



**REPUBLIC OF KENYA**

**IN THE HIGH COURT OF KENYA**

**AT MOMBASA**

**JUDICIAL REVIEW APPLICATION NO. 25 OF 2013**

**OKUYOSI E. TIMOTHY .....PLAINTIFF**

**VERSUS**

**1. KENYA PORTS AUTHORITY PENSION SCHEME.....1<sup>ST</sup> RESPONDENT**

**2. GIMCO LIMITED ..... 2<sup>ND</sup> RESPONDENT**

**3. MUNICIPAL COURT RESIDENT MAGISTRATE.....3<sup>RD</sup> RESPONDENT**

**RULING**

1. The exparte applicant Okuyosi E. Timothy and 34 other tenants of Motor Mart Building, Moi Avenue, Mombasa have through a Notice of Motion filed on 17<sup>th</sup> May, 2013, moved the court under the provisions of order 53 rule 3(1) of the Civil Procedure Rules for the following orders:-

(i) An order of prohibition be issued, directed against the Third respondent in the Municipal Court, Mombasa, prohibiting the Magistrate or any other Magistrate from proceeding to issue eviction warrants, against the applicants from property known (sic) as LR No. XX/149, XX/150 and XX/151, known by the name Motor Mart building, along Moi Avenue, Mombasa, pursuant to the orders of that court, made on the 25<sup>th</sup> April, 2013 in case Number 1342 of 2013, Republic vs Kenya Ports Authority Pension Scheme;

(ii) An order of certiorari be issued to bring to this court and quash the proceedings and orders in Municipal court case Number 1342 of 2013, Republic vs Kenya Ports Authority Pension Scheme; in so far as the same affect the applicants, which proceedings and orders were made on the 25<sup>th</sup> day of April, 2013; and

(iii) Costs of the application be provided for.

2. It is supported by the verifying affidavit dated 13<sup>th</sup> May, 2013 and the statement in support of the facts dated 13<sup>th</sup> May, 2013. The exparte applicants' deponent filed a further affidavit on 7<sup>th</sup> April, 2016. The 1<sup>st</sup> respondent filed a replying affidavit on 17<sup>th</sup> July, 2013, in opposition to the said application. The Hon. Attorney General entered appearance for the 3<sup>rd</sup> respondent but filed no response.

## THE EXPARTE APPLICANTS' SUBMISSIONS

3. Mr. Buti, Learned Counsel, represented the exparte applicants. He submitted that they were seeking an order of certiorari for the reason that the exparte applicants were not granted a hearing by the 3<sup>rd</sup> respondent thus the rules of natural justice were not adhered to. He stated that in the charge sheet at the Mombasa Municipal court, the 1<sup>st</sup> respondent was granted 30 days to remedy the wrong it was charged with and that the Municipal court granted orders for a Notice to issue to the tenants to vacate the premises. It was submitted that these orders were granted in the absence of the tenants who were not served with notices to vacate. Counsel relied on the case of **Municipal Council of Mombasa vs Republic & Umoja Consultants Ltd.** [2002] eKLR, where it was held that the court would only be concerned with the process leading to the making of the decision and not the decision itself.

4. Mr. Buti submitted that the 1<sup>st</sup> respondent had confirmed that the exparte applicants were not heard before the orders were made thus there was a violation of their rights. He argued that some of the exparte applicants are protected tenants and that due process of the law ought to be followed. It was submitted that no certified court order was served on the exparte applicants. What was served on them was a letter dated 26<sup>th</sup> April, 2013. Efforts made by the exparte applicants to obtain a copy of the orders of the court were futile thus the prayer for orders of certiorari.

## 1<sup>ST</sup> AND 2<sup>ND</sup> RESPONDENTS' SUBMISSIONS

5. Mr. Wafula, Learned Counsel for the 1<sup>st</sup> and 2<sup>nd</sup> respondents submitted that it was not in dispute that the 1<sup>st</sup> respondent was the owner of the building and the exparte applicants are business owners in the said building. The building in issue; namely motor mart building was however condemned by the Public Health Department vide a notice dated 12<sup>th</sup> March, 2013 that ordered the 1<sup>st</sup> respondent to repair the building.

6. He further informed the court that the notices issued by the Public Health Department have not been challenged. He indicated that once a notice is issued, the person receiving the notice must comply. He stated that the 1<sup>st</sup> respondent was prosecuted in CM Criminal case No. 1342 of 2013 for failure to comply with the Public Health Notices. Mr. Wafula submitted that the orders to repair the building were issued to the landlord, the 1<sup>st</sup> respondent and not to the tenants. A copy of the said notice was attached to the replying affidavit. It was his assertion that the repairs required cannot be reasonably done when the exparte applicants are in occupation of the said building. He referred the court to a report by Mexcad Consulting Engineering Ltd which was attached to the 1<sup>st</sup> respondents replying affidavit that states that renovations cannot be done when the tenants are in the building. He contended that it is dangerous for any person to be in occupation of the building. He submitted that there is no requirement under the Public Health Act for tenants to be heard. It was his submission that the building endangers the exparte applicants and their customers. He added that the granting of the orders sought is discretionary.

7. He referred to the treatise **H.W.R Wade and C.F Forsyth** on Administrative Law, 7<sup>th</sup> Edition, page 718, which states that:-

***“The most important remedies discussed in the book, declaration, injunction, mandamus are discretionary and the court may therefore withhold them as it thinks fit. In other words, the court may find some act to be unlawful but may nevertheless decline to intervene.”***

8. He also cited the case of **Republic vs National Transport and Safety Authority and 10 Others exparte James Maina Mugo** [2015] eKLR, where Odunga Judge held that grant of Judicial Review orders are discretionary. Mr. Wafula stated that if the court finds that the exparte applicants were entitled to be heard, the court should weigh this against public interest and find that the orders sought should not be granted. He closed his submissions by stating that the letter dated 26<sup>th</sup> April, 2013 shows that the exparte applicants were requested to vacate the building for renovations to be done and they would go back as their leases were not being terminated. He prayed for the application to be dismissed for lack of

merit.

## **THE EXPARTE APPLICANTS' REJOINDER.**

9. Mr. Buti submitted that the respondents submissions were on the merit of the decision and not on the decision making process. The court would not be interested in the dilapidated nature of the building. The only issue to be considered is whether the exparte applicants were heard before they were issued with their letters notifying them to vacate the premises. He added that the right to natural justice is provided under article 25(c) of the Constitution.

## **ANALYSIS AND DETERMINATION**

The issue for determination is if the exparte applicants rights to natural justice have been violated.

10. The court on 14<sup>th</sup> day of May, 2013 granted orders that leave to apply for orders of certiorari was to operate as stay of execution of the orders of the 3<sup>rd</sup> respondent made on 25<sup>th</sup> April, 2013. The main bone of contention by Counsel for the exparte applicants is that they were not given a hearing before they were served with the letters dated 26<sup>th</sup> April, 2013 requiring them to vacate the premises in issue. Secondly, the alleged order in Municipal Court Criminal case No. 1342 of 2013, **Republic vs The Administrator Kenya Ports Authority Pension Scheme** was not served on the exparte applicants by the 2<sup>nd</sup> respondent. The deponent, Okuyosi E. Timothy in his verifying affidavit at paragraph 6 deposes that despite their Advocate requesting for a copy of the order none was availed. He was instead supplied with a copy of the charge sheet. In paragraph 8 thereof he states that exparte applicants' Advocates perused the court file on 9<sup>th</sup> May, 2013 and noted that the charge against the accused (1<sup>st</sup> respondent) was to the effect that he failed within 30 days to comply with a Notice issued under section 119 as read with section 120 and 121 of the Public Health Act, Cap 242, Laws of Kenya. The (1<sup>st</sup> respondent) pleaded guilty and a plea of guilty was entered. One Mr. Kiarie addressed the court stating that the 1<sup>st</sup> respondent intended to remedy (the nuisance) within 2 months and that there were tenants in possession (occupation of the premises). He applied for an order that the tenants be removed therefrom. The court then made an order for Notice to issue to vacate the said premises. The 1<sup>st</sup> respondent was then released on a cash bail of Kshs. 50,000/=.

11. In paragraphs 9 and 10 of the said affidavit the exparte applicants state that they were not informed of the existence of the suit by the 1<sup>st</sup> and 2<sup>nd</sup> respondents. They further depose that the drastic orders requiring them to vacate the premises were made in proceedings in which they did not participate in and they were condemned to vacate the suit premises unheard. The exparte applicants read mischief in the changing of the Management agent from Lustman & Company. It was their contention that the new management agent desisted from carrying out normal cleanliness and disconnected their water supply thus perpetrating the problem and creating the complaints for which the 1<sup>st</sup> respondent was charged.

12. At paragraph 18 of the verifying affidavit, the exparte applicants indicate that they legitimately expect and are at all times carrying on such business with the ultimate view that their leases will not unilaterally and unexpectedly be interrupted by the 1<sup>st</sup> and 2<sup>nd</sup> respondents without first resorting to the application of due process of the law and being mindful of the rules of natural justice.

13. The 1<sup>st</sup> and 2<sup>nd</sup> respondents argument is contained in the replying affidavit filed on 17<sup>th</sup> July, 2013 by the 1<sup>st</sup> respondent's Pension Administrator, Amani K. Ruto. In paragraphs 4, 5, 8 and 9 thereof, he deposes that the 1<sup>st</sup> respondent was issued with a thirty (30) day notice to remove the nuisance brought about by the burst drainage system among other disrepairs inherent in the subject building. They were unable to remove the said nuisance. As an Administrator to the 1<sup>st</sup> respondent, he was charged by the Public Health (Officer) of the City of Mombasa for not complying with the notices dated 12<sup>th</sup> February, 2013 as a result of which the deponent appeared before the 3<sup>rd</sup> respondent and pleaded guilty to the charges.

14. In paragraphs 6 and 7 of the said affidavit, the 1<sup>st</sup> respondent had a Health Safety and Structural Integrity Report (sic) undertaken and the report dated 17<sup>th</sup> April, 2013 marked as AKR 2 was prepared. The report described the suit property as in need of urgent repairs which could only be undertaken after the tenants from the building were evacuated. In paragraphs 11 and 12 of the affidavit the deponent states that the Magistrate was within his powers in issuing the notices to the tenants to vacate the premises in order to allow for the nuisance to be removed. He asserted that the Medical Officer of Health can only serve a notice on the occupier or owner of a building or premises on which a nuisance arises when the author of a nuisance cannot be found. There is therefore no breach of natural justice that was occasioned. In paragraph 15 of the said affidavit, it is deposed that only twenty (20) tenants signed the authority for Okuyosi E. Timothy to act on their behalf. In this regard I am in total agreement with the 1<sup>st</sup> and 2<sup>nd</sup> respondents that only 20 tenants as depicted in the letter of authority to act filed in court on 14<sup>th</sup> May, 2013 gave authority to Okuyosi E. Timothy. It therefore follows that any orders made by this court will apply to the said exparte applicants.

15. Section 119 of the Public Health Act provides that:-

***“The medical officer of health, if satisfied on the existence of a nuisance, shall serve a notice to 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 thinks it desirable (but not otherwise), specifying any work to be executed to prevent a recurrence of the said nuisance. Provided that –***

***(i) where the nuisance arises from any want or defect of a structural character, or where the dwelling or premises are unoccupied, the notice shall be served on the owner;***

***(ii).....”***

16. The notices issued to the 1<sup>st</sup> respondent by the Public Health Officer marked as AKR 1 outline defects of structural character such as beams and columns having been compromised due to roof leakages, deterioration of internal walls and floor. It is my finding that in accordance to the proviso to section 119 of the Public Health Act, the notices were properly issued to the 1<sup>st</sup> respondent as the owner of the suit property as some of the nuisance comprised defects of structural character. My understanding of the provisions of section 119 of the Public Health Act is that the notices issued by the Public Health Officer on 12<sup>th</sup> February, 2013 would have been served on the tenants if the said officers opinion, they were the authors of the nuisance. It is apparent from the notices that they were not. The provisions of article 25(c) of the Constitution was therefore not violated by the 3<sup>rd</sup> respondent.

17. The extent of Judicial Review was set out by Lord Diplock in the case of **Council for Civil Service Unions vs Minster for Civil Service** [1985] A.C 374 at 401 D when he stated :-

***“Judicial Review has I think developed to a stage today when .... 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’ ... 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 ..... By ‘irrationality’ I mean what can now be succinctly referred to as ‘Wednesbury unreasonableness’ .... 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 .... I have described the third head as ‘procedural impropriety’ rather than failure to observe rules of natural justice or failure to act with procedural fairness towards the person who will be affected by the decision.”***

18. The provisions of section 120 (1) of the Public Health Act must be considered alongside the above decision. The section provides as follows:-

***“if the persons on whom a notice 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 summons requiring the person on whom the notice was served to appear before his court.”***

19. In the present application, the Public Health Officer followed due process as by law provided when he lodged a complaint relating to the nuisance before the 3<sup>rd</sup> respondent who issued summons to the 1<sup>st</sup> respondent, being the person to whom the notice had been served. Procedurally, the Magistrate could not have issued summons to the exparte applicants to appear before him as they had not been served with notices by the Public Health Officer requiring them to remedy the nuisance in the suit premises.

20. In **Municipal Council of Mombasa vs Republic & Umoja Consultants Ltd**, Civil Appeal No. 185 of 2001, it was held that Judicial Review is concerned with the decision making process not with the merits of the decision. Also refer to **Republic vs Business Premises Tribunal & 3 Others Exparte Christine Wangari Gathege** [2014] eKLR. This court from the analysis outlined in the foregoing paragraphs of this ruling finds that the 3<sup>rd</sup> respondent was under no legal obligation to summon the exparte applicants to court to give them a hearing. He therefore did not breach the rules of natural justice.

21. As a result of the foregoing, the court makes the following orders:-

- (i) The application dated 16<sup>th</sup> May, 2013 is hereby dismissed;
- (ii) The 1<sup>st</sup> respondent will issue the exparte applicants with notices of not less than 6 months to vacate the suit premises to enable the 1<sup>st</sup> respondent remedy the nuisance;
- (iii) The 1<sup>st</sup> respondent will address the issue of the subsisting tenancies of the exparte applicants before issuing them with the notices to vacate the said premises; and
- (iv) Costs to the 1<sup>st</sup> and 2<sup>nd</sup> respondents.

It is so ordered.

**DELIVERED, DATED and SIGNED** in open court at Mombasa on this 6<sup>th</sup> day of **October, 2016.**

**NJOKI MWANGI**

**JUDGE**

**In the presence of**

Mr. Wafula for the 1<sup>st</sup> and 2<sup>nd</sup> respondents

No appearance for the exparte applicants

No appearance for the 3<sup>rd</sup> respondent

Mr. Oliver Musundi Court Assistant