



**Municipal Council of Nairobi v Haji & another (Civil Appeal 109 & 113 of 1943 (Consolidated)) [1944] KESC 1 (KLR) (15 July 1944) (Judgment)**

*Municipal Council of Nairobi v Haji & another [1944] eKLR*

Neutral citation: [1944] KESC 1 (KLR)

**REPUBLIC OF KENYA  
IN THE SUPREME COURT OF KENYA  
CIVIL APPEAL 109 & 113 OF 1943 (CONSOLIDATED)**

**L SMITH, J**

**JULY 15, 1944**

**BETWEEN**

**MUNICIPAL COUNCIL OF NAIROBI ..... APPLICANT**

**AND**

**HAJI & ANOTHER ..... RESPONDENT**

**The Malaria Prevention Ordinance should not be construed as part of the Public Health Ordinance.**

*The case comes before the court by way of a case stated under Order XIII, Rule 6 of the Civil Procedure Rules, 1927. The court was asked to determine four issues of law regarding the interaction between the Public Health Ordinance and the Malaria Prevention Ordinance. The court declined to rule on the first issue, dismissed the second and third in favor of the plaintiff, and ruled on the fourth issue, affirming the powers of local authorities under the Malaria Prevention Ordinance.*

Reported by John Ribia

**Health Law** –public health - public health ordinance - malaria prevention ordinance - statutory interpretation –nuisance - local authority powers - right of a local authority to abate a nuisance - special act vis-à-vis general act - whether any powers or provisions of the Public Health Ordinance were abrogated, repealed, or superseded by the Malaria Prevention Ordinance - whether the right of a local authority to abate a nuisance was dependent on the conviction of the owner or occupier - whether section 8 of the Malaria Prevention Ordinance should be construed as part of the Public Health Ordinance - whether the specific provisions relating to nuisances under the Public Health Ordinance applied to the Malaria Prevention Ordinance - whether local authorities could enforce the Malaria Prevention Ordinance if landowners fail to comply with mosquito prevention measures - Malaria Prevention Ordinance, 1929 section 8 - Public Health Ordinance, 1921, sections 121, and 126; Civil Procedure Rules, 1927 order XIII rule 6.

**Brief facts**

The plaintiff sought determination on whether certain provisions of the Public Health Ordinance were abrogated, repealed, or superseded by the Malaria Prevention Ordinance. The Malaria Prevention Ordinance,



enacted in 1929, sought to empower local authorities to prevent the breeding of mosquitoes, an issue already partially addressed by the Public Health Ordinance (enacted in 1921). The plaintiff asked for clarification on the relationship between the two statutes and how specific provisions relating to nuisances and mosquito breeding should be enforced.

### **Issues**

- i. Whether the right of a local authority to abate a nuisance was dependent on the conviction of the owner or occupier
- ii. Whether any powers or provisions of the Public Health Ordinance were abrogated, repealed, or superseded by the Malaria Prevention Ordinance.
- iii. Whether section 8 of the Malaria Prevention Ordinance should be construed as part of the Public Health Ordinance.
- iv. Whether the specific provisions relating to nuisances under the Public Health Ordinance applied to the Malaria Prevention Ordinance.
- v. Whether local authorities could enforce the Malaria Prevention Ordinance if landowners fail to comply with mosquito prevention measures.

### **Held**

1. The court declined to address whether any powers or provisions of the Public Health Ordinance were abrogated, repealed, or superseded by the Malaria Prevention Ordinance. The court deemed the issue overly broad and speculative. Courts should not rule on theoretical or non-specific legal questions.
2. Section 8 of the Malaria Prevention Ordinance was not part of the Public Health Ordinance but operated alongside it. This section provided local authorities with specific powers to control mosquito breeding, which were independent but complementary to the Public Health Ordinance.
3. The provisions of the Public Health Ordinance dealing with nuisances, particularly those related to mosquito breeding, applied concurrently with the Malaria Prevention Ordinance. That reinforced the power of local authorities to treat such conditions as nuisances.
4. Once notice has been served to the landowner or occupier under section 8 of the Malaria Prevention Ordinance, failure to comply allows local authorities to act directly to prevent mosquito breeding, including prosecuting the owner or occupier. Local authorities retained the power to enforce the ordinance even when compliance was not met.

*Suit partly allowed.*

### **Orders**

- i. *Judgment entered for the agreed amounts in both Civil Case Nos. 109 and 113 of 1943.*
- ii. *In the event of non-agreement, the case would be set down for hearing to determine the amounts due.*
- iii. *Costs of the suit awarded to the plaintiff.*

### **Citations**

1. *Sunlife Assurance Company of Canada v Jervis* [1943] 2 All ER 425; [1944] AC 111
2. *Corporation of Yarmouth v Simmons* (1879) 10 Ch D 518
3. *Pirbhai, Jamal and others v Municipal Council of Nairobi* Civil Case No 156 of 1940

### **Statutes**

1. Public Health Ordinance (cap 124) sections 119; 120; 121; 136 (a), (b), (c)
2. Malaria Prevention Ordinance, 1929 sections 8, 13, 14
3. Civil Procedure Rules (cap 21 Sub Leg) order XIII rule 6



## JUDGMENT

1. These cases come before the Court by way of case stated under the provisions of order XIII, rule 6, of Civil Procedure Rules, 1927. The facts are set out in paragraphs 1 to 6 of the case stated and determination is sought on four issues of law as set out.
2. The first issue reads as follows: “Are any, and if so what, of the powers and provisions of the Public Health Ordinance abrogated, repealed or superseded by the Malaria Prevention Ordinance?” In my opinion this issue is of such a general and “fishing” nature that no useful purpose can be served by attempting to answer it. As Viscount Simon said in the case of *Sun Life Assurance Company of Canada v Jervis*, a House of Lords Case reported at p 91 of the Weekly Notes of 25.3.44, “If the House heard the appeal it would not be deciding an existing lis between the parties, but would merely be expressing its view on a legal conundrum without in any way affecting their position.”
3. The second issue reads: “Is section 8 of the Malaria Prevention Ordinance to be construed as if it were incorporated in and formed part of the Public Health Ordinance?” The Public Health Ordinance is Cap 124 of the Laws of Kenya and was enacted in 1921. Under Part XII of that ordinance certain provisions are made for the prevention and destruction of mosquitoes. Section 136 (a) deals with collections of water, etc, which permit or facilitate the breeding or multiplication of animal or vegetable parasites of men or domestic animals or of insects or other agents which are known to carry such parasites or which may otherwise cause or facilitate the infection of men or domestic animals by such parasites. Sub-section (b) deals with any collection of water in any well, pool, gutter, channel, depression, excavation, barrel, tub, bucket, or any other article and found to contain any of the immature stages of the mosquito, while subsection (c) deals with any cesspit, latrine, urinal, dung pit or ashpit found to contain any of the immature stages of the mosquito. The section goes on to say that any of the conditions set out in (a), (b) and (c) shall be nuisances liable to be dealt with in the manner provided for the treatment of nuisances.
4. The treatment of nuisances is dealt with in Part IX of the Ordinance and the procedure to be adopted is set out in section 119 and 120 while section 121 deals with venalities in relations to nuisances. In 1929 an Ordinance to enable local authorities to take measures for the prevention of malaria within the Colony was enacted being Ordinance 19 of 1929. A reference to the objects and reasons of that Ordinance in the Official Gazette (Government Notice No 412 of 27th June, 1929) shows that the Bill gives effect to the recommendations of the Select Committee on the Drafts Estimates for 1929 that Government should take powers in the interests of Public Health to prevent the owner or leaseholder of land in townships from having on such land places in which mosquitoes may breed, and should introduce legislation providing that proper and adequate steps shall be taken by the owner or leaseholder to remove such potential breeding places from such land to the satisfaction of the local authority, who should be empowered to deal with such places at the expense of the owner or leaseholder if such owner or leaseholder refuses or neglects to do so.
5. Section 8 of the Ordinance provides that whenever it appears to a local authority that any collection of water is or is likely to be a favourable to the existence or propagation of mosquitoes the local authority may require the owner or occupier of the land to comply with such requirements in regard to such collection of water and if the owner or occupier of the land does not comply with such requirements he shall be guilty of a contravention of the Ordinance and the local authority may enter upon such land and carry out or complete the required work thereon and may recover the cost of carrying out or completing such work from the person in default.



6. Section 13 lays down the penalty for any contravention of any of the provisions of the Ordinance.

Section 14 reads as follows:

“The powers and provisions contained in this Ordinance shall be in addition to and not in derogation of the powers and provisions contained in the Public Health Ordinance.”

7. I would here quote from the judgment of Fry, J, in *Corporation of Yarmouth v Simmons* 10 Ch Div 518 at p 528; “I think the law is clearly laid down by Lord Coke in case of *Alton Woods* that a saving clause in an Act of Parliament which is repugnant to the body of the Act is void. In the next place, it is to be borne in mind that where there are provisions in a Special Act which is inconsistent with a prior General Act the provisions of the General Act must yield to those of the Special Act. The case of the *Attorney General v Great Eastern Railway Co* (7Ch. 475 and 6 HL 367) is an authority for that, if authority was wanting.”

8. For the reasons which appear from what I have stated above I am of opinion that the reply to Issue 2 must be in the negative and that for the same reasons the reply to issue 3 is in the affirmative.

9. As regards Issue 4 it appears to me that section 8 of the Malaria Prevention Ordinance makes it clear that once notice has been served on the owner or occupier of the land and such notice has not been obeyed the local authority can proceed forthwith and enter on the land and can also prosecute the owner or occupier for a contravention of the Ordinance-in other words the answer to issue is in the negative.

10. Mr Sharpley quoted the case of *Jamal Pirbhai and Others v The Municipal Council of Nairobi* (Civil Case No 156 of 1940), but I fail to see how that case has any application here as what to be decided was whether certain by-laws purporting to be made under the provisions of the Public Health Ordinance were ultra vires the Ordinance.

11. In my opinion there must be judgment for the plaintiff in both civil cases Nos 109 and 113 of 1943 with costs. If the parties will agree to the amounts judgment will be entered for those amounts. In the case of non-agreement the case will have to be set down for hearing and determination of the amount due.

**DATED AND DELIVERED THIS 15<sup>TH</sup> DAY OF JULY, 1944.**

**LUCIE-SMITH**

**JUDGE**

