



IN THE COURT OF APPEAL

AT NAIROBI

(CORAM: NAMBUYE, KARANJA & MWERA, JJ.A.)

CIVIL APPEAL NO.90 OF 2006

BETWEEN

CITY COUNCIL OF NAIROBI.....APPELLANT

AND

BARCLAYS BANK OF KENYA LIMITED.....RESPONDENT

*(An Appeal from judgment and Order of the High Court of Kenya at Nairobi (Wendoh), dated 17<sup>th</sup> March, 2006*

*in*

**MISC. CIVIL APPLICATION NO.1261 OF 2005)**

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**JUDGMENT OF THE COURT**

The appeal arose from the High Court judgment (Wendoh J) delivered on 17<sup>th</sup> March, 2006. The present respondent, Barclays Bank of Kenya as the applicant, filed a notice of motion dated 13<sup>th</sup> September, 2005 under Order 53 Rule 3(1) of the Civil Procedure Rules against City Council of Nairobi as the respondent, seeking the following orders:

- i. *an order of **certiorari** to quash the charge sheet and all proceedings in Criminal Case No.M1509(A)/05, Republic vs Manager, Barclays Bank (K) Ltd, Market Branch;*
- ii. *an order of **prohibition** to issue against the respondent, City Council of Nairobi from commencing any further criminal proceedings against the applicant in relation to the painting and repair of its premises called Market Branch; and*
- iii. *an order of **mandamus** compelling the respondent Council to make a refund of Sh.90,000/=, being cash bail paid by the applicant bank in the criminal case aforementioned.*

The respondent filed a replying affidavit and when the notice of motion came up for hearing, the learned judge was told that on 20<sup>th</sup> January, 2005 the respondent, now the appellant by the hand of its public health officer, Ms Lucy Kamau, served a notice on the applicant/respondent requiring it to repair and paint its premises at Market Branch both internally and externally within 21 days, failure of which it

could be prosecuted. On 21<sup>st</sup> January, 2005 the respondent bank wrote to the council stating that it had recently renovated and painted its Market Branch premises but if a joint inspection with the Council would point out what needed painting, then the bank would oblige. The appellant did not respond to that letter and on 27<sup>th</sup> January, 2005, it served a charge sheet and summons requiring the bank's manager to appear in court and answer charges of failing to paint its building. All that gave rise to the judicial review application before the learned judge. The respondent bank contended that by failing to respond to its letter of 21<sup>st</sup> January, 2005 yet proceeding to charge it, the appellant Council breached rules of natural justice; it acted capriciously; the nuisance said to have been committed by the respondent, when it allegedly failed to repair its premises, was not injurious to life or health and did not fall under the purview of Section 118 of the Public Health Act Cap 242 Laws of Kenya. It was also contended by the respondent that the appellant was acting in excess of jurisdiction when it purported to prosecute the respondent as it was moving to do, under the sections of the said Public Health Act which were not applicable.

After hearing the arguments, the learned judge concluded, *inter alia*, that the charge as drawn did not disclose any offence; the replying affidavit filed did not show the nature of nuisance complained of or what injury or danger it posed to the public. Neither did it disclose specific areas that required repainting. The Judge on this point concluded:

***“I therefore hold that the charge which the applicant faced was fatally defective and the charge does not disclose any offence known under Sections 115 and 118 of the Public Health Act.”***

Judge Wendoh made other findings in her judgment favourable to the respondent but not relevant in this appeal. But her one observation was subject of this appeal.

***“I wish to note here that since proceedings of the court are sought to be quashed, the court should have been joined as a respondent in these proceedings.”***

The Council being dissatisfied with the High Court judgment preferred this appeal premised on twelve (12) grounds. We need not reproduce them here because at the hearing Ms Boyani, learned counsel for the appellant condensed those grounds into two main ones and argued them together. The two are:

- i. *the learned High Court judge erred in law when she found that failure on the part of the respondent to paint the subject premises, did not constitute an offence under the Public Health Act; and*
- ii. *having found that the magistrate hearing the criminal proceedings against the respondent ought to have been joined in the notice of motion as a respondent, the motion was a nullity and untenable.*

Ms Boyani, told us that all **sections 115, 116, 118, 119 and 120 of the Public Health Act** (Supra) (all inclusive) defined and provided for the offence of nuisance and the failure by the respondent not to repair its premises constituted that offence. In the long run such an act would be injurious to health and pose a danger to the public. It was thus in error for the learned judge to find that the charge sheet by which the respondent was brought to court, disclosed no offence under the Public Health Act.

As for the non-joinder of the magistrate's court in the judicial review application filed by the respondent, we were told the motion was a nullity and not worth basing any finding on it favourable to the respondent.

Mr. Ogunde, learned counsel for the respondent, maintained that Section 118 of the Public Health Act did not define “*nuisance*”. That that provision sets out activities/omissions that constitute nuisance and failure to paint or repair was not one of them. Parliament did not intend to make that act punishable as a nuisance. That, there was no evidence of a medical officer to show that indeed failure to paint a building would be injurious and dangerous to health.

On the other limb of failure to join the magistrates court as a respondent in the judicial review

proceedings under Order 53 Rule 3(2) of the Civil Procedure Rules, we heard that that did not matter. There was a charge sheet that was illegal and defective and so the omission complained of did not amount to much in substance.

In our re-evaluation and re-assessment of all facts in this matter, the brief determination of this appeal is that we have perused all the sections 115 to 120, inclusive of the Public Health Act as contended by the appellant. We are unable to find in any of them, and specifically Section 118, where nuisance is defined or that an act of failure to repaint a building constitutes a nuisance, the same being injurious and dangerous to health. Neither was there evidence of such laid before the learned judge. Accordingly, she was not in error in her finding that the charge sheet laid before the respondent did not disclose an offence and so it was defective. It is trite law and a principle in criminal prosecutions that an offence must be defined by law, setting out all its ingredients in order for a valid charge to be laid. If the alleged offence does not conform to that then, if prosecuted, the trial will result in an injustice to the accused. That seemed to have been the case here and the learned Judge had to stop such a course of things by issuing an order of *certiorari* to quash the charge sheet facing the respondent. Accordingly this ground fails.

Moving to the non-joinder of the magistrate's court in the judicial proceedings in the High Court, we agree that Order 53 Rule 3(2) of the Civil Procedure Rules was applicable in these circumstances.

**“3.(1) ...**

***(2) The notice shall be served on all persons directly affected, and where it relates to any proceedings in or before a court and the object is either to compel the court or an officer thereof to do any action in relation to the proceedings or quash them or any other order made therein, the notice of motion shall be served on the presiding officer of the court and on all parties to the proceedings.”***

In this appeal Ms Boyani told us that the notice of motion before the learned judge did not mention the magistrate's court as a party and neither was it served on that court.

The record has it that the order of *certiorari* was to quash the charge sheet and the proceedings in the criminal case against the respondent. But the order for prohibition was to be directed to the appellant and its employees not to commence or conduct further criminal proceedings in the said criminal case against the respondent. The proceedings were no doubt before the magistrate's court. So in terms of Order 53 Rule 3(2) of the Civil Procedure Rules the notice of motion ought to have been served on that court or its presiding officer. It was not done. Did that constitute invalidity or prejudice in the matter? We do not think so. The basis of the proceedings – the charge sheet itself, was found to be defective since it did not disclose an offence under the Public Health Act and it was quashed. All in all, the omission not to serve the subject notice of motion on the magistrate's court, in our view did not constitute prejudice or render the judicial review proceedings a nullity. This ground too fails.

In sum we dismiss this appeal in its entirety as lacking any merit. The appellant will pay costs to the respondent.

**Dated and delivered at Nairobi this 18<sup>th</sup> day of October, 2013.**

**R. N. NAMBUYE**

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**JUDGE OF APPEAL**

**W. KARAN JA**

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**JUDGE OF APPEAL**

**J. W. MWERA**

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**JUDGE OF APPEAL**

I certify that this is A true copy of the original

**DEPUTY REGISTRAR**

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