REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT MACHAKOS

APPELLATE SIDE

(Coram: Odunga, J)

JUDICIAL REVIEW APPLICATION NO. 189 OF 2019

EDWARD N OMOTII.....APPLICANT

=VERSUS=

COUNTY GOVERNMENT OF MACHAKOS.....1ST RESPONDENT

MAVOKO SUBCOUNTY HEALTH OFFICER.....2ND RESPONDENT

THE PRINCIPAL MAGISTRATE, MAVOKO LAW COURTS.....3RD RESPONDENT

JUDGEMENT

1. The applicant herein **Edward N Omotii**, has moved this Court by a Notice of Motion dated 10th February, 2014, filed in Court on 11h February, 2014 seeking the following orders:

> **1) Certiorari to bring to this court and quash the charge sheet and all incidental and consequential proceedings related to Criminal Case No. 171 of 2019 before the Senior Principal Magistrates Court, Mavoko.**
>
> **2) Prohibition prohibiting the 1st and 2nd Respondents from in any manner whatsoever or otherwise acting upon, enforcing or attempting to enforce the notice issued under the Ministry of Health and Emergency Machakos Government Reference No SCHO/MAV/28/2018.**
>
> **3) Mandamus compelling the 1st and 2nd Respondents to lay sewerage systems within Mlolongo area in Compliance with its duty to maintain cleanliness and prevent nuisances under Section 116 of the Public Health Act CAP 142 of the Laws of Kenya**
>
> **4) Costs be provided for.**

Applicant's Case

2. According to the applicant, on 4th March, 2019, the 2nd Respondent purported to issue summons against him to appear in court at Mavoko on 7th March, 2019 for the purposes of taking plea on charges brought under the ***Public Health Act***, Cap 242 of the Laws of Kenya. It was deposed that the said summons related to a property which the applicant is neither a proprietor of nor a developer. It was his case that the proprietor is Pedem Africa Limited.

3. The applicant deposed that the said summons was served upon a caretaker of the said premises, one **Lilian Nyasimi** on 4th March, 2019 who informed the applicant of the development. The charges in question, it was disclosed, related to sanitation and housing under the said Act where section 199 makes it mandatory that a notice to remove nuisance be served on the author of the nuisance and if he cannot be found on the occupier or owner of the dwelling or premises requiring the removal within a time specified in the notice. It was however contended that no such notice was issued and/or served upon the applicant and/or owner of the said premises. According to the applicant, he is only one of the shareholders in the company that owns the said premises. However, the charge sheet registered in the said court describes him as a caretaker of the property and that he has never been served with the purported notice allegedly issued under the Ministry of Health and Emergency Machakos Government reference no. SCPHO/MAV/28/2018.

4. It was averred that the subject nuisance relates to alleged discharge of water from a factory purportedly belonging to the applicant, yet the

subject premises are residential premises, belonging to a private limited company, and with no factory on site. It was averred that the developer of the said premises made the necessary application for development permission under the ***Physical Planning Act*** disclosing clearly that the method of water disposal from the property would be by way of natural drains which application was approved since the 1st Respondent has not laid sewerage systems in the area as required by the law. Despite that the developer has gone out of its way to install a biological bio digester for waste water treatment from the subject premises.

5. The applicant therefore contended that the actions of the Respondents are mala fides, an abuse of power and unconstitutional.

6. In response to the application the 1st and 2nd Respondents filed the following grounds of opposition:

1) The application is frivolous, vexatious and an abuse of the court process.

2) The application is premature and the orders sought are not available to the applicant.

3) The applicant is arguing the merits of the criminal case before this court instead of ventilating the same at the hearing of the criminal trial.

4) There are no grounds for this court to interfere with the said case as the applicant has not adduced evidence showing that he will not get a fair trial or suffer prejudice if the orders sought herein are not granted.

5) That the applicant admits he was served with the requisite notice which he failed to honour or challenge.

Determinations

7. I have considered the foregoing.

8. Section 119 of the ***Public Health Act*** provides:

The medical officer of health, if satisfied of the existence of a nuisance, shall serve a notice on the author of the nuisance or, if he cannot be found, on the occupier or owner of the dwelling or premises on which the nuisance arises or continues, requiring him to remove it within the time specified in the notice, and to execute such work and do such things as may be necessary for that purpose, and, if the medical officer of health think it desirable (but not otherwise), specifying any work to be executed to prevent a recurrence of the said nuisance.

9. Section 120 of the same Act provides:

(1) If the person on whom a notice to remove a nuisance has been served as aforesaid fails to comply with is of the requirements thereof within the time specified 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 person on whom the notice was served to appear before court.

(2) If the court is satisfied that the alleged nuisance exists the court shall make an order on the author thereof, or 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.

(3) 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.

(4) If the court is satisfied that the nuisance, although removed since the service of the notice, was not removed within the time specified in such notice, the court may impose a fine not exceeding two hundred shillings on the person on whom such notice was served, and may, in addition to or in substitution for such fine, order such person to pay all costs incurred up to the time of the hearing of the case.

(5) If the nuisance, although removed since the service of the notice, in the opinion of the medical officer of health is likely to recur on the same premises, the medical officer of health shall cause a complaint relating to such nuisance to be made before a magistrate, and the magistrate shall thereupon issue a summons requiring the person on whom the notice was served to appear before him.

(6) If the court is satisfied that the alleged nuisance, although removed, is likely to recur on the same premises, 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 do any specified work necessary to prevent the recurrence of the nuisance and prohibiting its recurrence.

(7) In the event of the person on whom such order as is specified in subsections (5) and (6) not complying with the order within a reasonable time, the medical officer of health shall again cause a complaint to be made to a magistrate, who shall thereupon issue a summons requiring such person to appear before him, and on proof that the order has not been complied with may impose a fine not exceeding two hundred shillings, and may also give directions as to the payment of all costs up to the time of the hearing.

(8) Before making any order, the court may, if it thinks fit, adjourn the hearing or further hearing of the summons until an inspection, investigation or analysis in respect of the nuisance alleged has been made by some competent person.

(9) Where the nuisance proved to exist is such as 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 dwelling is fit for that purpose; and may further order that rent shall be due or payable by or on behalf of the occupier of that dwelling in respect of the period in which the closing order exists; and on the court being satisfied that it has been rendered fit for use as a dwelling the court may terminate closing order and by a further order declare the dwell habitable, and from the date thereof such dwelling may be let or inhabited.

(10) Notwithstanding a closing order, further proceedings may be taken in accordance with this section in respect of same dwelling in the event of any nuisance occurring or of the dwelling being again found to be unfit for human habitation.

10. These provisions were considered by **Okwengu, J** (as she then was) in **Githui vs. Public Health Officer Crim. 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 failing to comply with the mandatory legal provisions and also in acting contrary to the rules of natural justice."

11. In **Republic Vs. Kigera [2006] 1 KLR (E&L) 132**, **Mbaluto and Bosire, JJ** (as they were) expressed themselves *inter alia* as follows:

"For a court to be satisfied as to the existence of nuisance, it must act on evidence and that evidence must be tested by cross-examination before being acted upon or at least persons against whom it is given must be given an opportunity to challenge it if only to demonstrate that justice has been done. No person should be made to feel that his interests have not been safeguarded or at least not been borne in mind by the Court in arriving at a decision which affects him… Upon receipt of a complaint under section 120(1) of the Public Health Act, the court should deal with the criminal matter in the normal manner until completion as provided under the Criminal Procedure Code. If the Court is, *prima facie,* satisfied that a nuisance has been proved to exists such as renders the premises unfit for human habitation, whether or not there is a conviction, it should adjourn further proceedings so as to summon before it all persons who are reasonably likely to be affected by an order of closure or demolition, if made. The summons or notice should give particulars of the nuisance, the orders proposed to be made, the date they are required to appear and, of course, require them appear to show cause why the order proposed should not be made. On the appointed time the court will then hear all those who have responded to the court's summons or notice and who wish to be heard and if, upon conclusion of the proceedings, the court is satisfied, on a balance of probabilities, that a nuisance does exist as renders the premise or dwelling unfit for human habitation, it should record such finding and proceed to declare them as such and make the necessary orders as provided under the Public Health Act. Although the Court is aware that the said procedures are likely to greatly prolong proceedings and delay the abatement of nuisances, it considers it ideal to meet the ends of justice, and at the same time reduce the number of applications similar to the present one, which may be made by the court."

12. Similarly, in **Republic –vs-Kisanga & Others 1990) KLR 97**, the Court held:

"The Courts dealing with a complaint that premises are a statutory nuisance within section 92(1)(a) of the English Act should, in making their findings, keep close to the wording of the statute and ask themselves after they have found the condition of the premises the questions (i) whether the state of the premises are such as to be injurious or likely to cause injury to health or (ii) whether it is a nuisance…It is undesirable to consider these questions in terms of fitness or unfitness for habitation. The Courts should find specifically under which limb the case falls and if either question is answered in the affirmative they should make a nuisance order which should be specific as possible rather than order in general terms to abate the statutory nuisance. In making the order the Court should take into account the circumstances in which the property is being occupied including the likely duration of the occupation. If the complainant is before the Magistrate on the basis of (c) above, the Act itself requires not consideration of the condition of the premises on a subjective view, but a positive finding that the premises are in a condition "liable to be injurious or dangerous to health" and the court would prefer to see the actual dangers set out seriatim…Upon receipt of a complaint under section 120(1) of the Public Health Act, the court should deal with the criminal matter in the normal manner until completion as provided under the Criminal Procedure Code. If the Court is, *prima facie,* satisfied that a nuisance has been proved to exists such as renders the premises unfit for human habitation, whether or not there is a conviction, it should adjourn further proceedings so as to summon before it all persons who are reasonably likely to be affected by an order of closure or demolition, if made. The summons or notice should give particulars of the nuisance, the orders proposed to be made, the date they are required to appear and, of course, require them appear to show cause why the order proposed should not be made. On the appointed time the court will then hear all those who have responded to the court's summons or notice and who wish to be heard and if, upon conclusion of the proceedings, the court is satisfied, on a balance of probabilities, that a nuisance does exist as renders the premise or dwelling unfit for human habitation, it should record such finding and proceed to declare them as such and make the necessary orders as provided under the Public Health Act… In any event, there is no power to order closure unless the court is satisfied that the house is unfit for human habitation, not merely to allow access where it is not given freely by the tenants… If the Magistrate is considering an order would affect the occupiers, as distinct from the owner, he is required to call the tenants if any to be heard in the matter… But he is unable to make a closing order at all unless he is satisfied that the premises are unfit for human habitation, and the Court requires to see a specific finding on the point, with reasoning, and at least notes of points observed to be the basis for such a finding: and the Court reserves its position as to whether a mere visit to the scene can form the basis of such a finding and thinks probably not. It should be remembered that at the outset it was up to the

Medical Officer to decide how to proceed, and if the premises were so obviously unfit for Human Habitation that the Magistrate could see it on one visit, one would have expected the proceedings to commence on that basis, not for the question to surface only when the allegation of the owner, to be treated with suspicion for the reasons shown above, started to make thoughts of closure come into picture."

13. **Wendo, J** on her part in **Barclays Bank of Kenya vs. City Council of Nairobi Nairobi HCMA No. 4475 of 2005,** expressed herself as follows:

"Where charges are preferred against the applicants without being given a chance to explain their side of the events or story especially after the applicants requested for audience, the Respondents were in breach of that cardinal rule of natural justice that one cannot be condemned unheard and the matter would fall squarely under the purview of judicial review."

14. In the instant case, the applicant contends that he was never afforded an opportunity of being heard before the adverse action was taken by the 1st and 2nd Respondents. Section 120 of the said Act clearly mandated the Respondents to afford the Applicant such an opportunity before an adverse order could be made. This requirement is reinforced by the provisions of Article 47 of the Constitution.

15. Having considered the material on record as well as the averments of the applicant, which averments were not controverted by the Respondents by way of an affidavit I find that the actions of the 1st and 2nd Respondents were tainted with procedural irregularities. One of the grounds for impugning a decision is the commission of procedural improprieties and as was held in **Pastoli vs. Kabale District Local Government Council and Others [2008] 2 EA 300:**

"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."

16. Apart from that it was contended that section 116 of the ***Public Health Act*** Cap 242 Laws of Kenya, obligates every local authority, and in this instance the 1st Respondent to take all lawful, necessary and reasonably practicable measures for maintaining its district at all times in clean and sanitary condition, and for preventing the occurrence of nuisances within its area of jurisdiction hence the said Respondents are under a duty to construct a public sewer in the area to handle sewerage and waste water disposal. The said section provides as hereunder:

It shall be the duty of every local authority to take all lawful, necessary and reasonably practicable measures for maintaining its district at all times in clean and sanitary condition, and for preventing the occurrence therein of, or for remedying or causing to be remedied, any nuisance or condition liable to be injurious or dangerous to health, and to take proceedings at law against any person causing or responsible for the continuance of any such nuisance or condition.

17. In this case the applicant seeks an order for mandamus compelling the 1st and 2nd Respondents to lay sewerage systems within Mlolongo area in compliance with its duty to maintain cleanliness and prevent nuisance under the said section. The Court of Appeal in **Kenya National Examinations Council vs. Republic Ex parte Geoffrey Gathenji Njoroge& Others Civil Appeal No. 266 of 1996 (CAK) [1997] eKLR** expressed itself inter alia as follows:

"The order of mandamus is of a most extensive remedial nature, and is, in form, a command issuing from the High Court of Justice, directed to any person, corporation or inferior tribunal, requiring him or them to do some particular thing therein specified which appertains to his or their office and is in the nature of a public duty. Its purpose is to remedy the defects of justice and accordingly it will issue, to the end that justice may be done, in all cases where there is a specific legal right or no specific legal remedy for enforcing that right; and it may issue in cases where, although there is an alternative legal remedy, yet that mode of redress is less convenient, beneficial and effectual. The order must command no more than the party against whom the application is legally bound to perform. Where a general duty is imposed, a mandamus cannot require it to be done at once. *Where a statute, which imposes a duty, leaves discretion as to the mode of performing the duty in the hands of the party on whom the obligation is laid, a mandamus cannot command the duty in question to be carried out in a specific way* … These principles mean that an order of mandamus compels the performance of a public duty which is imposed on a person or body of persons by a statute and where that person or body of persons has failed to perform the duty to the detriment of a party who has a legal right to expect the duty to be performed. An order of mandamus compels the performance of a duty imposed by statute where the person or body on whom the duty is imposed fails or refuses to perform the same but if the complaint is that the duty has been wrongfully performed i.e. that the duty has not been performed according to the law, then mandamus is wrong remedy to apply for because, like an order of prohibition, an order of mandamus cannot quash what has already been done…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. In the present appeal the respondents did not apply for an order of certiorari and that is all the court wants to say on that aspect of the matter." [Emphasis provided].

18. While I, in principle, agree with the decision in **Peter K. Waweru vs. Republic [2006] eKLR**, in this case it is clear that this court cannot compel the 1st and 2nd Respondents to undertake their obligation under the said section in a specific manner. Accordingly, the order of mandamus sought cannot be granted in the manner in which it is crafted herein.

19. Therefore, the order which commends itself to me and which I hereby grant is an order of Certiorari bringing into this court and quashing the charge sheet and all incidental and consequential proceedings related to Criminal Case No. 171 of 2019 before the Senior Principal Magistrates Court, Mavoko. I further prohibit the 1st and 2nd Respondents from in any manner whatsoever or otherwise acting upon, enforcing or attempting to enforce the notice issued under the Ministry of Health and Emergency Machakos Government Reference No

20. The costs of these proceedings are awarded to the applicant.

21. It is so ordered.

Judgement read, signed and delivered in open court at Machakos this 19th day of November, 2019.

G V ODUNGA

JUDGE

In the presence of:

Miss Mwau for Mr Nthiwa for the 1st and 2nd Respondents

CA Geoffrey