



**REPUBLIC OF KENYA**  
**IN THE HIGH COURT OF KENYA AT KAKAMEGA**  
**CRIMINAL APPEAL NO. 15 OF 2014**

**ELIPHAS OSINDE AYUKU .....APPELLANT/APPLICANT**

**VERSUS**

**1. REPUBLIC**

**2. ALPHONCE MAKACHA ..... RESPONDENTS**

**3. ALFRED LIMISI**

**RULING**

Before me is a Notice of Motion dated 17th February 2014 filed by the appellant Eliphas Osinde Ayuku. The application was filed through Anziya & Company advocates. It was brought under **Section 362** and **363** of the Criminal Procedure Code. The prayers are as follows -

1. That this application be certified urgent and be heard ex-parte in the first instance;
2. That the honourable court be pleased to stay execution of the Orders issued by the trial magistrate on 3<sup>rd</sup> February 2014 pending hearing and determination of appeal.
3. That the honourable court be pleased to order the 2nd and 3rd respondents to remove their properties if any in the premises known as Kakamega Town Block 1/203 to pave way for major repairs.

The application has grounds on the face of the Notice of Motion. The grounds are, that the appellant is the landlord of the subject premises. That the premises were closed down by the trial magistrate for repairs following recommendations by the Public Health Officer. That the repairs recommended were major and could not be done with the properties in the premises. That out of the 8 tenants, only the two respondents alleged that their properties were in the premises. That the trial magistrate ordered the appellant to keep custody of the said property. That the appellant did not stay in town and had therefore nowhere to put the property. That the repairs could not be carried out within 30 days as ordered by the trial magistrate.

The application was brought under certificate of urgency. It was filed with a supporting affidavit of the appellant. It was deponed in the affidavit *inter alia* that 6 tenants had moved out peacefully. That the Public Health Officer obtained an order closing down the premises for major repairs and that immediately repairs were commenced, they were stopped by a court order. That the repairs required removal of the roof. That the tenants were asked to move out by the appellant and 6 of them complied except the 2<sup>nd</sup> and 3<sup>rd</sup> respondents. That the learned magistrate later reviewed and stayed his own orders and ordered that the roof be repaired within 15 days while the premises be repaired within 30 days. That it was not possible for the appellant to carry out the repairs as ordered by the lower court.

Together with the application, the appellant filed a petition of appeal on the same 17th February 2014.

The application is opposed. The 2nd and 3rd respondents filed a joint replying affidavit. It was deponed *inter alia* that the appellant removed iron sheets and fenced the premises contrary to the court order obtained by the Public Health Officer. That though the appellant was directed to close down the premises to allow carrying out renovations, he instead removed the roof and exposed their property to damage. That they had incurred losses of over Kshs.900,000/= due to the actions of the appellant, as the premises were now fenced and could not be accessed. That they should not be ordered to remove their property from Kakamega Town Block 1/203, when the appellant had not compensated them for the loss incurred.

Though the Republic was listed in the application as the 1st respondent, the Director of Public Prosecutions who participated in the lower court proceedings, did not participate in the application proceedings. The appellant through Anziya & Co. advocates filed written submissions. The 2nd and 3rd respondents through J. B. Shilenje & Co. advocates also filed written submissions. Counsel relied on the written submissions. In addition, the 2nd respondent stated orally in court that he was the one who was seriously affected by the actions of the appellant. I have considered the submissions.

This is an application for stay of execution of orders issued by the trial magistrate pending hearing and determination of the appeal. It is also an application requesting for orders that the 2nd and 3rd respondents remove their properties from the said premises for major repairs to be carried out.

The matter herein arose from the proceedings in the lower court commenced through a complaint made by a Public Health Officer a Mr. Jacob Juma Shamala, under the **Public Health Act (Cap. 242)**. The complaints were filed in court against the appellant, but he failed to appear in court. The learned magistrate on 18th December 2013 made the following orders -

1. **The Kakamega Township Public Health Officer do proceed to plot No. Kak. Town Block 1/203 and close the premises thereon belonging to Mr. Elphas Ayuku forthwith.**
2. **The O.C.S. Kakamega Police Station is directed to facilitate compliance of order No. (1) above.**
3. **Mention on 23/12/2013 for review.**

After this order was made, the 2nd and 3rd respondents on 19/12/13 requested to be joined as interested parties to the proceedings. The request was granted. Subsequently, the following orders were made by the court on the same day.

1. **This court orders of 18/12/13 closing premises Kak Town Block 1/203 are set aside forthwith.**
2. **The applicant's to serve the respondent.**
3. **Inter-parties hearing on 23/12/13.**

On the 23/12/13, Mr. Onsando appeared for the interested parties. Mr. Oroni appeared for the State and Mr. Munyendo appeared for the respondent, who is Elphas Ayuku the appellant herein.

Following submissions by the counsel present, it was agreed that the contesting parties be cross-examined on the affidavits filed. This was done on 7/1/14. It was then agreed that submissions be filed. After submissions were filed, the court delivered a ruling on 3/2/14, in which the learned magistrate concluded as follows -

1. **The closure order issued by this court remains alive.**
2. **The respondent having indicated that he has iron sheets ready, I order that he roofs the building within 15 days from the date hereof.**
3. **As I have not made any order of eviction, the owner is directed to secure tenant's property.**
4. **The owner shall carry out the requirements indicated in the notice within 30 days from expiry of the 15 days indicated under order 2 above.**
5. **During the period of the closure order, no rent shall be due or payable by/or on behalf of the**

**occupier of the building in question.”**

The orders of the court above, are what have elicited the filing of the appeal herein, and the present application.

I am now dealing with the application only and not the appeal.

It has been submitted by counsel for the appellant that the trial magistrate did not have jurisdiction to vary his own orders. That under **Section 362** and **363** of the Criminal Procedure Code, only the High Court or on a superior subordinate court could vary the trial court's orders. In my view, that is an arguable point. It will be substantively determined on appeal.

It has to be appreciated that, the proceedings before the subordinate court were brought under Section 119 of the Public Health Act (Cap 242). Under section 120 of that Act, the subordinate court has wide powers in managing the implementation of its orders and consequences arising therefrom. Again that is a matter to be determined in the appeal, which has already been filed.

In my view, from the facts and evidence placed before me, the appellant has not laid a basis or legal justification for granting stay of execution orders from the decision of the trial court. I wish to mention also that stay of execution of decisions in criminal cases are provided for under **Section 336** of the Criminal Procedure Code, not the sections herein cited by the counsel for the appellant. I will decline to grant the stay orders requested.

As for prayer 3 of the application, which is a request that this court orders for removal of the property of the 2nd and 3rd respondent's from the subject premises, I am of the view that that prayer cannot be granted by this court at this stage. It is a substantive issue raised in the petition of appeal. Granting the request will amount to making a substantive order before the appeal is heard, which cannot be done at a preliminary application stage. I decline to grant the prayer.

In my view, the avenue available to the appellant is to fix the appeal for hearing on priority basis.

To conclude, I find no merits in the application. The same is dismissed. Costs, if any, will follow the results of the appeal.

***Dated and delivered at Kakamega this 23rd day of May, 2014***

**George Dulu**

**J U D G E**