REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT NAIROBI

JUDICIAL REVIEW DIVISION

MISCELLANEOUS CIVIL APPLICATION NO. 166 OF 2014

REPUBLIC .....APPLICANT

VERSUS

MEDICAL OFFICER OF HELATH.....1ST RESPONDENT

THE PRINCIPAL MAGISTRATE,

MAVOKO LAW COURTS. …….....2ND RESPONDENT

EX PARTE.....Kings Developers Limited

JUDGEMENT

Introduction

1. The applicant herein, **Kings Developers Limited**, moved this Court by a Motion on Notice dated 8th May, 2014, filed in this Court on 12th May, 2014 seeking substantially the following orders:

1. **THAT an order of Certiorari do issue removing into the High Court for purposes of quashing the entire proceedings in Criminal Case Number 491 of 2014 (Republic vs. Kings Developers Limited).**
2. **THAT an order of Prohibition do issue to the Respondents prohibiting them from either jointly and/or severally commencing, sustaining or proceeding with any criminal proceedings against the Applicant herein with respect to any dealing relating to the property known as LR No. 12715/290 Syokimau.**
3. **THAT costs of this Application be provided for.**

Applicant's Case

2. According to the Applicant, it has its registered offices at Saj Ceramics Building, 2nd Floor on Mombasa Road and that none of its directors reside on the residential units erected on LR No. 1215/290, Syokimau which was owned by **Join Ven Investments Limited** which disposed off the same to third parties who now reside thereon and/or have rented the same to other parties. According to the applicant the suit property's affairs are presently run by an interim Management Committee through officials appointed by it.
3. According to the applicant, it is neither an occupier nor owner of the 360 units erected on the suit property and was never served with any Notice as envisaged under the ***Public Heath Act***, Cap 242

Laws of Kenya (hereinafter referred to as the Act) in respect of the suit premises whereat nuisance complained of is originating. According to the applicant not being either an occupier or owner of the suit premises it cannot in law be served with a notice, summoned and/or charged with an offence under sections 120 and 121 of the Act.

4. However on 25th April, 2014 the applicant was summoned to appear through its managing director before the 2nd Respondent to answer charges of failing to comply with statutory notice under section 120 of the Act despite the fact that the applicant had neither seen nor been served with the alleged notice.
5. According to the applicant the failure to serve the said notice was a procedural lapse.
6. Although duly served neither the Respondents nor the interested parties who entered appearance in this matter filed any response to the application. It follows that the applicant's contention were uncontroverted.

Determinations

7. I have considered the foregoing.
8. 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.

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. **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."

12. In the instant case, the applicant contends that he was never afforded an opportunity of being heard before the charges were preferred before the Magistrate by way of a Notice. It is further contended that there was no complainant in the matter. In other words the applicant is contending that no complaint was made. 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.

13. Having considered the allegations made which allegations have not been controverted the inescapable conclusion I come to is that the decision to prefer charges against the applicant by the 1st Respondent before the 2nd Respondent was tainted with illegality and procedural impropriety. In other words the rules of natural justice were never complied with before the impugned criminal proceedings were instituted. 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

14. Accordingly, I find merit in the Notice of Motion dated 8th May, 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 entire proceedings in Criminal Case Number 491 of 2014 (Republic vs. Kings Developers Limited) which proceedings are hereby quashed. I further prohibit the Respondents from either jointly and/or severally commencing, sustaining or proceeding with any criminal proceedings against the Applicant herein with respect to any dealing relating to the property known as LR No. 12715/290 Syokimau.
15. As the application was not opposed the applicant will have half the costs to be borne by the 1st Respondent.

Dated at Nairobi this 11th day of November, 2014

G V ODUNGA

JUDGE

Delivered in the presence of:

Mr Andati for the Applicant

Cc Patricia