



**REPUBLIC OF KENYA**  
**IN THE HIGH COURT OF KENYA**  
**AT MOMBASA**

**Criminal Revision 4 of 2008**

**1. J. H. JUMANI**

**2. SAKINA JUMA.....APPLICANTS**

**VERSUS**

**MUNICIPAL COUNCIL OF MOMBASA.....RESPONDENT**

**ORDER ON REVISION**

One Abdulhafidhi Mohamed Mabragan was charged in Mombasa Resident Magistrate's court Criminal Case No. 3939 of 2007 with failing to comply with a requisition notice served upon him under by-law 243 of the Building Code, Local Government (Adoptive) By-laws Building Orders 1968. the particulars of the charge were that Abdulhafidhi Mohamed Mabragan (herein after "the accused") on 1<sup>st</sup> November 2007 at about 2.30 p.m. was served with a building notice requiring him with immediate effect to embark on major repairs to his building standing on plot No. 6/XXXVIII/MI Old Town area Mombasa "which became ruinous, dangerous and dilapidated condition" (sic). The charge indicated the defects as follows:-

- 1) The walls have developed cracks.
- 2) The floor slab is peeling off.
- 3) The roof is leaking.

The accused appeared before Hon. Ndubi C. N., District Magistrate II, on 21<sup>st</sup> November 2007 and pleaded guilty to the charge. The prosecutor informed the Learned District Magistrate that the facts were as per the charge sheet. The accused admitted the facts upon which he was convicted on his own plea of guilty.

In mitigation the accused pleaded for forgiveness and stated that he has three tenants in the premises who had refused to vacate the same to enable him carry out the necessary repairs. He then asked for the assistance of the court to have the tenants vacate the premises.

The court obliged and issued "a vacation notice to the tenants to vacate the premises within 30 days." The court also imposed a fine of Kshs. 3,000/= in default one months imprisonment. It is the notice to vacate the premises that has provoked this revision. Two tenants J. H. Juman and Sakina Juma instructed

Anil Suchak advocate who wrote to the court requesting that its reversionary power be exercised at least with respect to the order of the Learned District Magistrate that the said tenants vacate the condemned premises.

The 3<sup>rd</sup> tenant is a firm trading as Tailorama. The firm is owned by Jayand Vailebdas Velji Senigra and Bharat Velji Senigra. On their part they instructed M/S Timamy & Company Advocates to seek revision of the order against them.

It must be pointed out from the outset that the accused is not challenging his conviction and sentence. Indeed from his statement in mitigation all he was interested in on conviction was assistance of the court to have the tenants vacate his premises. The Learned District Magistrate in a rather off handed and casual manner granted the relief sought by the accused. It cannot be gainsaid that her order would have to adversely affect the tenants who were not before her. She made no attempt at all to grant the tenants an opportunity to be heard before issuing what she called “vacation notices”. There was therefore a total failure to comply with the Rules of Natural Justice. She condemned the tenants without giving them an opportunity to be heard. That is a basic principle of our jurisprudence and it is surprising that the District Magistrate was not alive to it. It is also rather surprising that the District magistrate did not see the need to satisfy herself of the condition of the premises before granting the wish of the accused. With all due respect to her, she must have known that her order would have far reaching consequences to the lives of the tenants and she should have heard them before making her order. In this regard I would echo the recommendation made by Mbaluto J and Bosire J, as he then was, in **Republic – v – Kabue Kigera [Nairobi HC CR Application No. 48 of 1986] (UR)**. In the exercise of powers under the Public Health act with respect to closure or demolition of premises, the Learned Judges recommended the following procedure which I also respectfully recommend:

**“1) Upon receipt of a complaint under section 120 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 appear 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 to make the necessary order as provided under the Public Health Act.”**

There is a further matter which I can dispose of briefly. The record of the Learned District Magistrate does not reflect the basis of her authority to issue the Vacation Notices. The accused was charged with failing to comply with a requisition notice served under By Law 263 (supra). The penalties prescribed in default of compliance are against the owner of the premises. The order made against the tenants was therefore made clearly without jurisdiction. The order can therefore not stand on this ground also.

Mr. Onserio the Learned State Counsel who appeared for the state did not support the order of the Learned District Magistrate neither did the accused counsel Mr. Obed. They however, sought an order that the case be referred back to the District Magistrate for the issuance of the requisite notice to the tenants.

I have seriously considered the plea made by the Learned state counsel and counsel for the accused. I have come to the conclusion that the Learned District Magistrate acted without jurisdiction as the penalties prescribed under the By Law can only be made against the owner of the building. I am also alive to the fact that, the tenants may be protected tenants and their eviction may be governed by a separate legislation and after due process in a different tribunal. Referring the matter back to the District Magistrate would therefore serve no purpose and may even perpetuate an illegality.

For the above reasons, the District Magistrate’s order made against the tenants by way of a vacation notice for them to vacate the premises within 30 days is hereby set aside. The accused, if he is, the owner of the building is at liberty to use lawful means to obtain vacant possession of the premises.

It is so ordered.

**DATED, SIGNED AND DELIVERED IN OPEN COURT THIS 6<sup>TH</sup> DAY OF OCTOBER 2008.**

**F. AZANGALALA**

**JUDGE**

Read in the presence of:

Suchak for the tenants in No. 4 and holding brief for Odera for the tenant in No. 5 of 2008, Abed for the accused and Onserio for the Republic.

**F. AZANGALALA**

**JUDGE**

**6<sup>TH</sup> OCTOBER 2008**