



**REPUBLIC OF KENYA**

**IN THE HIGH COURT OF KENYA AT NAIROBI**

**JUDICIAL REVIEW CASE NO. 40 OF 2014**

**IN THE MATTER OF AN APPLICATION FOR ORDERS OF CERTIORARI**

**AND**

**IN THE MATTER OF THE CHIEF MAGISTRATES' COURT AT THIKA CASE NO. 4248 OF 2011**

**AND**

**IN THE MATTER OF CLOSING ORDER MADE BY THE HONOURABLE S. N. IN CHIEF MAGISTRATE'S COURT AT THIKA CRIMINAL CASE NO. 4248 OF 2011**

**AND IN THE MATTER OF THE PUBLIC HEALTH ACT (CAP 242) LAWS OF KENYA**

**AND**

**IN THE MATTER OF THE LAW REFORM ACT (CAP 22) LAWS OF KENYA**

**BETWEEN**

**REPUBLIC .....APPLICANT**

**VS.**

**THE RESIDENT MAGISTRATE AT THE CHIEF MAGISTRATES  
COURT AT THIKA (HON. S.N. TELEWA)....RESPONDENT**

**AND**

**THE RUIRU SUB-COUNTY**

**PUBLIC HEALTH OFFICER.....INTERESTED PARTY**

**EXPARTE : JOHN WAITHAKA WANJIKU**

**JUDGEMENT**

**Introduction**

1. The applicant herein **John Waithaka Wanjiku**, has moved this Court by a Notice of Motion dated 10<sup>th</sup> February, 2014, filed in Court on 11<sup>h</sup> February, 2014 seeking the following orders:
  1. **THAT an order of Certiorari does issue to remove into this Honourable Court and to quash the proceedings, judgment and also the Closing Order made by the Honourable Magistrate S. N. Telewa on 11<sup>th</sup> November 2013 in Chief Magistrate's Court at Thika Criminal Case No. 4248 of 2011.**
  2. **THAT the costs of this application be provided for.**

### **Applicant's Case**

2. The application was supported by a verifying affidavit sworn by the Applicant on 30<sup>th</sup> January, 2014.
3. According to the Applicant, he is the owner of a three storied building standing on Plot No. 554 Githurai Nairobi which building has 76 tenants who have rented premises therein both for residential and business purposes. It however came to his attention that an order was made by **Honourable S.N. Telewa** on 11<sup>th</sup> November 2013 *inter alia* closing the said building in accordance with Section 120(9) of the **Public Health Act**. He however averred that he was not personally served with the said Order nor were his tenants. Further he was not given an opportunity to be heard in the processes culminating to the said Closing Order.
4. The Applicant further asserted that he had not seen any specific finding by the learned Magistrate that the said building is unfit for human habitation nor did the Learned Magistrate give her reasoning or her observations that form the basis for making the said Closing Order.
5. He therefore contended the said Closing Order is drastic and has not crystallized as stipulated in Section 129(9) of the **Public Health Act**. He deposed that though it was apparent that the Learned Magistrate inspected the said building, he was neither involved nor privy to the same. In his view, the issues being raised concerning drainage of water and sewage in the said building are unwarranted especially considering that he had plans for the septic tank for the said building, which were duly approved by the Public Health Officer Thika even before he undertook the construction of the said building, a material fact that the Learned Magistrate did not consider. He affirmed that he had exercised due diligence to ensure that the said building is not injurious to health or a threat of disease, vermin or the like including regularly servicing the drainage pipes and that the building has been in occupation since the year 2008 and there have not been any complaints by either the Tenants or the neighbours regarding the propriety of the building or any nuisance resulting there from.
6. It was further contended that all his said efforts notwithstanding, the sewer and drainage problem in Githurai area have been compounded by the lack of a proper sewer system coupled with the shallow water bed as well as the high population in the area making the situation dire and that it is the responsibility of the Government and in particular the County Governments to install sewer systems and the said responsibility cannot be abdicated nor can the said County Governments pass the buck to private owners.
7. He therefore believed that the said Closing Order and the proceedings relating thereto are shrouded in obscurity, irrelevance, irregularity and are indeed unprocedural, unconstitutional, illegal, Wednesbury unreasonable, arbitrary, blatantly illegal, unjust, oppressive and in flagrant disregard to the rules of natural justice hence it is only fair and in the interests of justice and the general public that this Court intervenes and grants the prerogative orders sought herein.

### **Applicant's Submissions**

8. On behalf of the applicant it was submitted that the Applicant was not a party to the Criminal Magistrate's Court at Thika and there is no evidence that he was ever served with the summons or notified of the said proceedings since the evidence is that the Compliance Notice was served upon one **Peter Mburu** whose relationship with the applicant is not disclosed. It was therefore submitted that the applicant was not given an opportunity to be heard and the process culminating into the impugned stop order was inherently flawed and mired by massive irregularities. Similarly the same was shrouded by obscurities and controversies from the very onset for example at the

- plea date, the charges were stated to have been read out and understood by the accused yet it was indicated the accused was absent.
9. It was therefore submitted that it cannot be said that the Applicant was accorded a fair hearing nor can it be said that justice was done or seen to have been done yet the Applicant has a constitutional right to a fair administrative process.
  10. It was submitted that the procedure set out in section 120(9) of the **Public Health Act** was not followed hence the Respondent is guilty of procedural impropriety and reference was made to **Republic vs. Kisanga & 8 Others [1990] KLR 110** to the effect that it was a condition precedent to the crystallisation of the Respondent's jurisdiction to grant a closing order under the said section that there be a finding that the dwelling unit was unfit for human habitation and injurious to health which finding was not made. Accordingly, the Respondent lacked jurisdiction to grant the impugned Closing Order.
  11. In support of the submissions, the Applicant cited **Republic vs. Kenya National Examinations Council ex parte Gathenji & Others Civil Appeal No. 266 of 1996**, **Republic vs. Kenya Revenue Authority ex parte Yaya Towers Limited [2008] eKLR**, **Council of Civil Unions vs. Minister for the Civil Service [1985] AC 374**, **Attorney-General vs. Fulham Corporation [1921] 1 Ch. 440**.

### **Determinations**

12. I have considered the foregoing.
13. Section 119 of the 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.*

14. 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.*

15. 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.”**

16. 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 exist 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."

17. Similarly in Republic vs. Kisanga & 8 Others (supra), 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 exist 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.”

18. **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.”

19. In the instant case, the applicant contends that he was never afforded an opportunity of being heard before the Closing Order was issued by the Respondent. Section 120 of the Act clearly mandated the Respondent 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.

20. Apart from that the proceedings in Thika Chief Magistrate’s Court Criminal Case No. 448 were conducted in a most unsatisfactory manner. Whereas the record of the said proceedings indicated that the substance of the charge and every element thereof were stated to the accused (the Applicant herein) in a language he understood, and replied thereto, the same records indicates that the accused was absent and summons were issued. There is no indication from the record that before proceeding in the manner in which she proceeded the learned Magistrate was satisfied that the accused had been served with the summons. Apart from that it defeats reasoning to understand how the charges were read to the accused in a language he understood if he was absent.

21. Having considered the material on record as well as the averments of the applicant I have no doubt in my mind that the rules of natural justice were never complied with before the impugned order was made and further there were serious procedural irregularities committed in the course of the said proceedings. 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.”

### **Order**

22. Accordingly, I find merit in the Notice of Motion dated 10<sup>th</sup> February, 2014 which I hereby allow with the consequence that an order of certiorari is hereby issued removing into this Court for the purposes of being quashed the proceedings, judgment and also the Closing Order made by the **Honourable Magistrate S. N. Telewa** on 11<sup>th</sup> November 2013 in Chief Magistrate’s Court at Thika Criminal Case No. 4248 of 2011 which decision is hereby quashed.

23. As the application was not opposed there will be no order as to costs.

**Dated at Nairobi this 3<sup>rd</sup> day of July 2014**

**G V ODUNGA**

**JUDGE**

**Delivered in the absence of the parties.**

**Cc Kevin:**