REPUBLIC OF KENYA.

IN THE HIGH COURT OF KENYA AT KITALE.

MISC. CIVIL APPLICATION NO. 59 OF 2012.

REPUBLIC :: APPLICANT.

VERSUS

THE HON. ATTORNEY GENERAL)

C.M. COURT, KITALE.)

MUNICIPAL COUNCIL, KITALE) :::::::::::::::::::::::::::: RESPONDENTS.

DISTRICT P. HEALTH OFFICER)

R U L I N G.

The genesis of this matter is the Criminal Case No. 2261 of 2010 instigated at the Chief Magistrate's Court at Kitale by the Republic through the District Public Health Office against the Kitale Municipal Council through its Town Clerk.

The Ministry of Public Health & Sanitation through the District Public Health Officer, Trans Nzoia District issued a statutory notice dated 23rd July, 2010, to the Town Clerk, Kitale Municipal council, requiring him to demolish all the illegal kiosks (structures) around the bus park toilet, which affect the proper use of the toilet and hence may lead to disease outbreak, provide air-tight covers to all open manholes serving the toilet, clear the blocked storm water drains and re-organize the bus-park to ease congestion.

The notice was issued pursuant to powers vested in the Public Health officer under section 117 of the Public Health Act (Cap 242 LOK) and for purposes of preventing a re-currence of a nuisance in terms of section 116 of the said Act.

The town clerk was given a seven (7) day ultimatum to remove the nuisance in the manner prescribed in the notice. However, as at the 12th October, 2012, the Town clerk had not complied thereby prompting the prosecuting public health officer to move the court for necessary orders.

On that 12th October, 2012, the prosecution informed the Learned Resident Magistrate, **Mr. S.K. Ngetich,** that the Municipal Council had not done anything to improve the situation. The Town Clerk through his legal counsel, **Mr. Samba,** indicated that he was willing to comply with the notice issued by the public health officer on the 23rd July, 2010, but was facing opposition from political quarters of people who had an interest. He asked the court to give the council an order authorizing demolition of the illegal structures around the bus park. He also asked for security to be provided by the OCS Kitale Police

Station during the exercise and undertook to finish the problem once and for all so that the matter would not proceed any further.

The prosecution agreed with the Town Clerk and indicated that orders may be issued under section 124 of the Public Health Act.

The court therefore ordered the Municipal Council to comply with the notice issued by the public health officer dated 23rd July, 2010 and that the OCS Kitale Police station provide security and supervision.

The order was issued so that the case could be expediated and since both parties were in agreement.

The matter was mentioned on 23rd October, 2012, when it was indicated by the prosecution that the order had not been extracted for execution.

The order was ultimately extracted on the 30th October, 2012 and thereafter, several traders, operating kiosks around the bus-park were served with notices to demolish their respective structures within three (3) days from the date of the notice i.e. 5th November, 2012. the ex-parte applicants in this matter were among the said traders.

On 26th November, 2012, the ex-parte applicants having obtained necessary leave from the court on 7th November, 2012, filed the Notice of Motion dated 26th November, 2012 for an order of certiorari to remove into this court and quash the order of the 12th October, 2012, by the Resident Magistrate, Kitale in CMCC No. 2261 of 2010, to the effect that all the illegal kiosks (structures) constructed around the bus-park toilet be demolished and also to remove into this court and quash the decision of the Municipal Council of Kitale, embodied in a letter dated 5th November, 2012, singed by the clerk of the council requiring the ex-parte applicants to each demolish their business premises within three (3) days or have the same demolished by the council at the expense of the ex-parte applicants.

The Notice of Motion is also for an order of Prohibition to prohibit the Municipal Council of Kitale from demolishing the business premises of the ex-parte applicants without complying with the relevant law.

The grounds for the application are contained in the body of the Notice of Motion. There are eight (8) grounds, supported by the averments in the supporting affidavit dated 26th November, 2012 and the verifying affidavit dated 7th November, 2012, all deponed by the first ex-parte applicant, **David Kamau Kareke,** on behalf of eight (8) other applicants.

The application is also based on the statement of particulars dated the 7th November, 2012 and is directed at the Hon. Attorney General (first respondent), the Chief Magistrate's Court Kitale (second respondent), the Municipal Council of Kitale (third respondent) and the District Public Health Officer (fourth respondent)

Replying affidavits dated 6th May, 2014 and 12th June, 2014 were respectively filed by the fourth and third respondents in opposition to the application which was heard on the 17th June, 2014, whereupon the ex-parte applicants were represented by the Learned Council, **Mr. Kiarie**, while the first, second and fourth respondents were represented by the Learned litigation counsel , **M/s. Maina,** and the third respondent was represented by the Learned Counsel, **Mr. Samba.**

Having considered the application in the light of the supporting grounds and those in opposition and also in the light of the respective submissions made by counsels for all the parties, let it be re-stated herein that this is a judicial review application and judicial review is basically concerned with the decision making process and not the decision itself. Consequently, the court would concern itself with such issues as to whether the decision makers had the jurisdiction to make the disputed decision and whether the persons affected by the decision were heard before it was made (see, **Municipal Council of Mombasa vs. Republic & Umoja Consultants Ltd. Civil Appeal No. 185 of 2001.)**

The court would also concern itself with issues as to whether the disputed decision was illegal and/or

"Ultra-vires", unreasonable, irrational or made in error of the law. Further, the court would concern itself with issues as to whether the rules of natural justice were violated while making a decision.

A creature created by statute can only do that which the Act and the rules made thereunder permit it to do. If it were to purport to do anything outside that which the Act and the rules permit it to do, then it would become amenable to the supervisory jurisdiction of the High Court otherwise known as judicial review under which orders of Certiorari and Prohibition may issue.

An order of certiorari would issue where the disputed decision was made without or in excess of jurisdiction or where the rules of natural justice were not complied with or for such reasons.

An order of Prohibition is aimed at the future and generally forbids a tribunal or a public body from continuing with any proceedings in excess of its jurisdiction or in contravention of the Laws of the Land. Such an order is powerless against a decision which has already been made. This means that the disputed decision in this matter having already been made cannot be interfered with by this court by way of an order of prohibition. Thus, the decision by the respondents to demolish the illegal structures around the bus park toilet would remain intact unless it was made in excess of jurisdiction or contravention of the law or in violation of the rules of natural justice in which case the court may interfere and restore the "status-quo" by way of an order of certiorari.

If the decision was made lawfully in the first place, the court ought not interfere to prevent implementation of the decision by an order of prohibition.

Therefore, the appeal by the ex-parte applicants for an order of prohibition seems to be a misconception.

Be that as it may, the basic issues arising for determination in this matter are firstly, whether the ex-parte applicants who are the owners of the kiosks and/or structures targeted for demolition were denied the right to be heard prior to the disputed decision being made and secondly, whether the fourth respondent had the jurisdiction to issue the material statutory notice dated 23rd July, 2012, which in effect led to the disputed decision.

With regard to the first issue, it is instructive to note that the ex-parte applicants were not parties to the Criminal Case No. 2261 of 2010 but the order being sought therein by the fourth respondent against the third respondent was bound to affect them since they were the occupiers of the kiosks or structures stated for demolition from which they operated their respective business as duly licensed by the third respondent Council which went as far as charging rent for occupation of the kiosks.

Suffice to state that the kiosks and the businesses carried out therein were authorized by the third respondent in accordance with its by-laws and cannot be said to be illegal kiosks coming under the purview of the material statutory notice.

It appears that the third respondent council entered into agreement with the ex-parte applicants and others allowing them to put kiosks or structures or stalls to operate their respective businesses. If therefore, the third respondent went against the agreement and decided to demolish the kiosks thereby putting to an end the businesses carried out therein, the ex-parte applicants would be entitled to remedy by way of damages for breach of agreement and/or for loss of business income.

Herein, the third respondent was acting under a court order obtained against itself at the instance of the fourth respondent by dint of the material statutory notice which appears not to have been brought to the attention of the ex-parte applicants as they were not parties to the material criminal case. Indeed, the fourth respondent had no obligation to issue the statutory notice to the ex-parte applicants as they were deemed not to be the authors of the nuisance complained of. The third respondent was deemed to be the authors of the nuisance and was therefore rightly served with the material statutory notice. It is the third respondent who licensed the ex-parte applicants to operate in the disputed kiosks and was therefore the author of the alleged nuisance.

The obligation to serve the statutory notice upon the ex-parte applicants would have arisen only if the third respondent could not be found. But herein, the third respondent was found and so there was no obligation on the part of the fourth respondent to serve the notice upon the ex-parte applicants or to take them to court in the event of non-compliance with the conditions imposed therein.

The third respondent was the right party to be charged in court for failing to comply with the conditions stipulated in the statutory notice.

Indeed, the third respondent was charged in criminal case No. 2261 of 2010 which gave rise to the present application. Not being parties to that case, the ex-parte applicants were not entitled to be heard prior to the court issuing is orders. They were neither the complainants nor the accused and cannot now claim that they were condemned unheard. The condemned party was the third respondent who was condemned after being heard and indeed consented to the issuance of the demolition order thereby transferring its wrongs to the ex-parte applicants. It is for that reason that the ex-parte applicants would be entitled to remedy from the third respondent with whom they had an agreement to put up and operate business I their respective kiosks.

However, the issuance of the statutory notice and the resultant effects had to be in accordance with the laid down procedure set out by statute which in this case was the Public Health Act (Cap 242 LOK). Herein, the material statutory notice was issued by the District Public Health Officer, Trans Nzoia District (i.e. the fourth respondent). The ex-parte applicants have raised issues relating to whether the fourth respondent had the necessary jurisdiction to issue the notice. This is the second issue for determination in this matter but it would be dealt with after the first issue which is currently being dealt with.

In that regard section 119 of the Public Health Act provides for a notice to remove nuisance and indicates that such notice is to be issued to the author of the nuisance or the occupier of the affected premises or dwelling by the medical officer of health.

Section 120 of the Act provides for the procedure to be followed if the notice is not complied with by the person to whom it was served. In that event, the medical officer of health is required to cause a complaint relating to such nuisance to be made before a magistrate and the magistrate shall thereupon issue a summons requiring person or whom the notice was served to appear before the court which if satisfied that the alleged nuisance exists will make an order on the author thereof, or occupier or owner of the dwelling or previous, as the case may be, requiring him to comply with all or any of the requirement of the notice or otherwise to remove the nuisance within a specified time and do any works necessary for that purpose.

The foregoing procedure basically applied to the third and fourth respondents as the notice was served upon the third respondent as the author of the nuisance by the fourth respondent. The ex-parte applicants as the occupiers of the premises did not feature in the process. The procedure it may safely be stated was to a large extent followed. This explained why the third respondent landed in court.

What happened at the court is what triggered this matter as an order was issued with the consent of the third and fourth respondents to the effect that the kiosks and/or shall and/or structures occupied by the ex-parte applicants be demolished.

The order was indeed drastic yet the ex-parte applicants as the most affected parties were not notified by the third respondent of the court proceedings neither were they heard by the court before the order was made. The condemnation of the third respondent was transferred to them without their knowledge and without being given any opportunity to be heard. It is such circumstances which may prevail upon this court to hold that the ex-parte applicants were condemned unheard. Being the occupiers of the premises stated for demolition which premises were licensed by the third respondent they were most affected by the order issued by the court for the demolition of the kiosks which in any event were not illegal kiosks prescribed in the statutory notice.

If there was any mess created at the bus-park at the behest of the third respondent then it was the

third respondent responsibility to undo the mess in a manner provided by law. If they had informed the ex-parte applicants of the existence of the court proceedings and what to expect thereafter the situation would have been different as the ex-parte applicants would have had an opportunity to be heard before the demolition order was made by the court or would have had an opportunity to be given reasonable time within which to remove the nuisance attributed to the execution of their kiosks and/or structures within the bus-park area.

Apparently, the whole exercise to remove the nuisance existing at the time and even at this very moment was well intentioned but the failure to involve the ex-parte applicants and hear them out prior to the demolition order being given by the court was clear violation of the rules of natural justice and more so, considering that the ex-parte applicant put up the disputed kiosks with authority from the third respondent.

As between the third respondent and the ex-parte applicants, the culprit was the third respondent who was not only the author of the nuisance but also the author of the predicament befallen by the ex-parte applicants who although had legal recourse by way of a civil suit against the third respondent, they nevertheless ought to have been made aware of the charge brought against the third respondent by the fourth respondent as it was bound to drastically affect them and their livelihood.

It is for all the foregoing reasons that this court must hold that the ex-parte applicants were denied the right to be heard prior to the onset of the demolition order. They were disregarded and completely ignored in total violation of the rules of natural justice on the part of the third respondent and by extension of the court. They would thus be entitled to an order of certiorari on that ground alone.

With regard to the second issue for determination, the material statutory notice dated 23rd July, 2010, was issued by the District Public Health Officer as opposed to a medical officer of health who under section 119 of the Public Health Act, was the right officer to issue such notice. There was no indication that the District Public Health Officer issued the notice for and on behalf of the relevant medical officer of health although there is indication that the notice was copied to the District Medical Officer of health. The public Health Act defines a medical officer of health and not public health officer.

However, section 9 of the Act provides for appointment and duties of officers in the public health sector and these include medical officers of health, medical officer's pathologists, health inspectors, post health inspectors and such other officers as may be deemed necessary.

A public health officer would fall under the category of "***such other officers as may be deemed necessary"*** and fall within the armbit of the medical officer of health and this explains why the statutory notice was copied to the District Medical Officer of Health.

The notice was therefore issued by the District Public Health Officer for and on behalf of the District Medical Officer of Health under what was seemingly delegated authority.

For the reasons foregoing, this court is of the view the District Public Health Officer (fourth respondent) did not act **"Ultra-vires"** or without jurisdiction when he authored and served the statutory notice upon the third respondent.

All in all , as stated hereinabove, the ex-parte applicants would be entitled to an order of certiorari for the single reason that rules of natural justice were violated by the second and third respondent when a demolition order was issued to have their lawfully erected kiosks and/or structures demolished without being offered a hearing as affected parties.

Nonetheless, it is for the public good and interest to have the kiosks and/or structures set up in a manner prescribed in the relevant rules so as to ensure that they do not create nuisance which may be injurious to public health and therefore prompt the medical officer of health through the public health officer take necessary action in accordance with the law. In such event, the public health officer should not only serve a statutory notice on the author of the nuisance but also the occupants of the premises, kiosks, stalls

or structures causing the nuisance.

Otherwise, this application is granted in terms of prayers (1) and (2) of the Notice of Motion dated 26th March, 2012.

The ex-parte applicants shall be entitled to costs of the application from the third respondent.

Ordered accordingly.

[Read and signed this 3rd day of July, 2014.]

J.R. KARANJA.

JUDGE.