



REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT KITALE

MISC. CAUSE NO. 15 OF 2015

REPUBLIC.....APPLICANT

VERSUS

THE PUBLIC HEALTH OFFICER TRANS-NZOIA....RESPONDENT

HESBON OKOTH MUDENYO..... EX-PARTE APPLICANT

RULING

1. The ex-parte applicant, **Hesbon Okoth Mudenyio**, obtained leave to apply for an order of certiorari, and the grant of leave was to operate as a stay of the decision of the **Public Health Officer, Trans-Nzoia County (Respondent)** to close the applicant's pub known as **Mwisho Mwisho Pub**. The substantive application was filed by a notice of motion dated 28th May, 2015 in which the applicant seeks an order of certiorari to remove into this court and quash the closure notice or decision of the respondent made on the 10th April, 2015, closing Mwisho Mwisho Pub.
2. The application is based on the grounds that the respondent lacked the jurisdiction under the cited Provision of the Law to close the premises and acted ultra vires as he lacked jurisdiction to issue closure notice on premises situated within Kitale Town which is not within his area of operation. That, the decision of the respondent was arrived at in violation of the principles, of natural justice as the applicant was not accorded an opportunity to be heard or abate and abate the nuisance if any. These grounds are supported and fortified by the applicant's supporting affidavit dated and deponed on the 13th April, 2015.
3. The respondent filed grounds of opposition dated 25th May, 2015 in which he contends that the application is incompetent and fatally defective for failing to comply with the mandatory Provisions of Order 53 of the Civil Procedure Rules, 2010 and that the notice of motion introduces new grounds which were not in the statutory statement of facts lodged with the applicant's chamber summons dated 13th April, 2015. Further, that the statutory statement of facts lodged by the applicant with the notice of motion is defective for failing to comply with the Provisions of Order 53 Rule (1) (2) of the Civil Procedure Rules.
4. At the hearing of the application the applicant through **Mr. Ingosi**, learned counsel, submitted that the notice purportedly issued by the respondent was issued pursuant to a non-existent Provision of the Law, as the applicable provision was Regulation 16(1)(b) of the Food Drugs and Chemical Substances (Food Hygiene) Regulations. That the said Regulation 16 does not provide for power to close premises but only allows a Public Health officer to serve a notice prohibiting usage of premises until compliance with the notice. That, herein it was not demonstrated that the applicant continued to use the premises ever after the issuance of the notice.
5. The applicant contended that the respondent's action was an administrative action which was "ultra vires". In any event, the (applicant) complied with the notice and the premises were re-opened on 12th March, 2015 but hardly a month thereafter another notice purporting to close the premises was issued. The notice was dated 10th April, 2015 and was issued pursuant to the

provisions of the Public Health Act, of which the relevant provisions is Section 119 which requires that time be given by the Medical Officer for the removal of the nuisance while Section 120 gives the procedure to be followed in the absence of compliance with the notice. It is therefore the applicant's contention that the prescribed procedure was not followed and hence, the respondent's action was unsupported by law and was in excess of jurisdiction.

6. **Prof. Sifuna**, learned counsel, submitted on behalf of the respondent that the notice of motion is incompetent for failing to comply with the mandatory provisions of Order 53 C.P.R. That the application for leave was spent once the leave was granted and as such only the statutory statement, verifying affidavit and the annexures lodged in the leave application was to be lodged together with the substantive motion. That once leave is granted a fresh application is filed yet herein, an application within an application was filed and as there cannot be two applications at the same time the present application is fatally defective since the purposes for a chamber summons and notice of motion are completely different.
7. Learned counsel, further submitted that the statement of facts attached to the substantive application does not have the relief sought nor does it qualify as a statement of fact contemplated in Order 53 Rule (1) (2) C.P.R. That the filing of an affidavit with the notice of motion was wrong as it was a new affidavit deponed on 28th April, 2015. That, Judicial Review application, being “Sui-generis”, its procedures must be strictly followed and no other procedures can be imported thereto. That, the notice of motion introduces new grounds over and above those set in the statutory statement of facts.
8. Learned counsel, also submitted that Order 53 requires that an applicant lodges with the registry a day before the application for leave the notice of intention to bring the application but this was not done herein and as regards the notice issued to the applicant by the respondent, the same was so issued in accordance with the law. That it was as a result of a typographical error that a wrong provision of the law was invoked and in any event, Section 162 of the Public Health Act does not invalidate a defect in form. That, the re-opening of the premises was on condition that the female toilet be put up but this was not done by the time the notice was issued. That an order of certiorari is a prerogative remedy but the applicant has come to court with unclean hands and should not therefore be encouraged to break the law.
9. After due consideration of the foregoing submissions and the grounds for the application, the issues for determination are **firstly**, whether the application is competent and proper before the court and **secondly**, whether an order for certiorari should issue against the respondent.

With regard to the first issue, it is apparent that the respondent's main objection to the application is grounded on matters of procedural technicalities and this explains why the respondent deemed it fit to only file grounds of opposition in exclusion to a responding or replying affidavit addressing the matters raised by the applicant. He in that regard relied on the decision in the case of **Republic -vs- K.P.T.C. Ex-parte E.A. Television Network Criminal Appeal No. 175 of 2000**.

10. Judicial Review proceedings are special in nature and whereas the Law Reform Act is the Substantive Law, Order 53 of the Civil Procedure Rules, 2010, is the procedural law.

The respondent's objection to the application on account of competence is based on the procedural law. Herein, necessary leave was obtained by the applicant as provided in Rule 1(1) of Order 53 on the 14th April, 2015, vide an ex-parte chamber summons dated 13th April, 2015. Thereafter, on the 30th April, 2015, the substantive application under a notice of motion dated 28th April, 2015, was filed in the same cause and/or file.

There was nothing wrong or prejudicial to the respondent by the applicant's action of filing the notice of motion in one cause with the chamber summons. There was no application within an application as the notice of motion was an independent application pursuant to the leave granted under the chamber summons.

The grant of leave effectively rendered that aspect of the procedure spent especially when the court ordered on the 27th April, 2015, that the leave granted does operate as a stay of the closure of the applicant's business premises.

11.As regards the requirement that notice of the application for leave be given to the registrar, the current Civil Procedure Rules, 2010, did away with that requirement. The notice of motion herein contains all the necessary documents in terms of Rule 4 of Order 53.

Basically, the notice of motion as presented is largely proper and competent. It is not fatally defective and incompetent as contended by the respondent and there being no substantial response or objection to the substance of the application, it would follow that the application is not seriously contested as the objection put forth by the respondent is on procedural identically rather than the substance of the application.

12.Be that as it may, in an old English case, *Republic -vs- Electricity Commissioners (1924)1 KB 71*, it was observed whenever any person or body of persons has legal authority conferred by legislation to make decisions in public law which affect the common law or statutory rights of other persons as individuals, it is amenable to the remedy of judicial review of its decision either for error of law in so acting or for failure to act fairly towards the person who will be adversely affected.

Judicial review is bequeathed with defined interventions namely illegality, irrationality and impropriety of procedure (see, *Republic -vs- Commissioner of Lands (Ex-part Late Flowers NBI HCCC 1235/98)*).

13.Herein, the applicant, seeks an order of certiorari to quash the closure notice or decision of the respondent issued on 10th April, 2015, closing the applicant's business premises known as "Mwisho-Mwisho Pub". It is the applicant's contention that the respondent lacked the necessary jurisdiction to take such action for reasons **firstly**, that the wrong provisions of the law was involved and **secondly**, the officer who actually issued the notice acted "ultra-vires" in as much as the affected premises are not situated in his area of operation. The applicant also contended that the decision or order of the respondent was arrived at in violation of the principles of natural justice as he (applicant) was not accorded an opportunity to be heard and/or abate the nuisance, if any.

14.Any decision, order or notice issued without necessary jurisdiction or "ultra-vires" or in contravention of the rules of natural justice would be unlawful and hence, attract an order of certiorari.

The court's intervention would be necessary where public authorities or persons act in bad faith, abuse of power, failure to take into account relevant consideration in decision making or take into account irrelevant consideration or even act contrary to legitimate expectations.

15.Herein, the subject notice dated 10th April, 2015, was issued by the District Public Health Officer Trans-Nzoia West pursuant to the Food, Drugs and Chemical Substances Act (Cap 254 LOK) as well as the Public Health Act (242 LOK) and regulations made thereunder.

The actual provisions of the said Public Health Act which were flouted by the applicant (if at all) are not indicated in the notice meaning that the notice was inchoate and therefore invalid for meaningful compliance and/or enforcement. Nonetheless, Regulation 16(b) of the Food, Hygiene Regulations made under the Food, Drugs, and Chemical Substances Act was involved in the notice.

16.The said Regulation provides that:-

"Where any food plant, by reason of its situation, construction or disrepair, is in such a condition that any food in the premises may be exposed to contamination or deterioration or become dirty, an authorized officer may serve a notice in writing on the person who owns or operates the food plant requiring him..

(a)

(b) not to use the plant until the conditions stated in such notice have been fulfilled”.

17. The failure to comply with a notice issued under the said Regulation 16 or any other would attract a criminal offence against the proprietor of the subject premises. The Regulation does not provide for closure of premises. It provides for non-usage of the premises until such time that the conditions given in the notice are fulfilled. The Regulation presupposes that the proprietor of the premises would be given adequate or reasonable time within which to act and abate or prevent the offending nuisance or otherwise.

18. The issuance of the subject notice by the respondent was therefore an error of law, an abuse of power and an action which was in excess of the power conferred by Regulation 16 (b) of the Food Hygiene Regulations.

The Public Health Act was cited in the notice without inclusion of the relevant provisions. This meant that the said Act was considered irrelevant by the respondent for the purposes of the subject notice which was in essence a closure order. Be that as it may, under the Act, Public Health Officers have no powers under Section 120 to order for closure of a premises as the subsection only empowers him to cause a complaint to be made before a magistrate and after that it is only the court that can order the closure of the premises. (see, **Republic -vs- District Public Health Officer, Kisii & Others Ex-parte Magero HCC Misc.226 of 2004 Kisii**).

19. Further, under Section 119 and 120 of the Act (i.e Public Health Act), it is only the Medical Officer of Health who has the power to issue a notice to remove a nuisance. If another officer takes the action of issuing a notice to remove a nuisance it would be on behalf of the Medical Officer and this must be clearly shown. The officers therefore acted in excess of power and went further in denying the applicant a hearing before taking the purported action of closing or attempting to close his premises yet the action affected his livelihood. Clearly, the respondent threw the principles of natural justice “out of the window”.

20. In sum, the procedure applied by the respondent in issuing the disputed notice for purposes of dealing with the nuisance attributed to the applicant was contrary to not only the Food, Drugs and Chemical Substances Act but also the Public health Act. Consequently, the action taken against the applicant by way of closing his business premises or even attempting to close the premises was unlawful and in clear excess of power.

The present application is therefore merited and is allowed to the extent that an order of certiorari shall forthwith issue bringing into this court and quashing the material closure notice dated 10th April, 2015, issued by the respondent against the applicant. Costs to the applicant.

Ordered accordingly.

J.R. KARANJA

JUDGE

11/6/2015

[Read and signed this **11th** day of **June, 2015**]

In the presence of Mr. Ongosi and Prof. Sifuna.