

REPUBLIC OF KENYA

IN THE HIGH COURT AT MOMBASA

CRIMINAL (REVISION) CASE NO 18 OF 1990

SWALEH.....APPLICANT

VERSUS

REPUBLIC.....RESPONDENT

(From the original conviction and sentence in Criminal Case No 66 of 1990 at Mombasa, GM Njuguna, Esq, RM)

RULING

The owner of a dwelling house Plot No 124 Section XVII Mombasa was charged and convicted for failing to abate the nuisance within 7 days as specified in the notice issued under S 119 of Public Health Act. He pleaded guilty and was fined shs 200/00 in default 2 days imprisonment. The prosecutor applied for demolition order thereafter. The learned magistrate issued notice to the tenant and heard both the tenant and the owner of the premises. The court also inspected the premises. Eventually, the court reached the conclusion that in order for the repairs to be carried out, it was necessary for the tenant to vacate. It gave the tenant 2 months to look for alternative accommodation. That order was made on 12/6/90 and expires on 12/8/90. The case is fixed for mention before the learned magistrate on 24/8/90.

The advocate for the tenant has written drawing the attention of the court to the illegality or impropriety of the order for the tenant to vacate. He argues in the letter that the magistrate has no jurisdiction to order the tenant to vacate and that that jurisdiction is given to Rent Tribunal. The tenant disclosed that he is the one who reported to the Public Health Officer when the owner of the premises refused to empty the pit latrine inside the house. It was admitted that the pit latrine which is inside the house is full but the tenant offered to empty it and off-set the costs from the rent.

Under S 120(9) of the Public Health Act, if the court is satisfied that the nuisance renders the dwelling house unfit for human habitation, it may issue a closing order and may make a further order that no rent shall be due or payable by the tenant during the duration of closing order. The court is also given power to terminate the closing order upon being satisfied that the dwelling has been rendered habitable.

The proceedings under the Public Health Act are of a criminal nature and the court is given power by S 120(9) of the Public Health Act to close down the dwelling house if the nuisance renders it unfit for human habitation. The court can even suspend the payment of rent by the tenant. The effect of a closing order is to remove the tenant or occupier from the dwelling house. It is not correct therefore that in proceedings under Public Health Act, the magistrate has no jurisdiction to order the tenant to vacate. When the court is exercising its jurisdiction under S 120(9) of the Public Health Act, it is not bound to consider the convenience of the tenant or occupier though it has jurisdiction to suspend the payment of rent. It is clear that the learned magistrate thought that the house would be repaired, toilet emptied and house rendered habitable. It is not apparent that he contemplated a demolition order.

Though the magistrate has jurisdiction to issue a closing order and to order the tenant to vacate, I do not think that he has jurisdiction to order a tenant to vacate outside a closing order or demolition order. In this case, the learned magistrate did not in fact issue a closing order and did not specifically order the tenant to vacate. He “advised” the tenant and gave him 2 months to look for alternative accommodation and the case for mention on 24/8/90.

My understanding of the record is that the learned magistrate has not made final orders which can be

revised. It is when the tenant appears before him on 24/8/90 when the learned magistrate will decide whether or not to issue a closing order and if so to direct regarding the rent.

For those reasons, I dismiss this application.

This ruling to be typed and copy supplied to the learned magistrate before 24/8/90.

Dated and Delivered at Mombasa this 3rd Day of August, 1990

E.M. GITHINJI

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JUDGE