



**REPUBLIC OF KENYA**  
**IN THE HIGH COURT OF KENYA**  
**AT NAKURU**  
**CIVIL CASE NO. 278 OF 2009**

SAMSON S. MAITAI.....1<sup>ST</sup> PLAINTIFF

SAMUEL S. KORIATA.....2<sup>ND</sup> PLAINTIFF

**VERSUS**

AFRICAN SAFARI CLUB LIMITED.....1<sup>ST</sup> DEFENDANT

MARA BUFFALO CAMP LIMITED.....2<sup>ND</sup> DEFENDANT

**RULING**

This Ruling relates to an application by way of a Notice of Motion dated 21<sup>st</sup> April 2010 brought under the provisions of Section 1A and 1B of the Civil Procedure Act, (Cap 21 Laws of Kenya) and Order XXXV rule 1(b) and 8 of the Civil Procedure Rules, and prays for two principal orders, namely -

(a) that summary judgment be entered in favour of the Plaintiffs against the Defendants and that the Defendants be evicted forthwith from the Plaintiffs' parcels of land known as NAROK/CIS-MARA/LEMEK/172 and NAROK/CIS- MARA/LEMEK/173.

(b) that the costs of this motion be to the Plaintiffs in any event.

The Application is supported by the Affidavits of the Plaintiffs, Samson Maitai and Samuel S. Koriota sworn respectively on 21<sup>st</sup> April 2010, and the grounds on the face of the application.

The Defendants did not file any affidavit in reply, but replied upon grounds of opposition of which their counsel (Kamoti & Co. Advocates) had filed and served a Notice of Preliminary Objection dated 9<sup>th</sup> June, 2010 that -

(a) the application is incompetent, frivolous and vexatious; and

(b) that the decree of the court given on 22<sup>nd</sup> October 2009 clearly required that the matter do proceed to formal proof and not proceed by way of application.

When this matter was urged before me on 9<sup>th</sup> June 2010, Mr. Kimani learned counsel for the Objectors relied upon ground (b) above and argued that the Deputy Registrar's Decree is not an opinion, but orders given by the court under Order XLVIII, rule (2)(a) & (b) of the Civil Procedure Rules - that judgment be entered by the Registrar under Order IXA, or where parties have consented on agreed terms, or may on application under Order XXIV (rule 3) of the Civil Procedure Rules (*Costs, where suit withdrawn or discontinued*). Counsel contended that the Deputy Registrar's Order directing that the matter proceed to formal proof was binding upon the court, and took away the jurisdiction of this court until the decree was first set aside.

On his part, Mr. Kinyanjui for the Plaintiffs contended **firstly** that there is no basis in law under which the Defendants are entitled to question the Plaintiffs as the Defendants have failed to file any defence. In addition, the Defendants have failed to file any affidavit to show any mischief or prejudice if the court granted the orders sought.

**Secondly**, counsel argued that Order XIV of the Civil Procedure Rules provides that issues arise when a material proposition of fact or law is affirmed by the one party and denied by the other, being issues of fact or of law. Material propositions are those propositions of law or fact which a Plaintiff must allege in order to show a right to sue or a defendant must allege in order to constitute a defence. Each material proposition affirmed by one party and denied by the other shall form the subject of a distinct issue.

In the absence of either an affidavit in opposition to the supporting affidavits of the plaintiffs, or a defence to the plaint to the plaintiffs' claim, there are no issues of fact to be addressed by the court. In fact, there is no triable issue of fact. The only issue raised by the Defendants in the Grounds of Opposition, is an issue of law, whether the decree by the Registrar requiring that they do proceed to formal proof ousted the jurisdiction of the court, or, put differently prevented or estopped the plaintiffs from seeking summary judgment as they have sought in the Notice of Motion, the subject of this Ruling. In this regard, I will **firstly** deal with the question of ouster of the jurisdiction of the court, or estoppel against the plaintiffs. I will *secondly* deal with the application itself.

Under Order XLVIII, rule (4) of the Civil Procedure Rules, the powers of the Registrar are deemed to be those of a civil court. So when a Registrar enters judgment under Order IXA of the Civil Procedure Rules, he or she is acting in the capacity of a civil court, that is to say, a court subordinate to the High Court to which that act is delegated by rule (1) of the said order.

Where a Plaintiff requests for judgment under Order IXA Rule (3) for instance, the power of the Registrar is to enter judgment in terms of the request for judgment, and the Registrar has no jurisdiction to make any other order or orders outside or beyond the request for entry for judgment. I was unable to trace in the court record the application to enter judgment. I therefore assume that it was in the manner in which the decree was drawn - that there be judgment for Shs 7,563,550/- being rent arrears, and that the question of eviction being prayer 2, be subject of formal proof. The Deputy Registrar was therefore correct in drawing the decree in the manner in which it is drawn. If it were otherwise, then it would have been challenged by the Plaintiffs' counsel. The question that is left for inquiry is what is meant by the order of "**formal proof?**"

I have not seen judicial definition of the phrase "**Formal Proof**". "**Formal**" in its ordinary Dictionary meanings - refers to being "**methodical**" according to rules (of evidence). On the other hand according to Halsbury's Laws of England, Vol. 15, para, 260, "**proof**" is "*that which leads to a conviction as to the truth or falsity of alleged facts which are the subject of inquiry.*"

Proof refers to evidence which satisfies the court as to the truth or falsity of a fact. Generally, as we well know, the burden of proof lies on the party who asserts the truth of the issue in dispute. If that party adduces sufficient evidence to raise a presumption that what is claimed is true, the burden passes to the other party who will fail unless sufficient evidence is adduced to rebut the presumption. In civil cases the court makes its decision on the "**balance of probabilities**". In criminal cases, a case must be proved "**beyond reasonable doubt.**" For instance to prove a debt is to establish a debt is due from a debtor, whether contractual as in this case, or out of bankruptcy.

So in this case when the decree states that prayer (b) (*which is that an eviction order do issue that the defendants be forthwith evicted .....*), "**to proceed for formal proof**" all it means is that the Plaintiffs will adduce sufficient evidence to raise a presumption that what is claimed is true, and the burden then passes to the other party, who will fail unless sufficient evidence is adduced to rebut the presumption. It is I think, with respect to counsel for the Defendants not correct to think or suggest that "**formal proof**" may only be established at a "**hearing**" of the case. I think that "formal proof" may be established also by any other method prescribed by the rules of procedure for moving the court. One such method is by way of Notice of Motion for summary judgment under Order XXXV rule 1(b) & 8 of the Civil Procedure Rules. The said Order provides -

**1(1) In all suits where a plaintiff seeks judgment for -**

- (a) a liquidated demand with or without interest
- (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 by non-payment of rent or breach of covenant or against persons claiming under such tenant or against a trespasser.

Where the defendant has appeared 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.

(2) The application shall be made by motion supported by an affidavit either of the plaintiff or of some other person who can swear positively to the facts verifying the cause of action and any amount claimed.

(3) Sufficient notice of the motion shall be given to the Defendant which notice shall in no case be

less than seven days.

**2(1) - The defendant may show either by affidavit or by oral evidence, or otherwise that he should have leave to defend the action.**

**(2) Any set off or counter-claim may entitle a defendant to defend to the extent of such set-off or counter-claim.**

By definition "*Affidavit*" means "*a written sworn statement of evidence.*" Order XVIII is entitled "*Affidavits*", and rule 2(1) thereof reads -

**"2(1) Upon any application, evidence may be given by affidavit, but the court may, at the instance of either party, order the attendance for cross-examination of the deponent."**

In this application, the Plaintiffs have through their Supporting Affidavits adduced evidence that the Defendants have breached the tenancy agreements with them by non-payment of rent, and have therefore forfeited their rights as tenants to remain upon the leased premises. The Defendants have not in their turn, filed any replying affidavits to rebut the averments contained in the Plaintiffs' Affidavits, despite having been given sufficient notice to do so.

Still worse, the Defendants have not shown any indication to defend the suit herein. They were served with summons to Enter Appearance on 8<sup>th</sup> December 2009. Apart from entering an Appearance on 21<sup>st</sup> December 2009, they have not filed any Defence at all, so that *prima facie* the plaintiffs are entitled to the prayers they seek. I say *prima facie*, because the Defendants in their Counsel's Grounds of Opposition, allege that the application is "incompetent, frivolous and vexatious."

Two of the expressions "frivolous" and "vexatious" are found in Order VI rule 13(1) (b) of the Civil Procedure Rules. The first expression "incompetent" may be included in the rule 13(1)(d) is "otherwise an abuse of the process of the court."

I will commence with the expression "incompetent". This word ordinarily means "not qualified or sufficient". In the context of law, it means not legally sustainable, lacking basis in law, or regulation. If either of these meanings are given to the expression "incompetent", I think the use thereof in this context is not sustainable primarily because Order XXXV rule 1(b) expressly grants the Plaintiffs the legal basis and competence to make the application for summary judgment. It is the rule, not anything else, which confers the competence upon the applicants. What is clearly prescribed cannot be regarded as "*incompetent*". That leg of the grounds of opposition must therefore fail.

The expression "*frivolous*" in its ordinary usage means, "**of little or no weight or importance, paltry, trumpery, not worth serious attention.**" In law however it means "*manifestly futile, lacking seriousness, sense or tolerance, given to trifling, or even silly.*" "*Vexatious*" however means and refers to actions which have no reasonable prospect of success, lacking any merit at all and brought without sufficient cause or grounds for the sole purpose of causing trouble or annoyance to the defendant or defendants. In the context of legal proceedings;

**"it must be a cause of action or application which on the face of it is clearly one which no reasonable person could properly treat as bona fide, and contend that he had a grievance which was entitled to bring before court"** - *Norman vs. Matthews [1916], 85 L. J. K.B. 857* per Lush J. at p. 859.

Having regard to the various and consistent meanings attached to the expressions "incompetent", "frivolous" and "vexatious" and the grounds of the application herein, I am unable to say that the Plaintiffs' Notice of Motion is anywhere either, "incompetent", "frivolous" or "vexatious" or still less an abuse of the process of court.

Having perused the Plaint herein, and in the absence of either a Defence, to the Plaint, or a Replying Affidavit to the averments in the Plaintiffs Supporting Affidavits, I find that the Plaintiffs' suit is unchallenged. I find no merit at all in the Grounds of Opposition as explained at length that "*formal proof*" of the balance of a claim may proceed either by way of oral evidence, or as in this application by way of affidavit evidence. The Defendants offered neither.

On the contrary, by failure to assist the court in its dispensation of justice, I find the Defendants and their counsel have failed to embrace the revolutionary changes that have been brought to our civil process by Section IA and IB of the Civil Procedure Act (Civil Procedure Act) (Amendment Act No. 9 of

2009) which places a specific statutory duty upon counsel for any of the parties to assist the court in its work of dispensation of justice. Although the filing of grounds of opposition is procedurally sanctioned by Order L rule 16, it is not sufficient in a case like this one, where the outcome is likely to affect the business of the Defendants and therefore the economy in that part of the country, to come to court and allege that the application is frivolous, vexatious or an abuse of the process of the court. It is incumbent upon the party or counsel of the party making such allegations to show by facts why an application is either frivolous, vexatious or an abuse of the process of court.

In this matter judgment was already entered for the Plaintiffs in the sum of Kshs 7,653,550/=. It has not been set aside. There is no application to set it aside. It is valid and binding upon the Defendants. The only prayer left is for the eviction of the Defendants. The grounds for eviction are clearly set out in Order XXXV rule 1(b) (supra) of the Civil Procedure Rules. The Defendants' right to retain the premises has been forfeited due to both breach of covenant and non-payment of rent (and for which judgment has already been entered). The Defendants have neither offered an explanation as to why they have not paid the sum due nor expressed their desire to remain upon the premises, and upon what terms. In the premises, I found no good reason for denying the Plaintiffs the prayers they seek.

For those reasons, I find and hold that the Plaintiffs' Notice of Motion dated and filed on 22<sup>nd</sup> April 2010 is competent, and is neither frivolous nor vexatious and on the contrary is well founded. I allow the same with costs.

There shall be orders accordingly.

**Dated, signed and delivered at Nakuru this 1<sup>st</sup> day of October 2010**

**M. J. ANYARA EMUKULE**  
**JUDGE**