REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA

AT NAIROBI

CRIMINAL REVISION CASE NO 27 OF 1989

REPUBLIC .....APPLICANT

VERSUS

KISANGA & 8 OTHERS.....PLANTIFF

JUDGMENT

February 5, 1989, the following Judgment of the Court was delivered.

We have before us a number of cases for revision from the City Magistrate which relate to orders made under the Public Health Act for closure of premises. In each of them the tenants concerned have applied for revision of the order of the City Magistrate. In most of them the tenancies concerned are protected by legistlation of one kind or another and the allegations seem to be that the owners are pleading guilty to such charges, even inviting them, in order to obtain possession when a closure order is made under the Act. As we shall endeavour to show, the Act provides for such dangers but, it seems to us that despite earlier cases the principles applicable are not being followed, and so we have determined to try to write a compendium of the law to try to make the matter clear enough to be followed in future. The Act referred to is the Public Health Act Cap 242.

1. What offence is the court considering in these cases?

115. No person shall cause a nuisance or shall suffer to exist on any land or premises owned or occupied by him or of which he is in charge any nuisance or other condition liable to be injurious or dangerous to health.

It will be noted that this is a three pronged section:

(a) no none shall cause a nuisance and

(b) no one shall suffer a nuisance to exist and

(c) no one shall suffer any other condition to exist which is liable to be injurious or dangerous to health.

In the circumstances described

The penal section is:-

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 diligence 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 willfully 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. As will be seen in due course, S 121 deals with cases where there is a nuisance, that is in cases (a) and (b) above only.

So what sort of nuisance are we concerned with in (a) and (b) of S 115, and in S 121?

It must be injurious to health

THE GREAT WESTERN RAILWAY COMPANY V BISHOP (1872) L.R. 550.

By s 8 of 18 & 19 Vict c 121, the word "nuisance' shall include any premises in such a state as to be a nuisance or injurious to health. The appellants were the owners of a railway bridge over a highway. The rainwater collected on the bridge, and, running through the planks, dripped on the highway and on persons using the highway. The appellants were summoned, under s 12 of the above Act, for allowing a nuisance to exist on their premises, and the justices ordered its abatement:-

Held, that the Act, being a sanitary Act, applied only to such nuisances as were injurious to health; and that as the nuisance complained of was not injurious to health, the justices were wrong in ordering its abatement. It must be a threat to health in the sense of a threat of disease, vermin or the like. COVENTRY CITY COUNCIL V CARTWRIGHT (1975) ALL ER 99 The case concerned a rubbish tip on which it was said that members of the Public might go onto it and cut themselves on tin cans etc, and the visual impact was a nuisance.

Section 92(1) (c) of the (English) Public Health Act 1936 was aimed at an accumulation of something which produced a threat to health in the sense of a threat of disease, vermin or the like. It followed that an accumulation could not constitute a "nuisance" within s 92(1)(c) merely because of its visual impact nor could an accumulation of inert matter be prejudicial to public health within section 92(1)(c) merely because the inert matter might cause injury to persons who came on to the land. It must not only affect persons occupying the premises NATIONAL COAL BOARD V NEATH BOROUGH COUNCIL [1976] 2 All ER 478

The word "nuisance" in s 92(1)(a) of the English Act meant either a public or a private nuisance at common law, i.e. an act or omission materially affecting the comfort and quality of life of a class of the public or an interference for a substantial period with the use and enjoyment of neighbouring property. Accordingly a nuisance could not be said to have arisen on premises if what had taken place only affected the person or persons occupying those premises.

The basis of the finding SALFORD CITY COUNCIL V MCNALLY [1975] All ER 860 .Once the magistrate had established that the state of the house was prejudicial to health, within a 92(1) (a) of the 1936 Act, he was bound to make a nuisance order. Justices dealing with a complaint that premises are a statutory nuisance within a 92(1) (a) of the 1936 (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) is the state of the premises such as to be injurious or likely to cause injury to health?

Or (ii) is it a nuisance?

It is undesirable to consider those questions in terms of fitness or unfitness for habitation. The justices should find specifically under which limb the case falls. If either question is answered in the affirmative they should make a nuisance order which should be as specific as possible rather than order in general terms to abate the statutory nuisance. In making the order the justices 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 Trial Magistrate on the basis of (a) or (b) above then the term “nuisance” is very specific, not necessarily something the Magistrate would prefer not to have going on next door to his own house for instance.

If the complaint 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”. We would prefer to see the actual dangers set out seriatim.

There is also a statutory deeming of what shall be considered nuisances, which we set out with the subsections which are most usually appropriate only:

> “118. (1) The following shall be deemed to be nuisances liable to be dealt with in the manner provided in this part.
>
> (b) Any dwelling or premises or part thereof which is or are of such construction or in such a state or so situated or so dirty or so verminous as to be, in the opinion of the medical officer of health, injurious or dangerous to health, or which is or are liable to favour the spread of any infectious disease.
>
> (c) Any street, road or any part thereof, any stream, pool, ditch, gutter, watercourse, sink, water-tank, cistern, water-closet, earth-closet, privy, urinal, cesspool, soakaway pit, septic tank, cesspit, soil-pipe, waste-pipe, drain, sewer, garbage receptacle, dust-bin, dung-pit, refuse-pit, slop-tank, ash-pit or manure heap so foul or in such a state or so situated or constructed as in the opinion of the medical officer of health to be offensive or to be injurious or dangerous to health;
>
> (d) Any well or other source of water supply or any cistern or other receptacle for water, whether public or private, the water from which is used or is likely to be used by man for drinking or domestic purposes or in connexion with any dairy or milkshop, or in connexion with the manufacture or preparation of any article of food intended for human consumption, which is in the opinion of the medical officer of health polluted or otherwise liable to render any such water injurious or dangerous to health;
>
> (e) Any noxious matter, or waste water, flowing or discharged from any premise, wherever situated, into public street, or into the gutter or side channel of any street, or into any nullah or watercourse, irrigation channel or bed thereof not approved for the reception of such discharge;
>
> (f) Any stable, sow-shed or other building or premises used for keeping of animals or birds which is so constructed, situated, used or kept as to be offensive or which is injurious or dangerous to health;
>
> (g) Any animal so kept as to be a nuisance or injurious to health;
>
> (h) Any accumulation or deposit of refuse, offal, manure or other matter whatsoever which is offensive or which is injurious or dangerous to health;
>
> (i) Any accumulation of stones, timber or other material if such in the opinion of the medical officer of health is likely to harbour rats or other vermin;
>
> (j) Any premises in such a state or condition and any building so constructed as to be likely to harbour rats;
>
> (k) Any dwelling or premises which is so overcrowded as to be injurious or dangerous to the health of the inmates, or is dilapidated or defective in lighting or ventilation, or is not provided with or is so situated that it cannot be provided with sanitary accommodation to the satisfaction of the

medical or dangerous to health;

(m) Any occupied dwelling for which such a proper, sufficient and wholesome water supply is not available within a reasonable distance as under the circumstances it is possible to obtain;

(s) Any act, omission or thing which is, or maybe dangerous to life, or injurious to health."

These definitions are not inconsistent with the case law as set out above.

2. Who is supposed to do something about the offence, and in what circumtamces?

"116. It shall be the duty of every local authority to take all lawful, necessary and reasonably practicable measures for maintaining its district at all times in clean and sanitary condition, and for preventing the occurrence therein of, or for remedying or causing to be remedied, any nuisance or condition liable to be injurious or dangerous to health, and to take proceedings at law against any person causing or responsible for the continuance of any such nuisance or condition."

"117. It shall be the duty of every health authority to take all lawful, necessary and reasonably practicable measures for preventing or causing to be prevented or remedied all conditions liable to be injurious or dangerous to health arising from the erection or occupation of unhealthy dwellings or premises, or the erection of dwellings or premises on unhealthy sites or on sites of insufficient extent, or from overcrowding, or from the construction, condition or manner of use of any factory or trade premises, and to take proceedings against any person causing or responsible for the continuance of any such condition."

The emphasis is ours and shows that the local authority is not concerned at all in these matters, even where there is a nuisance alleged, unless there is danger to health, said in Coventry City Council v Cartwright as to be read "in the sense of a threat of disease, vermin or the like", affecting persons other than those who occupy the premises (NCB v Neath Borough Council).

It is interesting to note that recourse to the courts is in each case a final supporting measure: in too many of the cases we have seen it appears to have been the first step: in too many cases we have seen the nuisance was restricted to occupiers, and in too many cases there was no such threat as mentioned above.

4. How is the local authority to proceed?

"119. 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 thinks it desirable (but not otherwise), specifying any work to be executed to prevent a recurrence of the said nuisance.

Provided that –

(i) Where the nuisance arises from any want or defect of a structural character, or where the dwelling or premises are unoccupied, the notice shall be served on the owner.

(ii) Where the author of the nuisance cannot be found and it is clear that the nuisance does not arise or continue by the act or default or sufferance of the occupier or owner of the dwelling or premises, the medical officer of health shall remove the same and may do what is necessary to prevent the recurrence thereof.

120. (1) If the person on whom a notice to remove a nuisance has been served as aforesaid fails to comply with any of the requirements thereof within the time specified, the 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 the person on whom the notice was served to appear before his court."

Again it is interesting to see that the provisions of the Act are in respect of the existence of a nuisance only, and not the circumstances we described at the beginning of this judgment in (c) relating to the condition of the premises. It would seem that such matters are only of concern to the local authority where they are expressly included in S 118. This again is consistent with the requirement of a Nuisance to other than the occupiers of the premises.

5. What may the court then do?

(a) The first step – case first before the court

ORDER COMPLIANCE

S120 (2) "If the court is satisfied that the alleged nuisance exists, 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 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."

There must of course exist a nuisance of the nature described for the Section to apply, since the proceedings are based upon the notice.

FINE FOR NON-COMPLIANCE TO DATE OR ORDER, AND ORDER COSTS

(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.

FINE FOR NON-COMPLIANCE WITHIN TIME SET BY NOTICE, AND ORDER COSTS

(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.

MAKE ORDERS WHERE LIKELIHOOD OF RECURRENCE

(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.

INSPECT THE PREMISES

(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.

MAKE CLOSURE ORDER WHERE UNFIT FOR HUMAN HABITATION

(9) 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 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 the closing order and by a further order declare the dwelling 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 the same dwelling in the event of any nuisance occurring or of the dwelling being again found to be unfit for human habitation.

This is the central part of the problem we are trying to resolve.

The general procedure is set out very succinctly in the judgment of Bosire J and Mbaluto J in Kabue's case.

1. Upon receipt of a complaint under s 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.

2. 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 to appear to show cause why the order proposed should not be made.

3. On the appointed date and time the court will then hear all those who have responded to the court's summons or notice and who wish to be heard. If upon conclusion of proceedings the court is satisfied, on a balance of probabilities, that a nuisance does exist as renders the premises or dwelling unfit for human habitation, it should record such finding and proceed to declare them as such and to make the necessary orders as provided under the Public Health Act.

Now when the owner of the premises pleads guilty to the charge before the Magistrate, what he is saying is that he is causing a nuisance, or suffering the nuisance to be caused depending on the nature of the charge, and has not used all diligence to carry out the order (S 121 (1)).

In case where the owner says that the tenants will not let him do the work, in effect what the owner is saying is that he is not guilty of the offence to which he has pleaded guilty, as he is being prevented from complying with the notice. In cases where the owner merely says that he cannot do the work without the tenants moving out, the same applies, for in both cases, if he had told that to the Local Authority when he received the notice, and on investigation it was found to be true, no doubt the notice would have been served on, and if necessary, the proceedings would have been taken against the tenants.

For this very reason, and in view of the urgency of genuine Public Health Problems, which we must not and do not forget, in such cases it would be a convenient and sensible practice to serve notices on all

parties likely to be affected at the outset where closure is likely, a matter which would be known to the Medical Officer. Who knows, in such circumstances, the City Magistrate might find himself much less troubled then with these cases, as very often the tenants would wish to do the repairs themselves, to save the sort of trouble we have here.

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. The remedy there is to take proceedings against those responsible, the tenants, if that is thought to be the correct course. If the court is satisfied that the premises are unfit for human habitation, and the owner is taking responsibility under the section, then, since the owner allowed the premises to get into that state, or suffered it according to his plea, a discharge of any kind would not seem to be the appropriate sentence for the owner, yet so often that is the sentence passed.

A criminal Court will not normally listen to a mitigation which is contrary to the plea. If the allegation is made before sentence, then the court should revert to trial of the owner on a not guilty plea as above, and the authority can consider its position, as to whether to proceed, or to give notice to the tenants, either instead of, or, more probably as well as, the owner. If the allegation is made after plea, then it should be very carefully treated prima facie, in view of the plea, it should be viewed with the greatest suspicion, as a point in mitigation inconsistent with the plea.

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 (see eg Republic v Kabue Kigera CA 48/86). But he is unable to make a closing order at all unless he is satisfied that the premises are unfit for human habitation, and we require to see a specific finding on the point, with reasoning, and at least notes of points observed to be the basis of such a finding: and we reserve our position as to whether a mere visit to the scene can form the basis of such a finding. We think probably that it cannot. 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 the picture.

When the tenants come to court, this is an ideal opportunity to make inspection of the premises to check whether there was indeed a nuisance with which the authority needed to concern itself, or whether the condition of the premises is indeed a condition which is liable to be injurious or dangerous to health to others than those who occupy the premises, requiring orders against any other person than the owner who pleaded guilty, and also to consider whether the premises are unfit for human habitation, for a closure order cannot be made unless they are.

The plea of the owner is not necessarily conclusive evidence against other parties who were not charged and asked to plead and who might be affected by any order he might make arising out of the plea. It is no evidence at all as the fitness for human habitation, and therefore the Magistrate is required to satisfy himself, bearing in mind that an unscrupulous landlord might proceed in the way the tenants in these cases allege, having made allegations contrary to his plea.

One consideration the Magistrate should have in mind in all these cases before embarking on measures which are bound to interfere with protected tenancies would be to discover from the tenants, when they appear, whether they are prepared themselves to do the necessary work on behalf of the landlord who has been ordered to do it, (under the terms of the tenancy, and protected tenancies make provision for recovery of the outlay), for that would be a convenient way of getting the job done, the job of the protection of the Public Health, to which end the Act is directed.

In REPUBLIC v KABUE KIGERA CA 48/86, Bosire J and Mbaluto J said:-

> “It was submitted that Public Health Matters are so fundamentally important that they ought not and should not be made subject to lesser matters of security of tenure (of the tenants). We agree

> under section 120(1) of the Public Health Act, a complaint relating to Public Health may only be made to a magistrate (of the first, second or 3rd class). The Tribunal is not empowered to entertain such a complaint or complaints. The magistrate is given wide powers under s 120, above, to fine to order their demolition. The court in exercising powers under the Public Health Act, is not concerned with the relationship between landlord and tenant. Its main concern, which is the object of the Act, is the security and maintenance of Health. The exercise of that power is not made subject to the provisions of the Rent Act, otherwise either of the Acts would have said so. S 37(2) of the Rent Act, talks of jurisdiction or power to deal with a matter "conferred by this Act". No power or jurisdiction which has been conferred on the Tribunal is to deal with matters "connected with the relationship of landlord and tenant of a dwelling house" (Preamble to the Act). Mr Nowrojee's submission is, therefore , not tenable. We therefore agree with Kneller J's (as he then was) conclusion in the case of Ibrahim Njeru v R Criminal (Revision) Case No 12 of 1979 (MSA), but for different reasons, that the Rent Act, does not divest jurisdiction from the subordinate Courts in dealing with closure or demolition of dwelling houses for Public Health reasons."

Whilst an order under the Public Health Act may be made despite the existence of a protected tenancy for the good reasons given by Kneller J in Njeru's case, and by Bosire J and Mbaluto J in Republic v Kabue Kagera 48/86, the Magistrate who makes the order should ensure that the protected tenancy should be interefered with as little as possible, consistent with the commonweal. It would be wrong, we think, totally to ignore the fact that there was a protected tenancy and such comments apply with as much force when the tenancy is not protected. The order should be sufficient, but no more, to achieve its purpose, the protection of the health of the public.

Another consideration, should it prove unavoidable to issue a closure order, is the power of the court to supervise such an order, whether of its own motion, or on the motion of affected parties.

Kneller J in Ibrahim Njeru v R Criminal Revision Case 12 of 1979 (MSA) noted this responsibility and corrected an order which merely dealt with closure in the following manner:-

> "This Court has all the powers of this district magistrate in the matter section 365 of the Criminal Procedure Code.
>
> It will now rectify the matters.
>
> 1. The premises are not to be used as a dwelling by anyone until it is fit for that purpose in the opinion of the magistrate.
>
> 2. No rent shall be due and payable by or on behalf of the applicant in respect of that dwelling in respect of the period in which the closing order exists.
>
> 3. The applicant has a further 10 days from today to vacate the premises.
>
> 4. Katana Kalume is to let the applicant occupy what he occupied before in the dwelling when the magistrate terminates the closing order and at the same time rent until further order of the relevant Tribunal or this court."
>
> (See generally section 120 Public Health Act)

The only thing we think should be added to that, with respect, very correct order, is that the Magistrate should try to establish a sensible time within which the work should be done in order to comply with S 120 (2) and specify it. We have no doubt that in Njeru's case the necessary information was not available to the court, but it is necessary provision, for the parties concerned need to know what arrangements to make. Failure to make such provision in an order by the Magistrate will always result in revision, and we shall do our best to provide for a period ourselves on whatever information is available. We are of the view that although the Act leaves a discretion in the Magistrate in such matters, in view of what we have said, we take the view that the discretion ought to be exercised in order to demonstrate that justice is

being done.

And the other matter which we wish to draw to the attention of all parties is that a closure order under the Public Health Act for repairs to be effected is merely a temporary interruption of a protected tenancy under an order of the court: we cannot see how it could be said to terminate it, for it could only be terminated under the protecting act: the Public Health Act does not purport to terminate tenancies by closure on the contrary (see S 121 (9)). In Njeru's case again Kneller J said:-

> "Mr Kombo claimed the closure order was the result of Katana Kalume's determination to eject the applicant. It may be so but on the documents it seems that it is a straight forward justified exercise by the Medical Officer of Health to abate and prevent the occurrence of a nuisance. There was no suggestion the Medical Officer of Health had been seduced by Katana Kalume into this manoeuvre against his duty or code of professional ethics and, anyway, the magistrate had seen the premises and found them unfit for human habitation.

If Katana Kalume has ousted the applicant his victory is temporary and pyrrhic: he has to make the place at his own expense fit for the magistrate to rescind the closure order and then let the applicant march right back into it at the old rent if he had not found somewhere better and cheaper in the meantime. Katana Kalume is subject to a penalty for everyday he fails to put the premises in good order and I am sure the Medical Officer of Health and magistrate will follow the law on this as carefully as they have done so far.

Other Judges in other cases have not been quite so sure that everything is above board. (see Kabue's case and Doshi & Ors v Rep CRC 17,20 & 24 of, 87 MSA):-

> "In fact by pleading guilty and saying that he was prepared to demolish the house but for the presence of the tenants in the building he was holding himself out as the owner of that building. That was false. There was therefore no basis for the lower court to pass the orders that it did in respect of the property which did not belong to Holu, the accused before it. These orders should therefore be set aside on this ground alone."

And

> "He conveniently finds himself charged with an offence alleging breach of compliance with requirements of a Municipal notice to which charge he is too anxious to plead guilty although he knows that whatever little excuse he had to call himself a landlord by virtue of his being the Managing Director of the Company that owned those premises, had also vanished after the company had disposed of those premises. The lower court wittingly or unwittingly appears to have become a party to the machinations of "the Landlord" in getting rid of his tenants."

We have, we think, a developing problem here, in more than one sense, and the Courts have to be aware of it.

If, as has been said has happened on occasion, a closure order is made, in respect of a protected tenancy, the tenants move out, and the owner proceeds to knock the premises down, or to make alterations which make it impossible for the tenancy to carry on after the repair period, then in addition to the fines provided for as shown below, that would be a contempt of the order of the court, and should be so dealt with, in a very serious manner.

There is, for instance, a great difference between gaining possession for the purpose of effecting repairs to protect the Public Health, and gaining possession of the premises with the purpose of complete remodeling, or even rebuilding, which can be done, if the Tribunal allows, in view of the accelerated development of the Town, under the protecting Act. The conduct of the owner after the closure order is made would be a good clue to his real intentions at the time of the closure order.

We would also wish to comment that the fines provided for in the Act have been allowed to fall so low in real terms that they are of little effect.

More severe fines might well assist in removing the problem alleged if it exists. At the moment it appears to be cheaper to allow the nuisance to continue, especially if the medical officer then does the work to remove the nuisance.

FINE FOR FAILURE TO COMPLY WITH ORDER

> "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 diligence 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 willfully 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. (2) The medical officer of health may in such case enter the premises to which any such order relates, and remove the nuisance and do whatever may be necessary in the execution of such order, and recover in any competent court to expenses incurred from the person on whom the order is made."

The Act continues with provisions as to orders for demolition, duties of the Medical Department (which are rewarding reading) and the making of rules which are of no concern here.

Those we think to be the principles which should be demonstrated to have been followed on the record.

Coming now, at last, perhaps it might be said, to the facts of the case before us, the complaint lodged by the Medical officer was in respect of the following items:-

1. Reconnect the disconnection water supply. This was done before the closure order was made. On the basis of the affidavits before us the owner does not come too well out of this .

2. Repair extensively cracked concrete floor. In view of what we have said above it seems difficult to fit this complaint into any of the categories the City Magistrate or the Medical Officer should have been concerned with.

3. Repair the chipped off cement block walls and plaster it to a smooth finish. In view of what we have said above it seems difficult to fit this complaint into any of the categories the City Magistrate or the Medical Officer should have been concerned with.

4. Remove all birds and chickens reared in the premises. The tenants do not come out well in this heading, but the order was complied with before the closure order was made.

5. All open drains to be in enclosed drains and connect to the Nairobi City Commission sewer. This does seem to be a matter of Public Health, but:-

> 1. In this type of housing there does seem to be an open drain which runs down the middle of the concrete yard outside the different rooms which is designed to take away wash water and water used to clean the yard. Dealing with such a problem and the main drainage of the property is an entirely different thing. No facts have been given on the pleas of guilty before the City Magistrate, and so we do not know what is really involved here.
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> 2. It will be noted that before the Tribunal the tenants have offered to comply with the notice, but have been unable to do so because of the order of closure, which they have had to deal with before this court.
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> 3. The owner seems to have done nothing to comply with the notice, and he has been ordered to do so. He would seem to be liable to the daily fine provided by the Act, for unlike the Tenants, whatever happens in this application, he will remain with the property, and these proceedings do not affect the position as he is primarily liable. The Tenants have given an undertaking to the Tribunal to do the repairs, and do not appear to have to move out to do so.

6. Repair all defective WC pans and flush cisterns.

In view of what we have said above, without more evidence than is available here from the Medical Offier, it seems difficult to fit this complaint into any of the categories the City Magistrate or the Medical Officer should have been concerned with. Quite obviously, however, this would be a desirable thing to put in order, and it seems the tenants have offered to do so.

7. Replace all the broken doors. In view of what we have said above it seems difficult to fit this complaint into any of the categories the City Magistrate or the Medical Officer should have been concerned with.

8. Repair the splash area concrete top. In view of what we have said above it seems difficult to fit this complaint into any of the categories the City Magistrate or the Medical Officer should hve been concerned with.

There was absolutely no basis for an order of closure in this case, and the Medical Officer did not ask for one. The court made no finding that the premises were unfit for human habitation. The only reference the Court makes is to the likelihood of recurrence which is irrelevant in such circumstances.

In exercising our power of revision therefore, we set aside the closure order. We consider that the owner of the premises has pleaded guilty to the offence with which it was charged, and that there never has been a conviction in respect of that plea. The plea, as we have stated above, was made equivocal by the allegation that the tenants were making the job impossible. Subsequent investigation has shown that it is very likely not to be true, but nevertheless, it would be against all principles for us to enter a conviction now. What ought to happen now is that the criminal matter should be heard as a not guilty plea and we remit the matter to the City Magistrate for hearing on that basis. For the avoidance of doubt we set aside any conviction there may be taken to have been entered against the owner, and we invite the attention of the City Magistrate to a consideration of which parties ought to be involved.

Although the order of the tribunal does not concern us, it does provide an example of what ought to have happened in this case, a very long time ago, at a time when the Medical officer would not have been involved, and putting the landlord in his proper position, as a Respondent being criticised for his failure to maintain the premises to what he has purported to agree in Court was a disgraceful degree.

Unfortunately at first sight, the order empowering the tenant to do the work and charge the landlord appears to be dependant upon the order of the City Magistrate, and might be thought to collapse with our order. But as we read the order, the reference to the order of the City Magistrate is a mere shorthand for the list of duties set out under 1. in the order, and the tenants remain authorised by the Tribunal to get on with that work, and have it paid for in the manner prescribed. There is no reason why they should not do so now, although there is no time limit on them except for their own comfort. Nor of course is there anything to stop the Landlord complying with the order of the Tribunal, although in doing so he will have to behave in a reasonable fashion and comply with the terms of the protected tenancy in that regard, as will the tenants. We hope their respective lawyers will consider their client’s position and advise them in that regard, so that it is not necessary to trouble the authorities any further in what is in fact a domestic affair.

Dated and delivered at Nairobi this 5th day of January, 1989

PORTER

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JUDGE

TANK

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JUDGE

I certify that this is a true copy of the original.

DEPUTY REGISTRAR