



REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT KISUMU

CIVIL CASE NO.125 OF 2012

ZAVERCHAND RAMJI MAYA GUDKA

MANOJ ZAVERCHAND GUDKA.....PLAINTIFF

VERSUS

MERIDIAN MEDICAL CENTRE.....DEFENDANT

RULING

This is a ruling on an application for summary judgment filed here on 7/2/2013 and dated 1/2/2013. It is a Notice of Motion brought under order 36 Rule 1 (a) of the Civil Procedure Rules and all other enabling provisions of law. Apart from summary judgment, costs of the application are also sought.

The plaintiffs – **ZA VERCHAND RAMJI MAYA GUDKA and MANOJ ZAVERCHAND GUDKA** - are the applicants. The application is against **MERIDIAN MEDICAL CENTRE**, the defendant/respondent.

The applicants are said to be the owners of **KISUMU MUNICIPALITY/BLOCK 10/115 and KISUMU MUNICIPALITY/BLOCK 10/778** (hereafter the suit properties). They are said to have entered into an agreement with the respondent on 1/4/2011 leasing the suit properties to the respondent at a monthly rent of 150,000/= payable quarterly. Then in April 2012 the respondent stopped paying rent and at the time of filing the suit rent arrears stood at 1,350,000/=. The respondent is said to have failed to give vacant possession of the suit properties despite expiry of Notice to quit issued to it.

The respondent filed grounds of opposition on 6/3/2013 and stated, inter alia, that the application is premature and bad in law. The defence filed, it was stated, raise triable issues and the applicants are said to be attempting to circumvent due process.

The Court heard the application on 23/4/2013 with Odeny for applicant stating much that is already in the application.

Kingati for respondent said Order 36 in Civil Procedure Rules anticipates a situation where no defence is filed and, where one is filed, it must be one without triable issues.

He said that the defence filed here has triable issues. It was also pointed out that the application was filed before defence and therefore lacked the benefit of the contents of the defence.

Instances were then mentioned where the defence specifically responds to particular issues raised in the plaint. I will not delve much into the arguments and counter-arguments raised. The law on summary judgment is clearly settled. It is true, as Kingati says, that Order 36 of Civil Procedure Rules anticipates a

situation where no defence is filed. More correctly, order 36 anticipates a situation where there is entry of appearance without subsequent filing of defence. That is the position in Order 36.

BUT decided case law – See for instance **GICIEM CONSTRUCTION CO. VS AMALGAMATED TRADERS AND SERVICE 91983) KLR 156, PROVINCIAL INSURANCE CO.EA LTD VS KIVUTI (1995-8) EA 283, and ISAAC AWUONDO VS SURGI PHARM LIMITED & Another: CA NO.134 OF 2003 (2011 eKLR)** – has mainly dealt with situations where defences are filed.

This suit is in this latter category.

And the law is also clear in the category. This much is clear: Applications of this kind are only allowed where the defences filed are trifling, fanciful and put forward to waste Court's time. They are also allowed where such defences lack bonafides, are hopeless, oppressive and tend to cause the opposite party unnecessary anxiety, trouble and expense.

The court considers too whether the defences are likely to prejudice, embarrass or delay the fair trial of the action.

For all this, the ruling in **NATIONAL BANK OF KENYA VS RUBBER COMPONENTS LTD and 2 others: HCC NO.40/04, ELDORET** is a good example.

The power of the court to enter summary judgment is to be exercised sparingly, cautiously and only in plain and obvious case (please see **GEORGE JOSHUA OKUNGU VS TOM MSHINDI & ANOTHER: HCC NO.348, NAIROBI**).

And in an application for summary judgment, even one triable issue would entitle the defendant to unconditional leave to defend. This is one of the imports of the decided case of **ISAAC AWOUNDO VS SURGIPHARM LIMITED & ANOTHER: CA NO.134/03 (2011 eKLR)** which was availed by the respondent here.

The same position is clear from the decided case of **BUSHSTOCK ENTERTAINMENT COMPANY LIMITED VS EAST AFRICAN BREWERIES LIMITED (2006)eKLR**

In our case here, the plaintiffs asserted that there was a running lease. The defendant avers that the lease never commenced. Para 7 of the plaint states the defendant is a rate defaulter and has so defaulted as from April, 2012. Para 4 of the defence counters that the defendant has not defaulted as alleged or at all.

The defendant has also denied owing a sum of 1,350,000/= to plaintiff. Also equally denied is reception of quit notice, failing to comply with terms of tenancy, refusal to pay rent and refusal to give vacant possession among others.

All these were issues raised in the plaint. They are weighty issues and are not denied in frivolous or vexatious way.

And there is a counter-claim to boot which, though stated to be separate by applicant, is actually based on the same alleged lease and in fact looks like a counter measure to the suit.

Looking at all this, it is plain and obvious that this suit has many triable issues. It is incorrect to say the defence filed is a sham. It raises many weighty issues and in fact the very essence of the suit as filed – that is whether the lease ever commenced or operated – is questioned.

It appears clear to the court that the defence filed is not trifling, fanciful or a waste of court's time. It is not a defence that looks poised to prejudice, embarrass or delay fair trial of this suit. This is not an

obvious case where the court can happily jump into entry of summary judgment. A full trial is required.

In fact, looking at the defence and counter-claim, I think it was an ill-advised move by the applicant to opt to prosecute the application.

In light of all this, I think the court's position is clear that this application is for dismissal. And the same is dismissed with costs to respondent to be paid forthwith as Order 35 Rule 8(2) would require.

A.K. KANIARU – JUDGE

31/7/2013

31/7/2013

A.K. Kaniaru – Judge

Roseline O. Court clerk

No party present

Interpretation – English/Kiswahili

Odeny for plaintiff/applicant

Kiingali (absent) for defendant/respondent

COURT: Ruling on application dated 1/2/2013 and filed on 7/2/2013 read and delivered in open **COURT.**

Right of Appeal – 30 days.

A.K. KANIARU – JUDGE

31/7/2013