



REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT NAIROBI

APPELLANT SIDE

CRIMINAL REVISION NO. 43 OF 1997

(From Original Order in Criminal case NO. M. 12724 Of the
Subordinate Court of the Resident Magistrate's Court at City
Hall)

ROBERT MUCHIRI MUHURI & ANOTHER t/a ROMUWA HARDWARE AND
FOUR OTHERS.....APPLICANTS

V E R S U S

REPUBLIC.....RESPONDENT

R U L I N G

The advocate representing the tenants in a subordinate court case at Nairobi filed an application for stay of execution and a review of the Magistrates courts orders.

This is one of those typical cases where a landlord who owns a building is charged before a criminal court under the Public Health act for maintaining premises that are of a health hazard. The landlord is normally requested to abate the nuisance failure to be is charged and orders made to the extent that the premises be demolished and rebuilt and or the landlord is duly fined.

The Health Act, besides the constitution must and is paramount to any other laws. This therefore meant previously that tenants and or occupants of the premises had little choice in the say when it came to an eviction. This situation changed when in the early 1990, the High court held that the tenants must appear and have a say in such proceedings.

It was as a result of this that the tenants were permitted to participate in the lower court although they were not party to the proceedings.

In this review, the tenants sort the orders of the Magistrate to be set aside on the grounds that the proceedings were irregular.

Under the review proceedings it requires that the lower court file be called for and made available to

the High Court to determine whether the proceedings were irregular or not. The orders of the High Court was made on 24.2.98, 27.2.98 13.3.98 and all the instances and up to date the lower court file could not be traced. The case was set down for hearing with the being:

M/S: Nganga advocate for the tenants

M/: Muchemi advocate for the landlord

Miss Kariuki for the Nairobi City Counsel

I made a ruling that section 365 of the Criminal Procedure code do apply. I perused the court file under the requirements of the revision section and noted that apart from typed proceedings annexed to affidavits the records of the lower courts was in complete. There was missing the written submission of the advocates for the tenant and the landlord. The Attorney General and or the City Council's advocate appear not to have participated save in the aspect of prosecution.

I wish to give a brief background from the records that are before me.

On the 13th January, 1997 the landlord appeared before the Resident Magistrate and stated to a charge(which was not within the court records) he had not complied(with the requirement) as there are tenants.

The tenants came on record through their advocate on the 22.1.97. On the 30.1.97 a site visit was made. On 11.2.97 a site visit was made. On 11.2.97 evidence was given by the Public Health Officer. He found the premises in a delapulated state, gave 21 notice to the landlord to demolish the building when the landlord had not complied he had the landlord charged in court.

Two tenants gave evidence on behalf of other tenants. They stated the premises was in good conditions. Submissions were to be given as I said earlier there was no records of this. The next thing he proceedings speak of is that the tenants had been given 30 days time prior to 29.9.97 to make good the premises but failed to rectify 10 conditions given. Only three conditions were attempted. He that's were summoned to explain why the repairs to the building had not been done. The public health officer stated he found the situation as it was on the 25.9.97. Little effort by the tenants had been made. The advocate for the tenants admitted that they had not fully complied.

The orders of the court is that 14 days was given to the tenants to vacate. The landlord does his repairs and the tenants he reinstated.

It was then that the orders of the court was brought to this court by the tenants to be revised. I believe this was the only avenue for the threats as they have no right of appeal in that they were not party to the suit. The best they could do was to ask for a revision.

When the matters came to the High Court. Patel Judge granted orders of stay. He proceeded to once again give the tenants time to carry out repairs.

A letter dated the 26.1.97 by way of a report is said to have satisfied the court that repairs were complete. A hearing was then to be heard.

My task in this revision is to see whether there has been any irregularity in the proceedings of the lower court. These proceedings are not before me because from the letter of 25.2.98 by the Senior Law clerk, the said file `has not been traced.....'

I made an order that a notice to show cause do issue to the executive officer city council as to why the file is not before the court. The case was to be mentioned on 18.1.99. The clerk in charge of the registry came and notified the court that the file is missing and has never been traced. All he has are a few photocopies and typed proceedings. These documents are no different from what has been supplied by the advocate.

The court therefore has not before it the `charge'; the original proceedings and it is therefore difficult to assess whether the proceedings are irregular. Irregularity I would have seen is in the calling of two tenants only and making a decision on those two tenants. There was no consent by the other tenants that they would wish to make repairs. They would have opted to vacate.

I further note that the parties have been before the Business Premises Tribunal on other matters involving the landlord. Due to the missing file(+ proceeding before Hon. Justice Patel). I would allow a revision. I hereby order a retrial of all the subordinate court proceedings before another Magistrate of competent jurisdiction.

Dated this 20th day of January, 1999 at Nairobi.

M.A. ANG'AWA

JUDGE



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