REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA

AT NAIROBI

CRIMINAL APPEAL NO 48 OF 1986

BETWEEN

REPUBLIC..... APPELLANT

AND

KABUE KIGERA.....RESPONDENT

ORDER

(Appeal from an Order of the First Class District Magistrate's Court at City Hall Nairobi, RM Desai Esq)

November 27, 1986, **Mbaluto & Bosire JJ** delivered the following Order on Revision.

This is a revision application brought on behalf of 34 tenants in premises on plot L.R. 209/4361/3, which were ordered closed by the first class District Magistrate, City Court Nairobi, by his order dated 27th May 1986, consequent upon his finding and declaration that the premises were unfit for human habitation. Two complaints were put forward in support of the application; firstly that the tenants were condemned unheard; secondly, that the City Court had no jurisdiction to make the closing order, the said premises being subject to the provisions of the Rent Restrictions Act, Cap. 296, Laws of Kenya (under, the Rent Act). The Order of closure was made under s. 120(9) of the Public Health Act, Cap. 242 Laws of Kenya.

The subject premises comprises of 35 units. Kabue Kigera (Kabue) jointly with his wife purchased the premises on 1st July 1985, while the same were in a dilapidated condition because that was the opinion of the Public Health Officer, when he visited them on 5th July 1985. Kabue was later prosecuted and convicted for failing to comply with a statutory notice which was issued and served on him by the Public Health Officer, under the provisions of the Public Health Act, requiring him to abate the nuisances he had noted on the premises. The fact of the existence of the nuisances was established by the testimony of the Public Health Officer.

However, the court did not hear the occupants of the premises who comprised 35 tenants. Be that as it may, the court was satisfied that the nuisances had been proved to exist and were such as rendered the premises unfit for human habitation. The court the proceeded to declare the premises unfit for human habitation and issued an order of closure. It meant that all the 35 tenants were to clear from the premises and to return after the nuisances had been removed. An order was made to that effect. The tenants were allowed a specified period to clear from the premises. Kabue was also given a specified period thereafter to abate the nuisances. He did not appeal to challenge either his conviction or the length of time he was allowed by the lower court to comply with the Public Health Officer's notice. Subsequently copies of the

order of closure were served on all the 35 tenants. One of them complied with the order, but the remaining 34 were aggrieved. They approached the Legal Advice Centre for legal advice. The Centre felt that their grievance had merit and filed this application. The prayer of the 34 tenants is that the order of closure be vacated and all the parties concerned be given an opportunity of being heard prior to the making of any order under the Public Health Act affecting any of them. Mr. Nowrojee for the Legal Advice Centre, for the applicants put forward formidable arguments in support of the two complaints. We propose to take them one after the other.

The main ground of complaint by Mr. Nowrojee was that the tenants were denied due process and yet they are the ones who were manifestly affected by the order of closure. In his view the tenants had a vested right to be heard before the order was made evicting them from their respective tenements. Learned Senior State Counsel, Mr. Harwood, agreed that the tenants should not have been thrown out without being afforded an opportunity of putting forward their views. Mr. Muguku for Kabue, the landlord, had views to the contrary. He did not think the tenants were denied natural justice the court having heard the prosecutor and him before making the order complained of.

He did not also think the tenants were entitled to be heard if the court was satisfied that a nuisance had been proved which rendered the premises unfit for human habitation. Further that the court did not have jurisdiction to hear the tenants because the Public Health Act has no enabling provision. We are unable to agree with Mr. Muguku. A court has a duty not only to do justice but also to show that justice has been done. In this case the court heard the Landlord, Kabue, and the Public Officer, but not the tenants. No reason is on record for not hearing the tenants. There was clearly denial of justice. It was imperative for the court to hear the tenants and any other person who, in its judgement was reasonably likely to be affected by the order of closure.

The fact that there was no express empowering provision in the Public Health Act, for the court to hear the tenants did not mean the court was divested or denied jurisdiction to hear them. The rules of natural justice are inherent in all proceedings be they judicial or administrative, unless of course, there is express provision to bar a court from hearing any interested party Mr. Muguku also put forward another argument which although ingenious, is not tenable, in our view. He submitted that once a court is satisfied as to the existence of a nuisance which renders premises unfit for human habitation there is no necessity of hearing the tenants or indeed any other person likely to be affected by an order, of either closure or demolition, if made. Counsel overlooked one fact, that for a court to be satisfied as to the existence of a nuisance, it must act on evidence. 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 not only been done but it has manifestly 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.

As regards the issue of jurisdiction of the lower court to make the order of closure, Mr. Nowrojee, submitted with zeal that by dint of s. 37(2) of the Rent Act, the lower court and other courts were divested or denied original jurisdiction to deal with issues touching on the eviction of tenants whose tenure is governed by the Rent Act. In his view only the Rent Restrictions Tribunal is vested with the power by s. 5 of the Rent Act to make orders of eviction against tenants. That being so, he said, the lower court should only have dealt with the criminal matter and left the issue of eviction to the Rent Restrictions Tribunal (under, the Tribunal). Both Mr. Harwood and Mr. Muguku, did not agree. They 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 s. 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 closure of premises or dwellings, or 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 has been conferred on the Tribunal to deal with Public Health Matters. The 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.

The issue which we must now grapple with is whether notwithstanding the failure of the court below to hear the 35 tenants, the closing order should be left to stand. In resolving the issue the principal consideration is whether the failure to hear the tenants occasioned a failure or miscarriage of justice. Messrs. Nowrojee and Harwood say so. Mr. Muguku disagrees.

We have anxiously considered the matter and in our view it is manifestly clear there was a failure of justice. It is possible that if the court had heard the tenants it may have been persuaded not to make the order complained of. For that reason the closing order cannot be left to stand.

It is vacated and the matter is referred back to the City Court with a direction that all the 34 tenants still in occupation of the premises in question and any other person who may reasonably be affected by an order of closure or demolition, if made, be summoned before it to show cause why such an order or indeed any other order under the Public Health Act, should not be made. Order accordingly.

We were invited to lay down a procedure for the guidance of subordinate courts in the exercise of their power of closure or demolition under the Public Health Act. Mr. Harwood proposed a procedure, which we agree with entirely except for matters of detail.

The procedure is as under:

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 appeal 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 make the necessary orders as provided under the Public Health Act.

We are conscious of the fact that the recommended procedure is likely to greatly prolong proceedings and delay the abatement of nuisances.

However, we consider 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 to this court. We are indebted to Mr. Harwood for his proposal which greatly eased up our quest for a reasonable and workable procedure.

November 27, 1986

MBALUTO & BOSIRE JJ