REPUBLIC OF KENYA

IN THE ENVIRONMENT AND LAND COURT OF KENYA

AT ELDORET

PETITION NO. 6 OF 2015 CONSOLIDATED WITH PETITION NO. 7 OF 2015

SPREE CLUB LIMITED..... PETITIONER

VERSUS

MEDICAL OFFICER OF HEALTH,

UASIN GISHU GOVERNMENT.....1ST RESPONDENT

PUBLIC HEALTH OFFICER, UASIN GISHU

COUNTY GOVERNMENT.....2ND RESPONDENT

UASIN GISHU COUNTY GOVERNMENT.....3RD RESPONDENT

JUDGMENT

PETITIONERS' CASE

The petitioners are limited liability companies carrying on businesses in Kenya. The first petitioner is spree club limited whilst the second petitioner is signature bar and restaurant limited. The respondents are the medical officer of health Uasin Gishu County and the second restaurant is the medical officer of health and the County government of Uasin Gishu. The petitioners filed the consolidated petitions on 27th and 29th April 2015 respectively seeking Conservatory orders restraining the Respondents from closing the Petitioners' premises on land parcel number L.R. NO. ELDORET MUNICIPALITY BLOCK 6/12, Oloo Street, Eldoret Town. The grounds are a statement of the events leading up to the notice issued to the petitioner to close the premises on 24th April 2015 the gist of which are that there was no prior notice issued and yet the petitioners had been operating the business for 10 years and had been licensed all along. The petitioners had complied with statutory requirements and had maintained high standards of hygiene. There was no inspection prior to notice. According to the petitioners, the respondents have no authority to close down the premises and that the respondent's decision is in breach of constitutional principles. The petitioner will suffer immense loss that is irreparable unless the orders are granted.

According to the petitioners, the respondents served letters upon them on their premises on 24th April 2015. The letters contained a closure notice based on section 115 of the Public Health Act which deals with unsuitable dwellings or nuisance. The petitioners have operated the business for 10 years and annexed licenses for the previous years to their supporting affidavits. Further, the petitioners contend that it was operating with the full knowledge of the respondents and therefore they are estopped from claiming that they were operating without permission.

The respondents never informed the petitioners that it was in breach and neither was the petitioner given a hearing before the decision was arrived at. The respondents' actions were in breach of the tenets of the constitution and the requirement that one has to be heard before being condemned. The petitioner employs 30 people and the closure of the premises would be unfair. The respondents' actions are malicious.

THE LEGAL FOUNDATION OF THE PETITION

The petitioners rely on the Constitution of Kenya 2010 which was promulgated and came into force on 27th August, 2010. They emphasize Article 2(1) of the Constitution of Kenya that establishes the supremacy of the Constitution and provides that the constitution binds all state organs at both levels of government and Article 2(4) of the Constitution provides that provides that any act or omission in contravention of the constitution is invalid. Article 3 of the Constitution that obligates every person to respect, uphold and defend the constitution.

Article 10 of the Constitution that sets out National values and principles of government that bind all state officers, state organs, public

officers and all persons whenever they apply or interpret the constitution, enact, apply or interpret any law, make or implement policy decision. Among the national values and principles of governance are the rule of law, good governance and accountability.

Under Article 47 of the Constitution, every person has a right to fair administrative action that is expeditious, efficient, lawful reasonable and procedurally fair. Article 165(3)(d) of the Constitution provides that the High Court shall have jurisdiction to interpret the constitution to determine the question whether anything said to be done under the constitution or any law is inconsistent with or in contravention of the constitution.

FACTS IN SUPPORT OF THE PETITION

On or about 24th April, 2015 at midnight, the respondents dropped a letter at the Petitioner's business premises dated 24th April, 2015. That the contents of the aforesaid letter were to the effect that the Petitioner ceases to do business forthwith. That at no time had the Petitioner been given notice to the effect that there was something wrong with his business premises and requiring it to remedy the act or omission. That there is no inquiry that was made on the petitioner's premises or any inspection and a report tabled that the petitioner's business is a nuisance or not complaint. That the petitioner was not given any hearing and has been condemned unheard. That the notice given is inhuman considering that the petitioner's business has been in operation for over 8 years and has all along been licensed by the respondent. That the petitioner has employed over sixty employees and it is inhuman to send them home without notice. That the petitioner has all along complied with all the statutory requirements and has put in place all relevant public health conditions and the environment is safe. The petitioner avers that the notice given is untenable and unconstitutional.

RELIEFS SOUGHT

The Petitioner therefore prays for a declaration that the petitioners' rights under Articles 27, 35, 40, 46 47, 48 and 50 of the Constitution have been violated by the respondent and a declaration that the notice of closure issued by the respondents dated 24th April, 2015 is null and void. An order of certiorari does issue to quash the respondents notice dated 24th April, 2015. A permanent injunction restraining the respondents from closing the petitioner's premises. Plus, costa of the petition.

In further affidavit, Haron Kutto states that this Honourable court has the jurisdiction to hear and determine this matter, the matter being related to land and environment.

That even if this matter was purely a regulatory function, the Respondent must operate within the confines of the law. The Respondent has not contravened any requirements of the law or terms of the licence to warrant the Respondent's actions. The Petitioners premises are not in the basement of the building as alleged or at all and the Petitioner shall invite the Honourable court to visit the premises and to enable it make an informed decision. That being the case, there was no need for any permission written or otherwise and that is why the Respondent has over the years allowed the Petitioner to operate the premises.

The Respondent having allowed the Petitioner to operate over the years and in view of the fact that nothing has changed over the period of time, the Respondent is estopped to raise issues of illegality at this stage and that as he stated earlier, he wishes to reiterate that there has been no complaint whatsoever by any customer of the Petitioner and the Respondent has not exhibited any such complaint as alleged or at all to enable it enforce the provisions of Article 46 of the constitution as purported or at all. That indeed the Petitioner has applied for a licence for the year 2015 and the same is being processed by the relevant body and if the same is not granted, that will be a matter for another forum. That the Respondent has complied with all the legal requirements and regulations. The Respondent has totally failed to exhibit any report or finding of the relevant body to show that the Petitioners business premises are in contravention of the law. What is being alleged by the deponent of the replying affidavit is mere hearsay.

RESPONDENTS' CASE

The respondents, vide their replying affidavit of Peter Lelei contend that this court does not have the jurisdiction to handle this matter. They maintain that the dispute concerns business licensing and compliance and has no bearing at all to the environment land use and occupation and title to land.

County government functions under part 2 of the 4th schedule of the Constitution include licensing and control of undertakings that sell food to the public, control of air pollution, noise pollution, other public nuisances and outdoor advertising, county planning and development, fire-fighting services and disaster management and regulation of cultural activities, public entertainment and public amenities.

Under section 120 of the Public Health Act, proceedings on compliance of notices issued pursuant to sections 117 and 118 are in the domain of the magistrate and therefore where there is a clear procedure for redress for any particular grievance prescribed by the constitution, an act of parliament, that procedure should be followed strictly as held by the court ***in International Centre for Policy and Conflict & Others vs. The Hon. Attorney General & others 2013, eKLR.***

Under section 151 of the act it is unlawful to live in, occupy, let or sub-let or to suffer or permit any basement to be used for habitation. It is unlawful to use such basement as a shop, workshop or factory or for the preparation and storage of food without the express written permission of the medical officer of health. No such permission has been obtained by the petitioner and neither has any such permission been submitted to the court.

The challenge herein is against the decision of a public officer and the same can only be filed under judicial review at the High Court. The notice of motion is contra-statute based on and tainted with illegalities which a court of law cannot countenance in the manner sought by the petitioner.

The fact that the petitioner has been operating illegally for 8 years does not entitle it to conservatory orders sought. Further, an application for license does not constitute a license. The constitution does not provide for a right to a license and one can only be issued with a license after following the regulations laid down in statute.

The petition does not meet the legal threshold established in ***Anarita Karimi Njeru vs. Republic (no.1) 1979 JKR on constitutional petitions***. The petitioner has failed to disclose material facts and has made untruthful statements. The performance of a statutory obligation is not subject to issuance of notice unless the law provides. A party engaging in an illegality cannot seek to be given notice for its failure to follow the law.

DETERMINATION

I have considered the petition and the rival submissions and do find the main first issue to for determination is whether the court has jurisdiction to hear this Petition which issue might make or break this petition.

Jurisdiction is the power or competence of a court to adjudicate on, determine and dispose of a matter. In civil matters, jurisdiction has practical significance when a litigant must choose the appropriate court in which to proceed.

In criminal matters, jurisdiction is significant in determining whether the court in which an accused person is tried has the power to do so. The issue of jurisdiction is obviously of importance to the person initiating litigation as it raises and answers the question: to which court should he address his claim? But jurisdiction is equally important for the court itself since it forms the basis for the court's power to grant or to refuse the relief sought. If a court declines jurisdiction, then the petition will be dismissed without reaching the merits of the case—and without the court granting the relief sought, even if the petitioner would otherwise have been entitled to it.

Jurisdiction is thus the power vested in the court by law to adjudicate upon, determine and dispose of a matter.

In the Kenyan case of **Owners of the Motor Vessel M. V Lillian S. v. Caltex Oil (K) Limited [1989] KLR,** Justice Nyarangi explained the importance of jurisdiction in the following terms: ***"Jurisdiction is everything. Without it, a court has no power to make one more step."*** Where a court has no jurisdiction, there would be no basis for a continuation of proceedings pending other evidence. A court of law downs its tools in respect of the matter before it the moment it holds the opinion that it is without jurisdiction.

Before adopting the above quoted words, the ***Court of Appeal in Mumo Matemu v Trusted Society of Human rights alliance and others*** observed that it is trite that the jurisdiction of any court provides the foundation for its exercise of judicial authority. As a general principle, where a court has no jurisdiction, it has no basis for judicial proceedings much less judicial decision or order.' Because of the importance of jurisdiction, a court of law must determine the question of jurisdiction upfront before embarking upon matters of the merits of the case.

Justice Nyarangi emphasized in this respect that

'I think that it is reasonably plain that a question of jurisdiction ought to be raised at the earliest opportunity and the Court seized of the matter is then obliged to decide the issue right away on the material before it'.

If the court determines that it has no jurisdiction, it downs the tools and must not proceed with the case any further. To proceed where there is no jurisdiction is a waste of time as the eventual decision will be of no consequence.

The jurisdiction of the Environment and Land Court is granted by section 13 of the Environment and Land Court. Section 13 of the ELC act states;

> **(1) The Court shall have original and appellate jurisdiction to hear and determine all disputes in accordance with Article 162(2)(b) of the Constitution and with the provisions of this Act or any other law applicable in Kenya relating to environment and land.**
>
> **(2) In exercise of its jurisdiction under Article 162(2)(b) of the Constitution, the Court shall have power to hear and determine disputes—**
>
> > **(a) relating to environmental planning and protection, climate issues, land use planning, title, tenure, boundaries, rates, rents, valuations, mining, minerals and other natural resources;**
> >
> > **(b) relating to compulsory acquisition of land;**
> >
> > **(c) relating to land administration and management;**
> >
> > **(d) relating to public, private and community land and contracts, choses in action or other instruments granting any enforceable interests in land; and**
> >
> > **(e) any other dispute relating to environment and land.**

The court therefore needs to identify whether the matter falls within any of the above provisions. The nature of the dispute is based on regulatory requirements and breach thereof.

There has been no evidence adduced to show that the dispute relates to environment and land. It is merely the failure to adhere to the regulatory requirements to use a part of the premises.

The Court of Appeal of Kenya in ***Co-operative Bank of Kenya Limited v Patrick Kangethe Njuguna & 5 others [2017] eKLR*** considered the jurisdiction of the ELC vis a vis H.C and observed that the respective jurisdictions of the ELC and the High Court are well spelt out by our ***Constitution.*** With regard to the ELC, ***Article 162(2) & (3)*** of the ***Constitution*** requires *inter alia*, that;

> ***"Parliament shall establish courts with the status of the High Court to hear and determine disputes relating to-***
>
> ***a) …***
>
> ***b) The environment and the use and occupation of, and title to, land."***

And that

(3) Parliament shall determine the jurisdiction and functions of the courts contemplated in clause (2)."

The court of appeal observed that to this end, parliament passed the ELC Act which establishes the ELC Court as well as the Land Act whose ***Section 150*** stipulates that the ELC

> ***"…. shall have jurisdiction to hear and determine disputes, actions and proceedings concerning land under this Act."***

The Court of Appeal further observed that the jurisdiction of the High Court on the other hand has been broadly set out under ***Article 163(3)*** which states that the High Court shall among others, have;

> ***a) Unlimited original jurisdiction in criminal and civil matters.***

In that matter both before the Court of Appeal and the court below, the appellant had contended that ***charging the suit*** land ***constituted 'use'*** of land, thus bringing the dispute within ***Article 162 (2) (b)*** aforesaid.

In order to affirm or reject this assertion, it is perhaps pertinent to ascertain the real cause of action herein while also revisiting the definition of land, land use and Charges.

The eminent judges found as follows: -

> ***35. Accordingly, for land use to occur, the land must be utilized for the purpose for which the surface of the land, air above it or ground below it is adapted. To the law therefore, land use entails the application or employment of the surface of the land and/or the air above it and/ or ground below it according to the purpose for which that land is adapted. Neither the cujus doctrine nor Article 260 whether expressly or by implication recognizes charging land as connoting land use.***
>
> ***36. By definition, a charge is an interest in land securing the payment of money or money's worth or the fulfillment of any condition (see Section 2 of the Land Act). As such, it gives rise to a relationship where one person acquires rights over the land of another as security in exchange for money or money's worth. The rights so acquired are limited to the realization of the security so advanced (see Section 80 of the Land Act). The creation of that relationship therefore, has nothing to do with use of the land (as defined above). Indeed, that relationship is simply limited to ensuring that the chargee is assured of the repayment of the money he has advanced the chargor.***
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> ***37. Further, Section 2 aforesaid recognizes a charge as a disposition in land. A disposition is distinguishable from land use. While the former creates the relationship, the latter is the utilization of the natural resources found on, above or below the land. As seen before, land use connotes the alteration of the environmental conditions prevailing on the land and has nothing to do with dispositions of land. Saying that creation of an interest or disposition amounts to use of the land, is akin to saying that writing a will bequeathing land or the act of signing a tenancy agreement constitute land use. The mere acquisition or conferment of an interest in land does not amount to use of that land. Else we would neither speak of absentee landlords nor would principles like adverse possession ever arise. If a disposition were held to constitute land use, an absentee landlord with a subsisting legal charge over his land would never have to contend with the consequences of adverse possession, for he would always be said to be 'using' his land simply by virtue of having a floating charge/disposition over the property.***
>
> ***38. Consequently, the assertion that a charge constitutes use of land within the meaning of Article 162 of the Constitution fails. In addition, the cause of action herein was not the validity of the charge, but a question of accounts.***

The petitioners have not demonstrated that the cause of action is derived from land use, title or occupation. The bone of contention is based on sections 151 the public Health Act that provide that basements not to be occupied without permission thus: -

> ***"It shall not be lawful to live in, occupy or use, or to let or sublet, or to suffer or permit to be used, any basement for habitation, nor shall it be lawful, without the written permission of the medical officer of health, to use such basement as a shop, workshop or factory, or for the preparation or storage of food, and no basement shall be used unless it is well lit and ventilated and is free from damp and is rendered rat-proof to the satisfaction of the medical officer of health."***

The dispute between the petitioner and the respondents revolved on issuance of a licence to the petitioners hence the same are improperly before this court and are dismissed for want of jurisdiction with no orders as to costs. In any event the petitions were overtaken by event when parties attempted to settle the dispute out of court hence delaying the determination of the petitions on merit.

Dated and delivered at Eldoret this 22nd day of February, 2019.

A. OMBWAYO

JUDGE