



**REPUBLIC OF KENYA  
IN THE HIGH COURT OF KENYA  
AT NAIROBI (NAIROBI LAW COURTS)  
Civil Case 309 of 2009**

**YOUNG B. WAFULA T/A  
BENRROB MOTORS SERVICES..... PLAINTIFFS**

**VERSUS**

**LAP TRUST  
SANNEX AUCTIONEERS..... DEFENDANTS**

**RULINGS**

By a notice of motion dated 16.11.09 the 1<sup>st</sup> defendant invoked the powers donated by Order 35 Rule 1 (b) Civil procedure Rules and Section 3A Civil Procedure Act for the following prayers that:

- i) summary judgement be entered against the plaintiff for vacant possession of SHOP. 26 LANGATA SHOPPING CENTRE, LR 209/10828 as per the counter claim;
- ii) summary judgement be entered against 6th plaintiff for sh. 1,607,793/26 as rent arrears plus mesne profits w.e.f 01.10.09 until vacant possession is delivered up, with interest;
- iii) in default of giving up vacant possession the 1<sup>st</sup> defendant utilize the services of the local police station (Langata) to effect eviction of the plaintiff.

Before hearing the submission by Mr Kirimi it was shown to the court that the plaintiff was duly served with the motion in question bearing the hearing date – 25.02.10. He acknowledged service but did not appear on the hearing day. The session went on ex parte with Mr Kirimi relying on the supporting affidavit. He told the court that by a letter of offer issued to the plaintiff by the 1<sup>st</sup> defendant on 7.5.03 he had a tenancy for 6 years to pay rents pm thus:

- a) 1-6-03 - 31.5.05 @ sh. 18 300/=
- b) 1-6-05 - 31.5.07 @ sh. 21 960/=
- c) 1-6-07 - 31.5.09 @ sh. 26 352/=

That was the expiry date of the lease and when it came that 1<sup>st</sup> defendant gave a notice on 26.2.09 not wishing to review the tenancy. The plaintiff had all along been a habitual defaulter and so had accumulated arrears of rent up to sh 1,607,703/26. He nonetheless remained in the premises without paying rent at sh. 26,352/= and the applicant accepted no rents from him. When applicant levied distress for rent the plaintiff filed a case – BPRT C. No. 535/09 to stem and stall any movement by the 1<sup>st</sup> defendant. That ease was struck out on procedural grounds. He came to this court, obtained interim orders to stop the stress. But on 29.7.09 Ali-Aroni – J dismissed the application. The plaintiff was ordered to deposit sh. 600,000/= which we acknowledged as owing. He defaulted. He sought a review of that order but it was refused. The 1<sup>st</sup> defendant filed a defence and the subject counter-claim. The plaintiff did not file a reply to the defence or defence to the counter claim. He continues to occupy the subject premises as a trespasser to the detriment and loss of the 1<sup>st</sup> defendant hence the prayers. In the replying affidavit the plaintiff spoke

of disputed rent arrears but without evidence. Then he deponed that the deposit of sh. 600,000/= was excessive. He has no defence to the counter-claim and accordingly no triable issues have been put forth to deny the 1<sup>st</sup> defendant the prayers sought. In this regard the case of Gohil Vs Wamai [1983] KLR 489 was cited as a defendant in the counterclaim the plaintiff was required to show either by affidavit or oral evidence That he should have leave to defend. The burden is on the defendant to satisfy the court that he is entitled to leave to defend the suit. Leave to defend will not be granted if he merely states that he has a good defence on merit; he must go further and show that the defence is genuine or arguable or raises triable issues.

Having heard counsel, perused the counter-claim in absence of a defence to it and gone over the replying affidavit, this court is satisfied that the 3 prayers set out ..... by the 1<sup>st</sup> defendant be and are hereby granted with costs.

Orders accordingly.

Delivered on 11.3.10.

**J. W. MWERA**

**JUDGE**