REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT ELDORET

MISC. CRIMINAL APPLICATION NO. 2 OF 1995

K P NAGARIA …….....…….APPLICANT

P P SHA…….....…….APPLICANT

VERSUS

REPUBLIC …….....…….RESPONDENT

RULING

The current applicants being a company were charged in Kitale PMs court with the offence of failing to comply with a notice of an Authorised Officer issued under section 119 of the public health Act Cap. 242 contrary to section 115 of the said Act and punishable under section 120 (1). A plea of guilty was entered and the court issued an order ordering the demolition of the premises on plot No. 2116/10/IV Kitale Municipality.

The tenants who are the current Respondents through their lawyer filed an application in Kakamega High Court seeking review of the PM's orders. The trial judge called for the PM's file which he reviewed accordingly in accordance with section 364 and 365 of the criminal procedure code and set aside the said orders.

The current applicants then filed a notice of motion without stating the provision under which it is made seeking review of the order of Revision. The current Respondents through their counsel served notice of preliminary objection which was argued on the day that the matter came up for hearing of the notice of motion. The gist of the objectors contention is that revision was done by the high court under the criminal procedure code section 361. That under that section the only remedy open to an aggrieved party is appeal to the court of appeal and as such the application before the court should be struck out.

In reply, the respondents counsel submitted that they only seek to set aside the order that the tenants do not return to the premises which have already been demolished as the said tenants were not party to the proceedings before the PMs Court and there were no orders for the eviction issued therein.

In reply, the objector stated that the court had jurisdiction to order the return of the tenants once he found that the demolition order was wrongly obtained.

Having heard both counsels on this preliminary objection I find that indeed the initial proceedings were of a criminal nature in which the learned trial magistrate went ahead to grant orders of a civil nature. If the accused person pleaded guilty the learned trial magistrate was supposed to impose a penalty and nothing more.

It is indeed correct that the aggrieved parties were not partied to the criminal proceedings. However being aggrieved they were entitled to seek legal remedy such as seeking a review through a lawyer. Section 364 of the criminal procedure code empowers the High Court to exercise its revisionary powers where it has called for the file on its own, where the file or decision has been reported to it or which otherwise comes to its knowledge. The use of the words otherwise gives the high court every possible avenue through which a decision of the lower court may be brought to its notice. The section does not say which groups of peons are to bring the decision to the notice of the court. It appears that anybody who is aggrieved by a

decision of the lower court may bring it to the attention of the high court for revision. It follows that the matter was properly before the high court on revision.

As regards ordering return to the premises, it follows that the order which automatically excluded them from the premises had been set aside there was nothing to prevent them from going back to the premises. Even if the judge had not said so in his orders the return would have been automatic.

Turning on to the point as to whether that order can be reviewed or not I find that the applicant has not stated under what provisions of the law the application has been made. The notice of motion is a civil procedure and it is never employed under criminal proceedings and that is why learned counsel has not cited the provisions of law under which the application is brought.

It follows that once the high court made that decision on revision any aggrieved party could only appeal to the court of appeal. I find that the application is misconceived and preliminary objection has merits and the same is allowed.

The application dated 28.2.95 and filed on the same day is hereby ordered to be struck out with costs to Respondent-objector.

Dated and delivered at Eldoret this 29th day of May, 1995

R. N NAMBUYE

JUDGE