REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT NAIROBI

CRIMINAL REVISION NO. 43 OF 1992

MOHAMED SAEED KHAN.....APPLICANT

VERSUS

CITY COMMISSION OF NAIROBI.....RESPONDENT

From original order in Criminal Case No 6696 of the 1992 of the 1st Class Magistrate's Court at City Court: PDJ Mwangulu Esq)

RULING

The applicant, Mohammed Saeed Khan, is one of the 29 tenants of the respondent at his premises known as LR 209/233/6, Nairobi which comprises of 5 shops and 24 dwelling rooms. He occupies one of the shops for purpose of his business of making coffins. Sometime on or about the 21st of August, 1992, the respondent, Kivindyo Isai was arraigned before the 1st Class Magistrate's Court, City Court on a charge of failing to comply with a notice issued under section 119 of the Public Heath Act (cap 242, Laws of Kenya) as read with section 115 and 120(1) of the said Act for failing to abate some nuisance as defined under section 118(1)(b) of the said Act on the said premises within the time specified in the notice which had been served on him on the 5th August, 1992. He admitted the offence and was convicted. In his mitigation, he stated that there were occupants in the suit premises which makes it difficult for him to abate the said nuisance. The Court then sentenced him to a fine of Shs 80/- or in default to serve 7 days in detention camp and thereafter he was to pay a fine of 80/- per day till the nuisance was abated. The Court then ordered that the said occupants be summoned to appear before it to show cause why a closing order should not be made. The affected tenants duly appeared before the Court including an employee of the applicant known as Harrison Mulwa. It has since been explained that the applicant was then out of the country. The Court was then asked to visit the suit premises by the prosecutor and on the 25th of August 1992 a visit was made by the Court. In his notes, the learned magistrate observed that this was an old building which was in a dilapidated state. He subsequently made a ruling to the effect that:-

"It is a ruling that for the efficient and proper abating the nuisance the occupants should give vacant possession of the premises of plot No 209/233/6 along Ukwala Road within the Nairobi City Commission; I issue a closing order with effect from the 31st October, 1992 from that time no rent should be paid to the landlord."

The applicant who was aggrieved by the said order then filed an application to this Court seeking to have the said orders revised. He seeks to challenge the application on a number of grounds as shown in his chamber summons dated 26th of October, 1992. Those grounds are:-

1. The learned magistrate erred in making the closing order regarding the suit premises with effect from

the 31st of October 1992 without limiting the period of such closure and without issuing appropriate directions.

2. That the said closing order was made without giving the applicant opportunity of being heard as required by the Rules of Natural Justice.

3. That the said closing order is erroneous and wrongful in that:-

(i) It has been made without following the prescribed procedure;

(ii) Without serving the applicant with a notice to show cause in the prescribed form;

(iii) Without making a specific finding that his premises are unfit for human habitation;

(iv) Without any basis for such an order.

(v) On an equivocal plea.

This Court duly granted a stay order which effectively restored the status quo on the suit premises pending the hearing of the said application inter parties.

At the commencement of the hearing of the said application, learned counsel for the applicant, Mr Shehmi, raised a preliminary point of law challenging the jurisdiction of the court in making a closing order under section 120(9) of the Public Health Act. If I understood his arguments, learned counsel was of the view that regardless of whether or not a nuisance exists, once the premises is shown to be for commercial purposes as opposed to a dwelling premises for human habitation, the Court is not empowered to make a closing order but can only fine the occupier or owner thereof or make any other suitable direction. According to Mr Shehmi, a closing order can only be issued in respect of dwellings which are not fit for human habitation but does not apply to any other type of premises. He stressed that the sub-section only refers to dwellings and not premises. That being so, he submitted that the learned magistrate had no jurisdiction to issue a closing order in respect of the suit premises in

as far as the business of the applicant was concerned.

Perhaps it is necessary to refer to the definition “dwelling”, “premises” and “trade premises” as shown in section 2 of the Public Health Act in order to understand the purport of the arguments that were raised before me by the counsel for the parties. Under that section:-

“dwelling” means any house, room, shed, unit, cave, tent, vehicle, vessel or boat or any other structure or place whatsoever, any portion whereof is used by human being for sleeping or in which any human being dwells;

“premises” includes any building or tent together with the land in which the same is situated and the adjoining land used in connection therewith, and includes of vehicles, conveyance or vessel;

“trade premises” means any premises (other than a factory) used or intended to be used for carrying on any trade or business.”

As I have already stated, the respondent was served with notice under section 119 of the Public Health Act (cap 242, Laws of Kenya) which empowers the medical officer of health when satisfied of the existence of a nuisance to direct the author of the nuisance or the occupier or the owner of the dwelling or premises on which the nuisance arises or continues to remove it within a specified time. In this case, he directed his notice to the respondent as he was the owner of the suit premises plot No LR 209/233/6 along Ukwala Road. Section 115 prohibits anyone to cause a nuisance or suffer to exist on any land or premises owned or occupied by him. So when the respondent did not comply with the notice issued on him, the medical officer of health decided to prosecute him by filing a complaint before the Court. What

constitutes a nuisance is defined under section 118(1) of the said Act; and the penalty is provided under section 121 of the Act which reads as follows:-

"121(1) Any person who fails to obey an order to comply with the requirements of the medical officer of health or otherwise to remove the nuisance shall, unless he satisfies the Court that he has used all diligent to carry out such order, be guilty of an offence and liable to a fine not exceeding Eighty Shillings for every day during which the default continues, and any person wilfully acting in contravention of a closing order issued under

section 120 shall be guilty of an offence and liable to a fine not exceeding eighty shillings for every day during which the contravention continues."

The premises, the subject matter of the suit that was filed against the respondent, comprises of both dwelling rooms and shops. The suit against the respondent was in respect of the entire premises which comprises 5 shops and 24 dwelling rooms. The premises was found by the Court to be old and dilapidated and the court below was satisfied that a nuisance exists as defined in the Act. He therefore issued a closing order. The power to issue such an order is granted, to the Court under section 120(9) of the Public Health Act which provides that:-

"where the nuisance proved to exist is such as to 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 the dwelling is fit for that purpose; and may further order that no rent shall be due or payable by or on behalf of the occupiers of the 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 the closing order and by a further order declare the dwelling habitable and from the date thereof such dwelling may be let or inhabited."

I think, with respect, that the point which learned counsel for the applicant sought to introduce between "dwellings" and "premises", may at best be termed as a distinction without a difference. I do not think that it was the intention of the Legislature to restrict the powers of the courts to issue closing orders where a nuisance exists which renders a building inhabitable to only those premises which were being used as dwellings. Public health matters are so fundamental to the lives of the people in general that it could not have been the intention of the Act only to protect those human beings who were dwelling or sleeping in certain rooms in one building and not those in the same building who were carrying out business. It would be disastrous, so I believe, to accept the reasoning of Mr Shehmi, that once a business cum-residential building as was the case here is found to constitute a nuisance, then only those parts that are being used for sleeping or dwelling could be ordered closed. Once a building is condemned as unfit for habitation, it matters not that it is a residential or a business premises or both. The preamble to the Public Health Act clearly shows that it is:-

"An Act of Parliament to make provision for securing and maintaining health."

I may add that it is the health of those who occupy such premises either for purposes of dwelling or carrying out business that the Act aims to protect. If it becomes necessary to close any premises on health grounds, then a magistrate to whom such a complaint is lodged and who is satisfied that a nuisance exists that renders such premises inhabitable, may proceed in addition to any other penalties prescribed, issue a closing order.

I am not prepared to give any narrower interpretation as was suggested by learned counsel for the applicant to s 120(9) of the Public Health Act so as to restrict its scope and operation to dwelling houses only. In my ruling, it applies to all premises whether used for dwelling or business. Given the prevailing shortage of decent housing in major urban centres in this country where rooms which were meant strictly for business are also used by occupiers thereof as dwellings, the Courts cannot afford to give section 120(9) of the Public Health Act any more restrictive application. It is common knowledge that many people in several towns in this country do live behind their business premises or *kiosks*, where such premises have no toilet facilities or running water such that the health of those working there or

occupying such premises is endangered. In these circumstances the Courts in suitable cases could perfectly issue closing orders.

I see nothing wrong with the closing orders that were issued in this case except that there was no time limit specified for abating the nuisance in the suit premises as required in law. To such extent only, such orders were defective but I am satisfied that the Court was possessed of necessary jurisdiction to make those orders. It follows therefore that the preliminary point of law that was taken on behalf of the applicant fails and is hereby dismissed.

Dated and Delivered at Nairobi this 12th day of July 1994.

S.O.OGUK

JUDGE