REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT NAIROBI

MILIMANI LAW COURTS

Civil Suit 76 of 2012

EUNICE WAIRIMU MUTURI…………………………….............PLAINTIFF

VERSUS

WASHINGTON MUCHIRI MUTURI....................….….......….DEFENDANT

R U L I N G

By a Notice of Motion dated 8th May 2012 filed on 11th May 2012 expressed to be brought under Orders 36 Rule 1(1)(b) and 4 Rule 1(6) of the Civil Procedure Rules and section 3A of the Civil Procedure Act, the plaintiff herein prays for an order that the Court be pleased to enter summary judgement against the Defendant and further order that the Defendant hand over vacant possession of the suit premises Comprised of 2nd and 3rd Floor in LR No. 209/1820 to the plaintiffs. In the alternative the plaintiff prays that the Defendant's Counterclaim filed herein on 5th April 2012. The application is grounded on the fact that the defendant's lease having expired on 14th May 2011, he was duly given a notice to vacate on 10th November 2011 expiring on 31st January 2012. However, the defendant entered into negotiations upon receipt of the said notice and accepted all terms set out by the plaintiffs save for rent payable per square foot as a result of which the same collapsed and the defendant thereby became obliged to hand over possession to the applicants which the defendant has refused, neglected and/or failed to hand over hence the defendant has no defence to the plaintiff's claim. The counterclaim, on the other hand violates the clear provisions of the Civil Procedure Rules as the same is not accompanied with a verifying affidavit.

The application is supported by an affidavit sworn by **Washington Muchiri Muturi** on 8th May 2012.

However, before going into the merits, it is important to note that the plaint herein was filed on 20th February 2012 and the defence and Counterclaim was filed on 5th April 2012. On 18th April 2012 the plaintiffs filed a reply to the said defence. This application as already stated was filed on 11th May 2012 after the close of the pleadings.

Order 36 rule 1(1) of the said rules states as follows:

"(1) In all suits where a plaintiff seeks judgment for—

(a) a liquidated demand with or without interest; or

(b) the recovery of land, with or without a claim for rent or mesne profits, by a landlord from a tenant

whose term has expired or been determined by notice to quit or been forfeited for non-payment of rent or for breach of covenant, or against persons claiming under such tenant or against a trespasser, where the defendant has appeared but not filed a defence the plaintiff may apply for judgment for the amount claimed, or part thereof, and interest, or for recovery of the land and rent or mesne profits."

It is clear that, where a defence is filed before an application for summary judgement is made; it is no longer open to a party to apply for summary judgement since no leave to defend would then be required. In such a case if a party feels that the defence filed does not disclose any reasonable defence or is vexatious or frivolous or amounts to an abuse of the process of the court, the only recourse available is for the party to apply for the defence on record to be struck out and judgement entered accordingly in accordance with Order 2 rule 15 of the Civil Procedure Rules. It would be a mockery of judicial process for the court to enter summary judgement without striking out the defence on record and since the two jurisdictions are distinct and separate, to apply for summary judgement when there already is a defence on record would be to muddle up the two jurisdictions. Therefore the argument by the plaintiff that the provision does not preclude an application being made even after filing defence when the defence filed is bogus and a waste of time is, with due respect, incorrect. A defence that is bogus and a waste of time recognizes that there exists a defence. Summary judgement jurisdiction is invoked where in the plaintiff's view there is no defence at all. Where there is a defence which in the plaintiff's view, is bogus as contended here, that defence squarely falls under order 2 rule 15(1)(b) and (c) since in my view such a defence is frivolous . It is also vexatious since it is only meant to keep the plaintiff busy and in the end may prejudice, embarrass or delay the fair trial of the action. Such a defence may also amount to an abuse of the process of Court. The process of the Court is meant for parties with serious legal disputes and if a party is shown to be intent in manipulating it with the intention of postponing the day of reckoning that amounts to an improper use of the process and hence amounts to an abuse.

The amendments to the Civil Procedure Rules were meant to ensure the overriding objective of the Civil Procedure Act and the Rules made thereunder are attained. Accordingly, in order to avoid the making of late applications for summary judgement it became necessary for timelines to be stipulated. The Court of Appeal in dealing with the overriding objective in the case of **Stephen Boro Gitiha vs. Family Finance Building Society & 3 Others Civil Application No. Nai. 263 of 2009**, held *inter alia* that the overriding objective overshadows all technicalities, precedents, rules and actions which are in conflict with it and whatever is in conflict with it must give way. If the often talked of backlog of cases is littered with similar matters, the challenge to the courts is to use the new "broom" of overriding objective to bring cases to finality, by declining to hear unnecessary interlocutory applications and instead to adjudicate on the principal issues in a full hearing if possible.

Accordingly, I find that this application is incompetent as it was overtaken by events by the filing of the defence before it was made and should have not been brought at all. Under Order 36 rule 8(2):

"If the plaintiff makes an application under this Order where the case is not within the Order, or where the plaintiff in the opinion of the court, knew that the defendant relied on a contention which would entitle him to unconditional leave to defend, the application may be dismissed with costs to be paid forthwith by the plaintiff".

A party who makes an application in breach of the clear provisions of Order 36 rule 1 clearly falls foul of this rule and, in the exercise of its discretion is properly entitled to invoke the provisions of this rule and order that the costs be paid forthwith.

In the premises, I decline to deal with the issue whether or not the defence has merit since to do so would amount to trespassing onto the jurisdiction of the Court which may be called upon to deal with the issue if an appropriate application was to be made. In the result prayer 1 in the Notice of Motion is disallowed on the ground that the same is incompetent.

With respect to the counterclaim, it is clear that the defendant did not comply with the provisions of Order 7 rule 5(a) of the Civil Procedure Rules which provides that the defence and counterclaim filed under rule 1 and 2 shall be accompanied by an affidavit under Order 4 rule 1(2) where there is a counterclaim. Order

4 rule 1(2) on the other hand provides that the plaint shall be accompanied by an affidavit sworn by the plaintiff verifying the correctness of the averment that there is no other suit pending, and that there have been no previous proceedings, in any court between the plaintiff and the defendant over the same subject matter and that the cause of action relates to the plaintiff named in the plaint. This provision recognizes the fact that a counterclaim is a suit filed together with the defence for convenience and in order to avoid multiplicity of suits. However, the only averment to be verified is the averment stated above. In the plaint filed herein, however, the plaintiff also fell foul of the said provision since what was verified in the affidavit was the claim rather than the aforesaid averment. The defendant, however, contends that the defect is curable. That is correct save that the decision whether or not to cure the defect is discretionary and before the Court decides to exercise its discretion and cure the defect the defaulting party is expected to offer some explanation why the rules were not complied with. In the absence of an explanation the Court will have no basis upon which to exercise its discretion and may well find that the failure to comply with the rules was deliberate.

In the present case, however, I have taken into account the fact that both parties have not complied strictly with the legal provisions. Accordingly in the exercise of the discretionary powers as well as the overriding objective I decline to strike out the counterclaim. Instead the defendant is directed to file an appropriate verifying affidavit within 10 days from the date hereof in default of which the said counterclaim to stand struck out with costs to the plaintiff.

In the circumstances of this case there will be no order as to costs.

Dated at Nairobi this 24th day of September 2012

G V ODUNGA
JUDGE

Delivered in the presence of

Mr. Nyamiaka for Oyugi for the Applicant/Plaintiff

No appearance for the Respondent/Defendant