



**REPUBLIC OF KENYA**  
**IN THE HIGH COURT OF KENYA AT NAIROBI**  
**MILIMANI COMMERCIAL & ADMIRALTY DIVISION**  
**CIVIL CASE NO. 231 OF 2012**

**COMMERCIAL BANK OF AFRICA LTD. .... PLAINTIFF**

**VERSUS**

**DAVID NJAU NDUATI ..... DEFENDANT**

**R U L I N G**

1. What is before this Court for consideration is the Plaintiff's Notice of Motion dated 1st February 2013. The Application is brought under the provisions of **section 80** *Civil Procedure Act* as well as **Order 36 and Order 45 rule 1** of the *Civil Procedure Rules*. The Application seeks the review of my Order made on 18th October 2012 and, as a result, the Notice of Motion dated 29th June 2012 be allowed. That Notice of Motion was, in fact, filed by the Plaintiff herein and not the Defendant, as stated in prayer 2 of the Application before this Court. The Application was supported by the Affidavit of **Ronald Mworio** sworn on 4th February 2013, the deponent being the Head of the Remedial Management Unit of the Plaintiff bank. Here again in paragraphs 2 and 3 of the Supporting Affidavit, the deponent referred to the defendant's Notice of Motion dated 29<sup>th</sup> June 2012 as opposed to the Plaintiff's said Notice of Motion of that particular date. However, as the point was not taken by the Defendant, I presume that both the Plaintiff's Application before this Court and the Supporting Affidavit can be cured under the slip rule.
2. According to the Supporting Affidavit and as amplified by the Plaintiff's submissions in relation to its Application before Court, in my Ruling dated 18th October 2012 I dismissed the said application dated 29th June 2012 on the grounds that:

**“i. The application was premature having been filed before the time for filing the Defence had lapsed and**

**ii. Order 36 rule 1 (1) does not apply where a Defence has been filed. The Defence in this case was filed out of time and after the application was filed.”**

According to the deponent of the Supporting Affidavit as well as in the Plaintiff's submissions in relation to the Application before this Court, there is an error on the face of the Judgement (I presume the deponent meant my Ruling of 18 October 2012) in that:

**“i. Order 36 rule 1 provides for the filing of an application for summary**

**judgement “where a defendant has appeared but has not filed a Defence”. Therefore, the application may be filed at any time after an appearance has been entered but before the Defence is filed.**

- ii. **As at the time when the Notice of Motion dated 29th June, 2010 was filed, there was no Defence on record.”**
3. The Defendant filed Grounds of Opposition on 19th February 2013. In his opinion, the grounds raised by the Plaintiff in its Application before Court did not disclose any error in the Ruling delivered on 18th October 2012 and that the Court had rightly held that the application dated 29th June 2012 was premature. The Defendant maintained that fact cannot change on review and, in fact, the Application before Court was inviting the Court to sit on appeal against its own Ruling. In the opinion of the Defendant, the Application was frivolous and should be dismissed.
4. In his submissions before Court, Mr. Fraser referred to the case of **Richard Page & Associates Ltd v Kapoor (1976-80) 1KLR** as per **Chesoni J** (as he then was) who had found that a plaintiff was not barred from applying for summary judgement under the old **Order XXXV, rule 1** of the *Civil Procedure Rules* by reason that a defence has been filed or the pleadings have closed or that there is a joinder of issue. He found that there was no time limit within which such an application must be made, but any delay in making the same must be justified. Mr. Fraser maintained that under the new **Order 36 rule 1** the same details that the application can be made for summary judgement where the defendant has appeared but not filed a Defence. In counsel’s opinion, the Rules Committee had put in a very small window and asked the Court to review the date of the Defendant’s Appearance, that of the application then before court and the date of the Defence filed. He referred to my learned brother **Odunga J’s** Ruling in **Commercial Bank of Africa Ltd v Rabadia & 2 Ors HCCC No. 109 of 2011** wherein the Judge was saying that the application was filed timeously within the small window as between the date of filing appearance and the date due for the filing of the Defence. In Mr. Fraser’s view, the Application dated 29th June 2012 was filed timeously and was not premature. If a party could only file an application for summary judgement after the time for filing of the Defence had expired, then the party would be seeking judgement in default. The mere filing of the Defence herein did not preclude the hearing of the Application. Counsel then referred to **Order 36 rule 2** which detailed that the Defendant could only file grounds of opposition in response or a replying affidavit “*or otherwise*”. In his view, the filing of the Defence is regarded to be as “*or otherwise*”.
5. With regard to the definition of “*error on the face of the record*”, Mr. Fraser referred the Court to the case of **Commercial Advertising and General Agencies Ltd v Qureishi (1985) KLR 458** as well as **Fidelity Commercial Bank Ltd v Rayani (1998) LLR 150 (CCK)** where it was held that a matter of law can give rise to an error on the face of the record. He also referred to **Mula’s Code of Civil Procedure Vol III, 15th Edition at paragraph 10 on page 2724** which detailed as follows:

**“10. Mistake or error apparent on the face of the record. – A review may be granted, whether on any ground urged at the original hearing of the suit or not, whenever the Court considers that it is necessary to correct an *evident* error or omission (*h*), and it is immaterial how the error or omission occurred (*i*). Thus, a review was granted where an error on a point of law was apparent on the face of the judgement (*j*) e.g., failure to apply the law of limitation to the facts found by the Court (*k*), or failure to consider particular section of an Act, or part thereof.”**

6. Miss. Nduati in reply, submitted that there were two pre-conditions before an application for summary judgement could be made under the old **Order XXXV**. In that old Order, there was no limitation as per the finding in the **Richard Page** case (*supra*). In counsel’s view, the new Order 36 did place a limitation as per the 2nd paragraph of the Judgement which reads as follows:

**“When the notice of motion came up for hearing Mr. YP Vohra, acting for the defendant, raised a legal preliminary objection. He argued that the defence was the**

**last pleading to be filed and that was done on 16<sup>th</sup> May 1978. There was no reply to the defence. In the circumstance the pleadings closed fourteen days after service of the defence, as provided under order VI, rule 11, of the Civil Procedure Rules; and there having been no reply to the defence there was a joinder of issue by virtue of order VI, rule 10. The Plaintiff, having joined issue with the defendant, cannot turn round and apply for summary judgment for “joining issue” (impliedly or expressly) means that the Plaintiff admits that there are triable issues; and where there are triable issues there can be no summary judgment. He submitted that, where the pleadings have closed, the door for applying for summary judgment under order XXXV too is closed and the Plaintiff cannot make such an application.**

As regards the Ruling by **Odunga J.** in the Commercial Bank of Africa case (supra), Miss. Nduati stated that both he and I had looked at the provisions of the law and found differently. The Plaintiff’s avenue was not to come to tell this Court that **Odunga J.** had held differently and expected this Court to change its mind by review. The Plaintiff’s remedy was to appeal because another Judge had taken a different view. Counsel noted that the Application filed on 29<sup>th</sup> June 2012 seeking summary judgement in its first ground was that the Defence did not disclose any *bona fide* triable issues. That would imply that the Plaintiff had looked at the Defence and decided that it did not contain any triable issue. There was no Defence on record as at 29<sup>th</sup> June 2012. As a consequence, counsel maintained that the Application had been filed in error and it was speculative. As at 29<sup>th</sup> June 2012, the Defendant was well within its time of filing its Defence. Counsel referred to her submissions made at the hearing of that Application and, in her opinion, the Plaintiff had moved to take advantage. The Civil Procedure Rules were enacted to be complied with and they were made to grant equality to the parties. At the time, the Defendant knew that it had 14 days in which to file a Defence. The Rules should not be used by one party to suppress the right of another.

7. Miss. Nduati noted that the Plaintiff had not serve the Application on the Defendant until after it had been served with the Defence on 5<sup>th</sup> July 2012. In his turn, the Defendant was unaware at the time he filed his Defence that there was an Application for Summary Judgement filed by the Plaintiff immediately prior thereto. In counsel’s view, the filing of such Application by the Plaintiff before the date due for the filing of the Defence, was intended to deny the Defendant justice. Counsel further referred the Court to **Order 36 rule 4**. She maintained that rule 4 read together with rule 1 provided that a Summary Judgement application could only be filed where there is no Defence. Although counsel agreed that a point of law can be raised as an issue for review, the Application before this Court was not based on review and was more by way of appeal.
8. Mr. Fraser, in a short reply, emphasised that the Plaintiff’s Application before Court was based on the fact that there was an error on the face of the record. That error was in the words of **Order 36 Rule 1**: “but not filed a defence”. Counsel maintained that the Rules Committee must have intended that such was meant to be read as to the application being filed prior to the filing of the Defence. If the time for Defence has passed, then the Plaintiff has the option to file for default judgement (underlining mine). The Plaintiff had no intention of preventing the Defendant from filing his Defence. He explained that that the application was filed on 29<sup>th</sup> June 2012 and that the Plaintiff’s advocates had to get a date from the Registry before they could serve the said application on the Defendant. As for counsel for the Defendant’s submission as regards **Order 36 rule 4**, she had forgotten to go on to read the words “or otherwise ordered”. However, Mr. Fraser agreed that in respect of the grounds to the said application, such should have read that there was no Defence not that there was no Defence filed. Counsel then referred to **sections 1A and 1B** of the *Civil Procedure Act* as regards technicalities.
9. I do not consider that there is any doubt that an error on the face the record can be a matter of law as contained in the ruling or judgement which is being reviewed. Indeed, Miss. Nduati rightfully conceded the point. Moving on from there, Mr. Fraser referred me to the Ruling delivered by my learned brother **Odunga J.** in the Commercial Bank of Africa case (supra) when submitting as to what he called the “small window” as between the entry of appearance and before the filing of defence in relation to the filing of an application for Summary Judgement. Counsel noted that **Odunga J.** had found that the plaintiff’s application in that case had been filed timeously as

required under **Order 36 rule 1** of the Rules. I noted that the Judge had proceeded in his said Ruling to consider the joint defence filed by the defendants in the case and had found that there were triable issues to be answered. Regretfully, my own position was different from **Odunga J's** on the point, as I found in my said Ruling of 18th October 2012, that the Plaintiff's Application dated 29 June 2012 was prematurely filed. Mr. Fraser's argument, it seemed to me, was that where there was an Appearance filed by the Defendant but no Defence filed, the Plaintiff had the option of applying for judgement in default. With respect, I do not think that this submission is correct. An application for judgement in default would necessarily be brought under the provisions of **Order 10** and such provides that judgement may be applied in default of Appearance not in default of Defence. To my mind, the provisions of **Order 36 rule 1** of the *Civil Procedure Rules, 2010* in relation to Summary Judgement apply once Appearance has been entered but no Defence has been filed. The position was different under the old **Order XXXV**. The wording of that Order has been changed under **Order 36 rule 1** by the inclusion of the words: **"but not filed a defence"** after the words:

**"where the defendant has appeared".**

However it was my view that the Defendant must be given a chance to file its Defence, within the 14 days after it has entered Appearance as provided in **Order 7 rule 1**, *Civil Procedure Rules, 2010*, before having to answer or respond to an Application for Summary Judgement. However, I stand to be corrected by none other than our former Chief Justice **Chesoni J.** (as he then was) in the **Richard H. Page** case (supra) in which he detailed:

**"This, in my view, means that the law having expressly required that before a plaintiff can go for summary judgment the defendant must have entered an appearance, there can be no importation of a requirement that such application must be before the pleadings have closed or before the defence or the reply to the defence has been filed. I recognized this reasoning when I said in *Bhundia Properties Ltd v East African Airways Corporation* (unreported) that:**

**If the defendant has filed a written statement of defence the Court may, in its discretion, look at it and see if it discloses an arguable case for the defendant which raises prima facie triable issues.**

**(See also *Mugambi v Gatururu* [1967] EA 196, 197). I am aware that in both the *Bundia Properties* and the *Mugambi* cases it is not stated whether the pleadings had, or had not, closed and there was a joinder of issue, which has the effect of denying that the defendant has an arguable defence at all, and the closing of pleadings which leaves the plaintiff with the conviction either that the defendant has a defence to the suit and so there cannot be an application under order XXXV for summary judgment or that the defendant has no defence to the suit and so an application for summary judgment is likely to succeed, can operate as a bar to an application for summary judgment. Indeed, the purpose of a summary judgment order is to enable a plaintiff quickly to realize what is his, so the application should be made immediately the condition precedent is fulfilled, ie appearance has been entered, and any delay in making the application must be explained".**

10. I do not accept Miss Nduati's submission that in this Review application filed by the Plaintiff, I would be sitting on appeal as against my own Ruling dated 18th October 2012. Accordingly, I allow the Plaintiff's Notice of Motion dated 1st February 2013 despite the errors on the face of the same as well as in paragraph 2 of the Supporting Affidavit. I regard these as technicalities as envisaged by **Order 51 rule 10 (2)** of the *Civil Procedure Rules, 2010*. In my said Ruling, I found that the Defence filed by the Defendant on 3rd July, 2012 to be a mere denial containing no triable issues. I find no cause to alter my view in that regard. As a result in allowing the Plaintiff's said

Application, I enter Summary Judgement as prayed for in the Plaint. Orders accordingly.

**DATED and delivered at Nairobi this 31<sup>st</sup> day of July, 2013.**

**J. B. HAVELOCK**

**JUDGE**