

- 3 ***The respondent lost injunction application but court made interim orders pending further orders.***
- 4 ***Amendment of pleadings by consent filed on 15/5/2009.***
- 4 ***The plaintiffs amended plaint is fatally defective, an abuse of the court process and founded on fraud.***
- 5 ***The applicants urgently require possession to reconstruct the premises and demise to the Co-operative Bank as the same has advanced Kshs. 3,118,500/= to be recovered by way of rent and the Bank is demanding vacant possession or refund the money.”***

The plaintiff in his amended plaint has pleaded that further to the sale agreement between him and the defendants, where he agreed to buy the suit property from the defendants, he had paid a deposit of Kshs. 3 million. As can be seen from ground (b) and (ii) the defendants contend that the plaintiff did not pay Kshs. 3 million. That ground however is contradicted by the defendants very own exhibit attached to the defendants affidavit in support of the Notice of Motion under consideration. That affidavit was sworn by **Alice Kiumbiro Mahinda**. The exhibit is number 4 which provides under clause number 3:-

“The purchase price or consideration shall be (Kenya Shillings 13 million) (read thirteen million) to be paid by the purchaser to the vendor as follows:-

(a) Kshs. 3 million (three million) has been paid to the vendor through the purchasers advocate receipt of which the said vendor herein acknowledges.”

The vendors in that agreement quoted above are the defendants in this action. That agreement is executed by the parties. In the light of what is stated in the clause quoted above, and bearing in mind that the defendants have contended in this action that the transaction did not materialize, then it becomes clear that, that is an issue that requires proper interrogation through *viva voce* evidence. It is noteworthy that the suit property according to the title annexed to the plaintiff’s replying affidavit dated 16th June 2009 is not registered in the defendant’s name. If that is so, then the defendants have no basis to seek as they do for the plaintiff to vacate the suit property. The title of the suit property is in the names of Godfrey Muhuri Muchiri, James Nderitu Mahinda and Godhard Mburu. The defendants did not respond to the plaintiff’s replying affidavit and I am therefore unable to know how the defendants lay claim to the suit property which is not registered in their names. The defendants by the Notice of Motion under consideration seek to strike out the plaintiff’s suit and to have judgment entered in their favour as prayed in the counterclaim. Essentially, what the defendants seek is summary judgment to be entered for them as per the counterclaim. In the counterclaim, the defendants are seeking an order of vacant possession of the suit property and for the eviction of the plaintiff. The principles that govern summary judgment applications are well set out in various decided cases. As I consider this matter, I shall bear in mind the principles set out in the case of **Giciem Construction Company Vs. Amalgamated Trades & Services** – Court of Appeal (Mombasa) No. 17/1983). In that case, the learned Judges of the Court of Appeal held that:-

“The power to grant summary judgment under Order XXXV should be exercised cautiously bearing in mind that, it was intended to apply on to cases where there is no reasonable doubt that a plaintiff is entitled to judgment and where therefore it is inexpedient to all the defendant to defend for mere purposes of delay.....in considering applications under Order XXXV the courts should grant leave to defend if there genuinely exists triable issues even if the court is skeptical about the success or merits of the proposed defence, and where the court has doubts as to the bona fides of the application it ought to impose an appropriate condition when granting leave to defend.....”

The plaintiff on his part ought to show that he has a ground to defendant the defendants’ counterclaim that was set out in the case **Gohil vs. Wamai** [1983] KLR where it was held:-

“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.”

I have already shown above some of the issues that are raised by the plaintiff. Those issues, in my view, show reasonable grounds of defence of the defendants’ counterclaim in accordance with Order XXXV Rule 2 of the Civil Procedure Rules. I make a finding that this is not a suitable case of entering summary judgment for the defendant. To do so would be to allow

what I consider as very contentious issues to be decided by way of affidavit evidence without being subjected to cross examination. That would be tantamount to a trial on affidavits which ought not to be as was held in the case Civil Appeal No. 151 of 2002 **Kirinyaga County Council and Kimmi Housing Co-operative Society Limited**. The defendants also sought the striking out of the plaintiff's amended plaint on the basis that it was filed out of time. The parties, by a consent filed in court on 12th May 2009, consented to the plaintiff and the defendants amending their pleadings. By that consent, the plaintiff was to amend and serve the amended plaint within 7 days of the date of the consent. The plaintiff should have filed the amended plaint by 22nd May 2009. Instead, the plaintiff filed his amended plaint on 26th May 2009. It is on that basis that the defendants sought to have the amended plaint struck out. As I have considered the defendants' prayer for striking out the plaintiff's amended plaint, I have found the words of Justice Ochieng' in the case HCC No. 1651 of 2001 **Nairobi Milimani Commercial Court Shamas Charana Vs. Harit Sheth t/a Harit Sheth Advocates** to be useful. The Judge in considering whether to strike out a plaint filed without a verifying affidavit stated thus:-

“But, that fact notwithstanding I believe that if the court can ultimately adjudicate on the real issues between the parties, we would have played the role of enhancing substantive justice.”

The learned Judge after making that comment proceeded to grant leave to the plaintiff to file formal application for leave to file a verifying affidavit. In our case, indeed it is correct that the plaintiff was 4 days out of time when he filed his amended plaint. But the fact is that amended plaint has already been filed and is on record in this matter. To strike it out would probably lead to the plaintiff again applying to amend his plaint. The end result of that would be to delay the disposal of this case and that would add to the costs incurred by the parties. On the other hand, it does seem that consent was filed by the parties without being adopted as an order of the court. Order VIA provides that the court has discretion to allow parties to amend their pleadings. In my view, parties cannot on their own reach a consent to amend pleadings in the absence of a court order. To do so would go to usurp the court's discretion. That as it may be, to entertain the defendants' prayer for striking out the plaintiff's amended plaint would be contrary to the spirit of Section 1A (1) of the Civil Procedure Act. That Section sets out the overriding objective of the Civil Procedure Act and Rules. That Section provides as follows:-

“1. A (1) The overriding objective of this Act and rules made hereunder is to facilitate the just, expeditious, proportionate and affordable resolution of civil disputes governed by the Act.”

The duty of the Court is well set out in Section 1B of the Civil Procedure Act. That duty is as follows:-

“1B (1) For the purpose of furthering the overriding objective specified in Section 1A, the Court shall handle all matters presented before it for the purpose of attaining the following aims:-

- (a) the just determination of the proceedings;***
- (b) the efficient disposal of the business of the court;***
- (c) the efficient use of the available judicial and administrative resources;***
- (d) the timely disposal of the proceedings, and all other proceedings in the Court, at a cost affordable by the respective parties; and***
- (e) the use of suitable technology.”***

The overriding objective of the Act as shown in Section 1A (1) has recently in decided cases in the Court of Appeal been referred to as the double “O” Principle. The Court of Appeal considered that principle in the case of **Mradula Suresh Kantaria and Surech Nanillal Kaptaria** Civil Appeal No. 277 of 2005 (unreported) and observed as follows:-

“In this regard, we believe one of the principal purposes of the double ‘OO’ principle is to enable the court to take case management principles to the centre of the court process in each case coming before it so as to conduct the proceedings in a manner which makes the attainment of justice fair, quick and cheap.”

Bearing that objective in mind and the duty of the court, I find that to ensure the attainment of justice is quick and cheap will be achieved by striking out the plaintiff's amended plaint. Although I have found that the defendants' application for the reasons given above cannot be entertained, I am acutely aware of the frustrations of the defendants due to the fact that there is an allegation that the plaintiff is not paying rent of the suit property. The courts, in my view, should always aid economic growth and development of the people of this country. There is no doubt that the suit premises is meant to earn the defendants profit. If it is not, then it is expedient that this case is concluded at the earliest opportunity to ensure that the purpose for which the suit premise is held by the defendants is realized. For that reason, I grant the following orders:-

- 1. The defendants' Notice of Motion dated 28th May 2009 is dismissed and the costs thereof shall be in the cause.**

2. *The plaintiff's amended plaint filed on 26th May 2009 is deemed as being filed with the leave of the court.*

3. *At the delivery of this ruling, the court will give a date for hearing of this suit to ensure that the purpose of which the courts are there as stated above are realized.*

Dated and delivered at Meru this 4th day of June 2010.

MARY KASANGO
JUDGE