



**Republic v Senior Resident Magistrate Court at Thika & 3 others; Mwangi (Exparte Applicant)
(Judicial Review E0001 of 2024) [2024] KEHC 8222 (KLR) (4 July 2024) (Judgment)**

Neutral citation: [2024] KEHC 8222 (KLR)

**REPUBLIC OF KENYA
IN THE HIGH COURT AT THIKA
JUDICIAL REVIEW E0001 OF 2024
FN MUCHEMI, J
JULY 4, 2024**

**IN THE MATTER OF THE FAIR ADMINISTRATIVE ACTION ACT NO. 4 OF 2015
AND
IN THE MATTER OF ARTICLE 50(2)(F) OF THE CONSTITUTION OF KENYA 2010
AND
IN THE APPLICATION FOR QUASHING PROCEEDINGS AND WARRANT OF
ARREST ISSUED IN COUNTY GOVERNMENT CRIMINAL CASE NO. E029 OF 2023**

BETWEEN

REPUBLIC REPUBLIC

AND

**SENIOR RESIDENT MAGISTRATE COURT AT THIKA 1ST RESPONDENT
DIRECTOR OF PUBLIC PROSECUTIONS 2ND RESPONDENT
INSPECTOR OF POLICE 3RD RESPONDENT
THIKA SUB-COUNTY HEALTH OFFICER 4TH RESPONDENT**

AND

SIMON MWANGI EXPARTE APPLICANT

JUDGMENT

Brief Facts

1. By a Notice of Motion dated 29th January 2024, the ex parte applicant seeks the following orders:-



- a. An order of certiorari to remove into the High Court for purposes of being quashed the decision of the Thika Sub-County Health Officer to charge and prosecute the ex parte applicant in Thika County Government Criminal Case No. E029 of 2023 pursuant to Section 115 and 164 of the Public Health Act of 2002 without due consideration of the statutory laid procedures.
 - b. An order of certiorari to remove and to bring before the High Court for the purposes of quashing the warrants of arrest issued by Hon. Diana Milimu (SRM) in Thika County Government Criminal Case No. E029 of 2023 on 20th November 2023.
 - c. An order of certiorari to remove and bring before the High Court for purposes of quashing the decision of the 2nd and 4th respondents to charge the ex parte applicant in Thika County Government Criminal Case No. E029 of 2023 with the offence of causing public nuisance by discharging waste water from the pig shed contrary to Section 164 of the Public Health Act Cap 242 Laws of Kenya and as amended by Kenya Gazette Supplement No. 49 (Act No. 3) of 2002 without according the ex parte applicant his right to fair administrative actions.
 - d. An order of prohibition do issue restraining the police officer tasked with the act of arresting from proceeding to arrest the ex parte applicant as ordered by the 1st respondent in County Government Criminal Case No. E029 of 2023.
2. The application is unopposed.

Ex parte Applicant's Case

3. The ex parte applicant deposes that he is a civil servant and an agri-business farmer doing pig farming for over 5 years now with the view of meeting the food sustainability goals of the country in line with vision 2030. The ex parte applicant further states that he practices intensive pig farming, also known as pig factory farming whereby grower pigs are housed indoors in group housing or straw lined sheds. To ensure waste management is at optimal conditions, the ex parte applicant states that he regularly disinfects and cleans through his workers who are trained by Farmers Choice. Additionally, the ex parte applicant states that he consults with Farmers Choice, who are his customers and who as a precondition to maintaining the contract for supply of pigs for beacon, have specialists who are attached to his locality and help determine the precise measures that are best practices for farming to ensure optimal produce and environment conservation.
4. The ex parte applicant further states that he has constructed a septic tank where all the animal waste is kept to avoid any environmental pollution. After the shed is cleaned, the waste is collected and directed to the septic tank through collector channels hence the sheds are without any filth.
5. On 27th September 2023, the ex parte applicant states that the 4th respondent served his servant with a statutory notice requiring him to remedy some complaints made against his farm, which he did by constructing a septic tank where all animal waste is kept to avoid any pollution. The ex parte applicant argues that according to the statutory laid down procedures, the 4th respondent was required to conduct a re-inspection of the farm to confirm compliance before taking any other action but they never did.
6. On 29th November 2023, vide Thika Magistrates Court County Government Criminal Case No. E029 of 2023, the ex parte applicant states that the 2nd and 4th respondents charged him with the offence of causing public nuisance by discharging waste from the pig shed contrary to Section 115 as read together



with Section 164 of the [Public Health Act](#) Cap 242 Laws of Kenya and as amended by Kenya Gazette Supplement No. 49 (Act No. 3) of 2002.

7. The ex parte applicant argues that he was never made aware of any such proceedings against him and without confirming whether he was summoned or in any way informed of the intention to charge him, the 1st respondent issued warrants of arrest against him for failure to attend court for plea taking on 21st August 2023. The ex parte applicant further states that he was only made aware of the same on 16th January 2024 when the officers from the 3rd respondent went to his farm to apprehend him in compliance with the warrants of arrest.
8. The ex parte applicant argues that the issuance of warrants of arrest against him despite the failure to inform him of the intention to charge him or summon him to appear in court to enable him to be present when being tried was a blatant violation of his right guaranteed under Articles 47 and 50(2)(f) of [the Constitution](#). Further, it militates against the interest of justice and such decision and proceedings ought to be quashed for being in contravention of [the Constitution](#).
9. Directions were issued that the application be canvassed by way of written submissions and from the record only the ex parte applicant complied by filing his submissions on 24th May 2024. The respondents on the other hand had not filed their submissions by the time of writing this judgment.

The Ex parte Applicant's Submissions

10. The ex parte applicant reiterates what he deponed in his affidavit and submits that the decision of the 2nd and 4th respondents to charge him in Thika Magistrates Court MCGCR/E029/2023 with the offence of causing nuisance contrary to Section 115 and 164 of the [Public Health Act](#) should be quashed as the respondents did not avail to him his constitutional right of fair administrative action. Relying on Article 47 of [the Constitution](#), Section 4 of the Administrative Action Act and the case of Judicial Service Commission vs Mbalu Mutava & Another [2018] eKLR, the ex parte applicant submits that the 2nd and 4th respondents did not consider that by charging him without informing him and further by not inspecting his farm to confirm compliance, they adversely affected his constitutional rights. As such, the ex parte applicant argues that the respondents acted unreasonably, irrationally and with misapprehension of the law. To support his contentions, the ex parte applicant relies on the case of Pastoli vs Kabale District Local Government Council & Others (2008) 2 EA 300.
11. The ex parte applicant submits that the 2nd and 4th respondents' actions amounted to an illegality and they made an error in law by charging him. Additionally, the two respondents were without jurisdiction hence their actions were ultra vires. The ex parte applicant argues that the 2nd and 4th respondents represent the national and county government respectively and their mandates are therefore to be exercised in line with the principles of respecting, upholding and defending [the constitution](#) as obliged under Article 2 of [the Constitution](#) and upholding the ex parte applicant's rights as demanded by Article 20 of [the Constitution](#).
12. The ex parte applicant submits that Section 115 of the [Public Health Act](#) does not invite criminal charges instead Section 119 of the Act requires that an author of the nuisance ought to be first notified of the nuisance and directions on what ought to be done to prevent further nuisance. Further Section 120 of the Act provides for the procedure if the author of the nuisance fails to comply with the notice and eventually the Act provides that the author of the nuisance can be presented before a court of law for criminal proceedings if he fails to adhere to the procedures.
13. The ex parte applicant submits that the 4th respondent in compliance with Section 119 of the Act served him through his servants a statutory notice informing him of the nuisance and ordering him to rectify



- the situation on 29th September 2023. Consequently, the ex parte applicant states that he proceeded to construct a septic tank to collect the animal waste as directed by the Health Officer. The 4th respondent did not however bother to revisit the farm to confirm compliance and together with the 2nd respondent proceeded to charge him without confirming if there was failure to comply which actions were not only ultra vires to the Public Health Act but also resulted in infringement of his constitutional rights.
14. Relying on the case of Accounting Officer Kenya Ports Authority vs Public Procurement Administrative Review Board & 3 Others [2019] eKLR, the ex parte applicant submits that the 1st respondent issuing a warrant of arrest against him acted ultra vires to the powers given under Section 120 of the Public Health Act which outlines the procedure to be taken in case of any alleged default in compliance with the notice. The ex parte applicant further submits that although acting on the advice of the 2nd and 4th respondents, the court action was in furtherance of the violation of his constitutional rights hence an illegality and therefore the warrants of arrest ought to be quashed.
 15. The ex parte applicant argues that the action of the 4th respondent was irrational and of gross unreasonableness. The ex parte applicant submits that he fails to understand why the 4th respondent did not re-visit the farm to ensure compliance after serving the notice or serving him with the notice of intention to institute criminal charges against him. From the notice issued by the 4th respondent, the ex parte applicant states that the 4th respondent knew his farm and his phone number and yet the 4th respondent failed to call him. Further, upon perusal of the criminal file MCCGCR/E029/2023, a copy of the said notice was in the possession of the 2nd respondent and thus it was unreasonable why the 2nd respondent did not inform him of the summons to appear in court for plea taking. Unlike the 4th respondent, the ex parte applicant argues that the 2nd respondent is an officer of the court and despite his knowledge of Section 120 of the Public Health Act, the 2nd respondent did not conduct any due diligence before charging him. As such, the ex parte applicant argues that the 2nd and 4th respondents were acting lazy and maliciously with the intention of misleading the court for their actions.
 16. The ex parte applicant relies on Section 4 of the Fair Administrative Action Act and submits that the actions of the respondents were tainted with procedural impropriety for failure to act fairly in arriving at the decision. The ex parte applicant argues that the respondents did not give him an opportunity to attend the proceedings or be heard or even appear before the 4th respondent in the presence of counsel of his choice instead he faced embarrassment before his family, farmers choice and the general public. As such, the ex parte applicant relies on the case of Republic vs Public Procurement Administrative Review Board & 2 Others ex parte Rongo University [2018] eKLR and submits that he has demonstrated reasonable basis to justify the orders sought and humbly requests the court to quash the decision of the respondents and award any other just orders it may please as accorded under Section 11 of the Fair Administrative Action Act.

Issue for determination

17. The main issue for determination is whether the court should issue an order of certiorari quashing the decision of the 2nd and 4th respondents to charge the ex parte applicant vide MCCCGR/E029/2023 without according him his right to fair administrative action and quashing the warrants of arrest issued by the 1st respondent in the said criminal case.
18. It is important to note that these proceedings are unopposed. All the respondents were served but did not file responses.



The Law

Whether the court should issue an order of certiorari quashing the decision of the 2nd and 4th respondents to charge the ex parte applicant vide MCCCCGR/E029/2023 without according him his right to fair administrative action and quashing the warrants of arrest issued by the 1st respondent in the said criminal case.

19. The three traditional grounds for judicial review being illegality, irrationality and procedural impropriety were explained in the case of Council of Civil Service Unions vs Minister for the Civil Service (1985) AC 374, 410 where Lord Diplock spoke of these grounds as follows:-

My Lords, I see no reason why simply because a decision-making power is derived from a common law and not a statutory source, it should for that reason only be immune from judicial review. Judicial review has I think developed a stage today when without reiterating any analysis of the steps by which the development has come about, one can conveniently classify under three heads the grounds upon which administrative action is subject to control by judicial review. The first ground I would call 'illegality' the second 'irrationality' and the third 'procedural impropriety.' That is not to say that further development on a case by case basis may not in course of time add further grounds. I have in mind particularly the possible adoption in the future of the principle of 'proportionality' which is recognized in the administrative law of several of our fellow members of the European Economic Community; but to dispose of the instant case the three already well-established heads that I have mentioned will suffice.

By 'illegality' as a ground for judicial review I mean that the decision maker must understand correctly the law that regulates his decision making power and must give effect to it. Whether he has or not is par excellence a justiciable question to be decided, in the event of dispute, by those persons, the judges, by whom the judicial power of the state is exercisable.

By 'irrationality' I mean what can by now be succinctly referred to as 'Wednesbury unreasonableness' (Associated Provincial Picture Houses Ltd vs Wednesbury Corporation [1948] 1 KB 223). It applies to a decision which is so outrageous in its defiance of logic or of accepted moral standards that no sensible person who had applied his mind to the question to be decided could have arrived at it. Whether a decision falls within this category is a question that judges by their training and experience should be well equipped to answer, or else there would be something badly wrong with our judicial system. To justify the court's exercise of this role, resort I think is today no longer needed to Viscount Radcliffe's ingenious explanation in Edwards vs Bairstow [1956] AC 14 of irrationality as a ground for a court's reversal of a decision by ascribing it to an inferred though unidentifiable mistake of law by the decision maker. 'Irrationality' by now can stand upon its own feet as an accepted ground on which a decision may be attacked by judicial review.

I have described the third head as 'procedural impropriety' rather than failure to observe basic rules of natural justice or failure to act with procedural fairness towards the person who will be affected by the decision. This is because susceptibility to judicial review under this head covers also failure by an administrative tribunal to observe procedural rules that are expressly laid down in the legislative instrument by which its jurisdiction is conferred, even where such failure does not involve any denial of natural justice. But the instant case is not concerned with the proceedings of an administrative tribunal at all.



In cases where a person's rights or fundamental freedoms are likely to be affected by an administrative decision, the administrator must give the person affected by the decision prior and adequate notice of the nature and reasons for the proposed administrative action; an opportunity to be heard and to make representations; notice of a right to a review or internal appeal against where applicable; a statement of reason; notice of the right to legal representation and right to cross-examine; as well as information, materials and evidence to be relied upon in making the decision or taking the administrative action.

20. In the instant case, the ex parte applicant states that on 27th September 2023, a health officer from the 4th respondent served his servants with a statutory notice requiring him to remedy some complaints made against his farm. Consequently, the ex parte applicant constructed a septic tank where all animal waste is kept to avoid pollution however the health officer did not re-inspect the farm to ensure compliance in accordance with Section 120 of the *Public Health Act*. Instead, the 2nd and 4th respondents instituted criminal charges against the ex parte applicant with the offence of causing public nuisance contrary to Section 115 as read together with Section 164 of the *Public Health Act* under MCCCCGCR E029/2023.

21. Section 115 of the *Public Health Act* provides:-

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 in charge any nuisance or other condition liable to be injurious or dangerous to health.

22. The Act further provides in Section 119 for the procedure to be followed by the 4th respondent in undertaking its duty in maintaining sanitation. The provision requires a medical officer of health, if satisfied of the existence of a nuisance, to serve a notice to remove the nuisance on the author of the nuisance or on the occupier or owner of the dwelling or premises on which the nuisance arises. In the event of non-compliance with the notice, Section 120 provides for an elaborate procedure to be observed as follows:-

- a. If the person on whom a notice to remove a nuisance has been served as aforesaid fails to comply with any of the requirements thereof within the time specified, the medical officer of health shall cause a complaint relating to such nuisance to be made before a magistrate, and such magistrate shall thereupon issue a summons requiring the person on whom the notice was served to appear before his court.
- b. If the court is satisfied that the alleged nuisance exists, the court shall make an order on the author thereof, or the occupier or owner of the dwelling or premises, as the case may be, requiring him to comply with all or any of the requirements of the notice or otherwise to remove the nuisance within a time specified in the order and to do any works necessary for that purpose.
- c. The court may by such order impose a fine not exceeding two hundred shillings on the person on whom the order is made, and may also give directions as to the payment of all costs incurred up to the time of the hearing or making of the order for the removal of the nuisance.

23. These provisions were considered in *Githui vs Public Health Officer Criminal Application No. 141 of 1996* where the learned Judge pronounced herself as follows:-

In the instant case the mandatory requirements of Section 119 and 120 of the *Public Health Act* were not complied with. No notice was served on the appellant. No formal complaint was lodged before the magistrate nor did the magistrate summon the appellant to appear before him. Instead a peculiar procedure was adopted through an ex parte chamber summons with the result that the appellant was condemned without being given



any hearing....Clearly the trial magistrate erred in complying with the mandatory legal provisions and also in acting contrary to the rules of natural justice.

24. Before the ex parte applicant was charged in court, the 4th respondent in compliance with Section 119 served him with a statutory notice informing him of the nuisance and ordering him to rectify the situation. The ex parte applicant proceeded and constructed a septic tank to collect the animal waste as directed by the health officer. To support his averments, the ex parte applicant annexed photographs to his application showing the already constructed septic tank. The health officer did not revisit the ex parte applicant's farm to confirm compliance as required by the law. Instead he charged the ex parte applicant with the offence of Causing Public Nuisance by discharging waste water from the pig shed contrary to Section 115 as read together with Section 164 of the *Public Health Act*.
25. On the perusal of the proceedings in Thika Magistrates Court County Government Criminal Case No. E029 of 2023, the ex parte applicant was meant to take plea on 21st August 2023. The ex parte applicant he was not present in court and the 1st respondent issued warrants of arrest against him. There is no indication from the record that before proceeding in the manner the learned magistrate proceeded, she was satisfied that the ex parte applicant had been served with the summons to attend court. Furthermore, the respondents in the instant matter did not file a response to the application to deny the allegations by the ex parte applicant or give their reasons why they proceeded as they did. In the premises, it is clear that the respondents were in contravention of Section 119 and 120 of the Act.
26. The 2nd, 3rd and 4th respondents did not defend these proceedings. As such, this court has only the evidence of the ex party applicant to consider. As such, the position herein is that the ex parte applicant was not served with the summons. It follows that the ex parte applicant was not given a chance to inform the court that he had already remedied the nuisance. Neither was the court informed that notice to rectify the nuisance had been issued to the ex parte applicant and complied with. Consequently, the 1st respondent proceeded to issue warrants of arrest on the information given to it instead of confirming service of summons on the exparte to attend court for plea taking. The 1st respondent as a court of law was not to blame in that a court of law relies on the information given to it by the police and the office of Director of Public Prosecution. It is not known what led the 2nd respondent to apply for a warrant of arrest. Was it based on information given to him by the police or by the 4th respondent? Any blame on failure to comply with the law or to disclose to the court all what had transpired before the ex parte applicant was charged lies squarely on the 2nd, 3rd and 4th respondents.
27. The rules of natural justice require that one cannot be condemned unheard as provided in Article 47 of *the Constitution* which stipulates:-
 1. Every person has the right to administrative action that is expeditious, efficient, lawful, reasonable and procedurally fair.
 2. If a right or fundamental freedom of a person has been or is likely to be adversely affected by administrative action, the person has the right to be given written reasons for the action.
28. In addition, Section 4(3) of the *Fair Administrative Action Act* lays down the procedure to be adopted by the administrator as follows:-

Where an administrative action is likely to adversely affect the rights of fundamental freedoms of any person, the administrator shall give the person affected by the decision-

 - a. Prior and adequate notice of the nature and reasons for the proposed administrative action;



- b. An opportunity to be heard and to make representations in that regard;
- c. Notice of a right to a review or internal appeal against an administrative decision where applicable;
- d. A statement of reasons pursuant to Section 6
- e. Notice of the right to legal representation, where applicable;
- f. Notice of the right to cross examine or where applicable; or
- g. Information, materials and evidence to be relied upon in making the decision or taking the administrative action.

29. The ex parte applicant had a constitutional right to be accorded fair administrative action by the 4th respondent who represents the County Government. Section 120 of the Public Health Act mandated the 4th respondent to afford the ex parte applicant such an opportunity before he could be arraigned in court. The 4th respondent was duty bound to go back to the scene of the nuisance to check whether the ex parte applicant had rectified the wrong. As directed. If the 4th respondent had fulfilled this duty, the ex parte applicant ought not to have been charged before a court of law. The requirement for fair administrative action provided for under Article 47 of the Constitution and Section 4(3) of the Fair Administrative Action Act and replicated in various statutes. In regard to this case. Consequently, the rules of natural justice were clearly flouted by the 2nd and 4th respondent. Further, there were serious procedural irregularities committed in the course of the arraigning the ex parte applicant before the court. In the case of *Patoli vs Kabale District Local Government Council and Others* [2008] 2 EA 300, the court observed:-

Procedural impropriety is when there is a failure to act fairly on the part of the decision-making authority in the process of taking a decision. The unfairness may be in non-observance of the rules of natural justice or to act with procedural fairness towards one to be affected by the decision. It may also involve failure to adhere and observe procedural rules expressly laid down in a statute or legislative instrument by which such authority exercises jurisdiction to make a decision.

30. As for the 2nd respondent, it ought to have confirmed before preferring charges that the 3rd and 4th respondent had complied with the provisions of the Public Health Act. There is no evidence that this was done. The ex parte applicant is categorical that he complied as directed by the 4th respondent but the 4th respondent failed to return to the scene for inspection.

31. Having found that the 2nd, 3rd and 4th respondents' actions were unlawful, illegal and unprocedural, the issue is whether the ex parte applicant is entitled to any remedies. The ex parte applicant sought judicial review orders of certiorari. The Court of Appeal in *Kenya National Examinations Council vs Republic ex parte Geoffrey Gathenji Njoroge* (1997) eKLR court stated:-

Only an order of certiorari can quash a decision already made and an order of certiorari will issue if the decision is without jurisdiction or in excess of jurisdiction or where the rules of natural justice are not complied with or for such like reasons.

What does an order of prohibition do and when will it issue? It is an order from the High Court directed to an inferior tribunal or body which forbids that tribunal or body to continue proceedings therein in excess of its jurisdiction or in contravention of the laws of the land. It lies, not only for excess of jurisdiction or absence of it but also for a departure



from the rules of natural justice. It does not however, lie to correct the course, practice or procedure of an inferior tribunal, or a wrong decision on the merits of the proceedings.

32. It is not in dispute that the ex parte applicant was not accorded fair administrative action and that he was charged in court and a warrant of arrest issued without the 2nd, 3rd and 4th respondents complying with the law. As such, I find that the ex parte applicant was wronged by the actions of the 2nd, 3rd and 4th respondents.
33. The ex parte applicant prays that this court grants orders of certiorari to remove into this honourable court and quash the decision of the respondents to charge and prosecute him vide Thika Magistrates Court in County Government Criminal Case Number E029 of 2023 with the offence of causing public nuisance contrary to Section 115 as read with Section 164 of the Public Health Act and quashing the warrants of arrest issued by Hon. Diana Milimu in the said criminal case.
34. The ex parte applicant seeks for orders of prohibition against the respondents not to arrest and charge him. However, it is noted that the intended arrest has now been overtaken by events and any intended arrest will be addressed in the final orders of the court herein of prohibition cannot therefor be issued herein.
35. It is my considered view that the ex parte applicant has established his case against the 2nd, 3rd and 4th respondents. These Judicial review proceedings are therefore successful to the extent aforementioned.
36. Consequently, the orders for certiorari calling into court the orders the 1st respondent for issue of the warrant of arrest and those of the 2nd, 3rd and 4th respondents of charging the ex parte applicant with the offence of causing public nuisance contrary to Sections 115 and 164 of the Public Health Act are hereby quashed.
37. The ex parte applicant shall have the costs of these proceedings.
38. It is hereby so ordered.

JUDGMENT DELIVERED, DATED AND SIGNED THIS 4TH DAY OF JULY 2024.

F. MUCHEMI

JUDGE

