



**REPUBLIC OF KENYA**  
**IN THE HIGH COURT OF KENYA**  
**AT NAIROBI (MILIMANI LAW COURTS)**  
**CIVIL SUIT 11 OF 2012**

**COMMISSION FOR HIGHER EDUCATION.....PLAINTIFF**

**VERSUS**

**TOUCH STONE DEVELOPERS LTD..... DEFENDANT**

**RULING**

There are two applications scheduled for hearing. First one is dated 13/12/2011 and second one 20/12/2011.

The application dated 13/12/2011 by the plaintiff seeks orders for summary judgment for:-

- a) Kshs.860.00 being arrears as at 1/10/2011 together with interest at the rate of 30% per annum from date of filing suit.
- b) Kshs.150.000 per month by rent/mesne profits from 1/11/2011 until the defendant is removed from or surrenders possession of LR No. Nairobi Block 90/164.

Order that the defendant do deliver vacant possession of LR Nairobi/Block 90/164 to the plaintiff and in default eviction order to issue against the defendant or any other person agent, employee found in occupation or possession of the said property.

The application is supported by affidavit of Lemmy Wanyeki Gatere and on grounds stated in the application. It is sworn that by a lease agreement the defendant took possession of the premises on LR Nairobi/Block 90/164 hereinafter described suit premises. Fully furnished with goods belonging to the plaintiff.

The lease was for a term of 2 years from 1/8/2010 to 31/7/2012 and rent of Sh.150.000/= monthly was to be paid by 5<sup>th</sup> day of every month and in case of default on that date a penalty of Kshs.10.000/= was payable By 1/10/2011 the defendant was in arrears of Ksh.869.000 which should attract interests as a commercial deal at commercial rates.

The defendant has failed to pay rent and the plaintiff has had to distrain for rent against the defendant's goods. It is no longer possible to levy distress because the goods in the premises belong to the applicant.

The applicant has rescinded the lease agreement and has served defendant it with notice to surrender possession of the suit property. Exhibited as LWG 4 letter dated above the applicant claims eviction order against the defendant together with unpaid rent of Shs.860.000 and monthly mesne profits at the rate of Shs.30,000 p.m.

In a replying affidavit Gideon Mwiti Irea filed an affidavit in which he reiterates his affidavits sworn on 20/12/2011. He swears that application dated 13/12/2011 is misconceived and an abuse of courts process. That the defendant filed its defence on 13/12/2011 and the plaintiff has not applied for defence to be struck off.

That the defendant has not failed to pay rent and the lease is still in force which shall expires on 31/7/2012. It is admitted that the plaintiff has attempted to levy distress see proclamation "G M 1 – 2". The defendant prays that the application be dismissed with costs. The defendant has filed a defence on same date this application was filed. The defendant denies being indebted to the plaintiff in the sum of Ksh.860.000/= and puts plaintiff to strict proof thereof.

The defendant has admitted having recalled cheques issued to plaintiff and that it has replaced with cash. It is denied that interest is payable as no agreement was made for payment of interest on arrears of rent.

Further defence alleges that this is a suit within the jurisdiction of lower court. The only exhibits shown are statement of defence and proclamation of attachment GM 1 – 2.

In reply Mrs. Kuria for defendant said that they have filed defence and therefore no application for summary judgment she submitted that the application is premature.

Upon reading the procedure Order 36 (new Order) it appears that there is difference between the new order and the (old order No.35). It is stated:-

**“Where the defendant has appeared but not filed a defence then plaintiff may apply for judgment .....” and the old order “where the plaintiff has appeared the plaintiff may apply.....”**

The defendant in this application basis his defence on the fact that it has filed its defence and therefore the plaintiff is not entitled to apply for summary judgment. This is a major departure in the amendment. It appears that the power granted to the plaintiff to obtain a summary judgment quickly is now limited.

In the defence filed the defendant denies owing Kshs.860.000 as at 13<sup>th</sup> December 2011 and avers that the agreement is not terminated and is existing to 31/7/2012. Further he denies receipt of Rescission Notice which he says was of no legal consequence.

However the plaintiff has attached Exhibits LWG – 3, LWG – 2, LWG – 4, LWG – 5 dated 9/6/2011 was a proposal to move out by 31/7/2011.

The statement of defence is not true and it is used only to delay the judgment. The defendant does not show that he should have leave to defend the suit.

In the circumstances and after examining the filed defence I am of the opinion that the applicant is entitled to judgment in the sum of Kshs.860,000/=. The balance shall go trial together with the trial on the issue of interest and mesne profits it is admitted that possession will be determined by expiry of the lease on 31/7/2012. It is ordered that the defendant shall vacate the premises on that date.

The costs of this application shall be paid by the defendant as shall be assessed by the Taxing Officer forthwith.

Orders accordingly.

**Dated and delivered at Nairobi this 26<sup>th</sup> day of June, 2012**

**J.N. KHAMINWA**

**JUDGE**