPP). The 1-page copy of Court proceedings exhibited does not however capture the portion of the proceedings, if any, in which the reading of the charge, taking of plea and conviction were made.
32. From two conflicting versions above, it is clear that there is a disconnect between the parties' narratives on how the proceedings before the Magistrate's Court was conducted.
33. I am however persuaded by the version given by the Interested Parties. This is because although the ex parte Applicant alludes that it is not aware of how the Court proceedings were conducted, this allegation of lack of knowledge is contradicted by the ex parte Applicant's own Statement in which it has pleaded as follows:
 - “3. Vide statutory notice purported to have been issued on 4th November 2022, the 2nd Interested Party purported to require the 3rd Interested Party to abate certain nuisances within Eldoret “Wholesale Market. The said notice purported to be issued under Section 118 of the [Public Health Act](#).
 4. The 3rd Interested Party conveniently and deliberately “failed to comply” with the said notice by way of implementation as a result of which the 2nd Interested Party laid a complaint before the Senior Principal Magistrate through Criminal Case No. E1019 of 2022.
 5. A Summons was issued against the 3rd Interested Party who upon appearance before Court on 24th November 2022 gleefully and quite readily pleaded guilty to an undisclosed charge.
34. The contents of the above paragraphs clearly betray and expose the ex parte Applicant's feigning of ignorance. It is evident that although not a party to the Court proceedings, the ex parte Applicant is



in possession of much more information and knowledge than it has disclosed to the Court regarding the proceedings conducted before the Magistrates Court and the manner in which the same was conducted. While only a copy of the proceedings of 24/11/2022 has been exhibited, it is evident that, by its own averments above, the ex parte Applicant is fully aware that there were earlier proceedings which included the reading out of the charge, entry of a plea of guilty and conviction, and which must have preceded the order of closure of the market. It is evident that the Court has not been supplied with the full extract of the proceedings. Being the party seeking a remedy, it is the ex parte Applicant who had the duty to collect and present evidence to the Court. The Court cannot therefore interpret the evidence presented in isolation and purport to make determinations.

35. Although it appears that the Court may have rushed the case and may have in the process, skipped some of the express steps stipulated under Section 120(1)-(9) before arriving at the order closing the market, in the absence of clear evidence on how the proceedings were conducted, I am unable to declare the process as invalid.
36. In the circumstances, I am unable to agree with the ex parte Applicant that the proceedings before the Magistrates Court were conducted in an irregular manner or procedure.
37. Counsel for the ex parte Applicant has also submitted that the Court closed the market under Section 120(9) of the Public Health Act on the basis that the “Eldoret Wholesale market” was a “dwelling”. According to Counsel, the definition given under Section 2 of the Public Health Act does not envisage a “market” as amounting to a “dwelling” and that therefore to that extent, the Court decision is tainted with illegality.
38. It is true that Section 120(9) which empowers the Court to close a unit on the ground that the nuisance has rendered it unfit for human habitation only refers to a “dwelling” which, as correctly pointed out by Counsel, would by ordinary language mean a “residence” or “of place living” and not a business place such a “market”. However, I note that Sections 118, 119 and 120, which are three provisions dealing with nuisance, read conjunctively continuously use the phrase “dwelling or premises”. It is therefore true that apart from “dwelling”, any other kind of “premises” is identified of falling within the provisions of Sections 118, 119 and 120. I refuse to read Section 120(9) in isolation as that will lead to an interpretation that borders on absurdity. There is no good reason why, amongst all the provisions, only Section 120(9) should be singled out and “sacrificed”. I do not find any reason to suggest that the drafters of the Act could have intended to remove places of business from the ambit of Section 118, 119 and 120. If that were the intention, then I trust the drafters would have expressly stated as much.
39. I am therefore persuaded, and I so find, that within the context of Section 118, 119 and 120 of the Public Health Act, the term “dwelling” as used in Section 120(9) would include the “Eldoret Wholesale market” which is the subject of this matter.

iii. If the notice and the Magistrate’s Court decision leading to closure of the market were tainted as alleged, what remedy should this Court give?

40. It is now evident that out of all the grounds raised to challenge the events and proceedings leading to closure of the market, I have only upheld the ground of non-service of the statutory notice upon the ex parte Applicant or its members. The question now is whether this omission is capable of nullifying the entire process.
41. In answering this question, first, I note that the ex parte Applicant has revealed that its members challenged the closure of the 2 markets and relocation of traders by filing Eldoret ELC Petition No. 006 of 2022. However, I observe that no pleadings from the alleged Eldoret ELC Petition No. E006 of 2022 has been exhibited. This Court has therefore been denied the opportunity to peruse the pleadings



and independently verify and rule out the possibility that the instant case is a duplication of that earlier proceedings or otherwise. I say so because the ex parte Applicant has expressly stated that that in that case, what it has challenged is closure of the two markets which is basically what will be achieved in the instant Application before this Court should it succeed. If that is the case, then it will be improper to again entertain the instant proceedings. The failure to exhibit the pleadings of the earlier case therefore leaves this Court in no position to conclusively make determinations on this very important aspect.

42. Secondly, there is also the question whether this case may have been overtaken by events. This is because the Interested Parties have submitted that the market has since been demolished in its entirety and is undergoing renovations. Inexplicably, the parties did not seriously address this issue but I note that the ex parte Applicant has submitted that the stalls in the market have been demolished. The Court is therefore not in a position to determine whether in the context herein, the demolishing of the stalls is equivalent to demolishing of the market. In the circumstances, and considering that Courts do not act in vain, the Court has been placed in a position where it is not certain whether any orders given by it are even capable of implementation.
43. I also note that the Magistrate's Court Order exhibited shows that the market was only closed for 30 days from 24/11/2022. To my understanding, this was a temporary order and upon such 30 days expiring, the order would become spent. According to both parties however, the orders were extended on 23/12/2022. However, once again, no copy of this alleged subsequent order of extension has been exhibited. There is no disclosure on how much extension was given and whether the extension has also now expired. Since as aforesaid, a Court does not act in vain, in the absence of this further very important material, again the Court is placed in a situation where it is not certain whether its orders will be capable of enforcement.
44. I also observe that the ex parte Applicant has alleged that the orders issued by the Magistrate's Court are vague and that they are being abused by the Interested Parties. On my part, having perused the copy exhibited, I cannot find any ambiguity as alleged. The orders are crystal clear and, in any event, interpretation or clarification of the same can only be sought before the same Court that issued the orders, not a different Court.
45. Again, if it is true that the orders of the Magistrate's Court are being abused or misused, then all that the aggrieved party needs to do is to bring this fact to the attention of the same Court that issued the orders for action.
46. In view of the foregoing, and although I agree that the failure to serve the statutory notice upon the ex parte Applicant or its members was a violation of the latter's right to a hearing, I have not been presented with other equally important facts to justify nullification the entire process leading to closure of the market. The same applies to my finding that the Respondent Court appears to have rushed the case and may, in the process have skipped some of the express steps stipulated under Section 120(1)-(9) of the [Public Health Act](#).
47. Finally, I note that the statutory notice was issued on 14/11/2022 and the Magistrate's Court order closing the market for 30 days was made on 24/11/2022. According to the ex parte Applicant, the order was then extended on 23/12/2022. However, it is not lost on me that the ex parte Applicant filed the present proceedings in July 2023, about 8 months later. There is no explanation for this very long delay. The closest disclosure made by the ex parte Applicant is that it learnt of the existence of the closure orders when it was served with a Replying Affidavit filed in the said Eldoret ELC Petition No. 006 of 2022. However, there is still no disclosure on when such Replying Affidavit was served as alleged. The 8-month delay therefore remains unexplained.



Final Orders

48. In the premises, I order as follows:

- i. The Notice of Motion dated 24/07/2023 and filed by the ex parte Applicant on 27/07/2023 and by extension, this entire Judicial Review proceedings, is hereby dismissed.
- ii. However, in the event that Eldoret Criminal Case No. E1019 of 2022 has not been fully determined or disposed of, the ex parte Applicant shall be allowed by the Magistrate's Court handling that case to fully participate and make representations or submissions therein before any further orders are made in that case. In the event that the case has now been fully disposed of, the ex parte Applicant shall be allowed to make or file any post-Judgment Application for review or setting aside or clarification or enforcement of any orders already made in the case or to make any other application(s) of similar nature.
- iii. The ex parte Applicant is therefore given liberty to appear before the Magistrate's Court handling the case and place before it for determination, the matters or grievances raised or identified herein.
- iv. Since this Court has dismissed this Judicial Review proceedings on grounds other than those preferred by the Interested Parties, I order that each party bears its own costs.

DELIVERED, DATED AND SIGNED AT ELDORET THIS 12TH DAY OF APRIL 2024

WANANDA J.R. ANURO

JUDGE

