

REPUBLIC OF KENYA
IN THE HIGH COURT OF KENYA

AT NAIROBI (MILIMANI COMMERCIAL COURTS)

Civil Case 502 of 2009

MERU CENTRAL FARMERS' CO-OPERATIVE UNION LTD. PLAINTIFF

VERSUS

JOSEPH KAMAU MUCHINA t/a SECURE HOMES DEFENDANT

R U L I N G

By an application by Notice of Motion dated 23rd November, 2009, and brought under **Order XII Rule 6** and **Order XXXV Rule 1 (1) (b)** of the **Civil Procedure Rules**, the Plaintiff seeks against the Defendant orders that –

1. ***Judgment be entered for the Plaintiff against the Defendant on admission in the sum of Kshs.2,059,585.80 plus future rents and land rates from 1st August, 2009, till payment in full and/or till the date of eviction plus interest thereon with effect from 1st August, 2009.***
2. ***The Defendant be declared to be in breach of the lease agreement dated 4th June, 2007, for non payment of the agreed rent on the agreed dates on his admission.***
3. ***The Defendant be ordered to be evicted from the Plaintiff's Title No.I.R.4232 (L.R. No.209/2437) at Nairobi for forfeiting the leased premises by non payment of rent; and the Plaintiff do re-enter the premises.***
4. ***Costs of the application and the entire suit be paid to the Plaintiff.***

The application is supported by the annexed affidavit of Fredrick

Kirima Mburugu, the Manager and Chief Executive Officer of the Plaintiff/Applicant herein, and is premised on the grounds that –

- (a) ***The defence dated 21st August, 2009, is virtually an admission of the Plaintiff's claim except the quantum of Advocates fees payable and debt collection charges.***
- (b) ***Though admitting the debt, the Defendant has not paid a single cent since this suit was filed towards clearing the already existing arrears and/or the monthly rents as they fall due.***
- (c) ***Currently, the rent in arrears, excluding the Land Rates and Advocate's fees for the lease and his debt collection charges, stand at Kshs.2,450,954.00 inclusive of the November, 2009 rent up from Kshs.1,778,246.00 which was due at the time of filing this suit.***
- (d) ***The claim for recovery of the leased premises by way of eviction can be determined summarily.***
- (e) ***The Defendant is adamant to pay the rent or quit the premises and unless coerced by a judgment of this Court he will continue with the breaches.***

To this application and the accompanying averments, the Plaintiff

filed neither a replying affidavit nor grounds of opposition. To make it worse, neither he nor his Advocate attended Court on the hearing date. Since the Advocate had been duly served with a hearing notice, the hearing proceeded *ex parte*. By his failure to file any document opposing the application, and also failure to attend Court on the hearing date, the Defendant rendered the application unopposed. The Plaintiff is therefore entitled to the prayers sought.

Before granting the prayers sought, I wish to confirm from the submissions of Mr. Mwarania for the Plaintiff that Clause 1 (i) of the Lease Agreement made between the parties on 4th June, 2007, enjoined the Defendant to pay the rent on the days and in the manner provided. Clause 3 (b) of the said Agreement further empowered the Plaintiff to re-enter the premises in default of payment of the rent or any part thereof after the issuance of a 21 days' notice to the Lessee of such non payment. I note that in Paragraph 5 of the plaint, the Plaintiff states that the Defendant was also liable to pay a proportionate share of rates due to the Nairobi City Council. This fact is also incorporated in Clause 1 (IV) of the Lease Agreement. Furthermore, the rent payable was subject to the payment of VAT at the rate of 16% with effect from 1st January, 2008.

A scrutiny of the defence filed by the Defendant discloses that he does not deny the obligation to pay the rent or the rates to the City Council

and the VAT. On the contrary, the Defendant's response to the accusation that he breached the Lease Agreement by failing to pay the foregoing items as stated in paragraph 7 of the plaint is that –

“The alleged arrears of rent and pro rata contribution towards the rates and/or land rent are admitted but the Defendant pleads that he sought and was granted limited forbearance thereto on account of, inter alia, the presently prevailing economic challenges.”

This smacks of a definite admission of breach of the provisions contained in the lease in relation to the payment of the rent, rates and the VAT as claimed in the plaint as well as in this application. And very cleverly, the Respondent does not specify the limitation of the forbearance, or how long it was to last.

Finally, I note that **Order XXXV Rule 1 (1) (b)** of the **Civil Procedure Rules** clothes this Court with jurisdiction to grant an order for recovery of land for non payment of rent under the summary procedure provided therein. I therefore direct that prayers (1), (2) and (3) of the application by Notice of Motion dated 23rd November, 2009 be and are hereby granted as prayed. As this ruling has practically compromised the main suit itself, the Plaintiff will also have the costs of this application as well as those of the main suit.

It is so ordered.

Dated and delivered at Nairobi this 29th day of July, 2010.

L. NJAGI
JUDGE